No. 23-753

IN THE

Supreme Court of the United States

CITY AND COUNTY OF
SAN FRANCISCO, CALIFORNIA,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

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

AMICUS CURIAE BRIEF OF THE LOCAL GOVERNMENT LEGAL CENTER ET AL IN SUPPORT OF PETITIONERS

[Additional Amici On Inside Cover]

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INTERESTS OF AMICI CURIAE[1]

The Local Government Legal Center ("LGLC") is a coalition of national local government organizations formed in 2023 to provide education to local governments regarding the Supreme Court and its impact on local governments and local officials and to advocate for local government positions at the Supreme Court in appropriate cases. The National Association of Counties, the National League of Cities, and the International Municipal Lawyers Association are the founding members of the LGLC.

The National Association of Counties ("NACo") is the only national association that represents county governments in the United States. NACo serves as an advocate for county government and works to ensure that counties have the resources, skills and support needed to successfully lead their communities. NACo's members provide water, wastewater and flood control services to the nation's 3,069 counties.

The National League of Cities ("NLC") is the voice of America's cities, towns and villages, representing more than 200 million people. NLC works to strengthen local leadership, influence federal policy and drive innovative solutions.

The International Municipal Lawyers Association ("IMLA") is a nonprofit professional organization of more

1. As required by this Court's Rule 37.6, Amici affirm that no counsel for any party authored this brief, in whole or in part, and Amici further affirm that no entity or person, aside from Amici Curaie, their members or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

than 3,000 local government entities, including cities, counties, and special districts. IMLA's mission is to advance responsible development of municipal law through education and advocacy.

The League of California Cities ("Cal Cities") is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhancing the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 25 city attorneys from all regions of the state. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

Amici's members own and operate infrastructure that provides for drinking water, water supply, wastewater treatment, flood control, and stormwater management. Their primary focus is the protection of public health and safety. This includes managing the relationship between a clean environment and public health and helping to ensure that the oceans, rivers, and streams in their communities are safe for public use.

Many of Amici's members operate National Pollutant Discharge Elimination System ("NPDES") permits that contain the types of generic prohibitions at issue in this case. Amici have a strong interest in ensuring that their members' existing and planned water quality infrastructure will be free from inappropriate application

of the Clean Water Act. Moreover, Amici's members expend significant resources to improve water quality. Amici submit this brief to ensure that those efforts will not be inhibited by a NPDES permit with vague and generic prohibitions that call on Amici to not "cause or contribute" to violations of any water quality standards, rather than operating with an NPDES permit with a defined effluent limit, either in a numerical or narrative form. Further, Amici submit this brief, because defined effluent limits ensure the NPDES permit is clear and unambiguous so as to assure compliance.

SUMMARY OF ARGUMENT

EPA and authorized states[2] regularly issue permits under the Clean Water Act ("CWA") that improperly and generically prohibit any discharges that "cause or contribute" to a violation of any water quality standard. This use of generic and vague prohibitions exposes Amici's members to open ended civil and criminal liability, and undermines their ability to invest in projects that improve water quality. This pattern and practice by EPA has profound implications for public utilities nation-wide. Most importantly, use of generic prohibitions has created uncertainty and lack of notice both as to whether a violation has occurred and as to what steps a permit holder

2. The Clean Water Act grants responsibility to the EPA and states with whom the EPA authorizes to grant NPDES permits. *See* 33 U.S.C. § 1342(b). Both EPA and authorized states undertake the practice of issuing NPDES permits. Throughout this brief Amici refers to EPA, as a matter of streamlining the discussion before the Court.

must take to avoid violating their permit. This is because achieving compliance with these generic prohibitions depends on conditions in the waterway that receives the discharge, not on actions that the discharger can control directly. The conditions in the waterway at-large may change and are subject to the actions of others, including natural conditions that can fluctuate with time. This pattern and practice in certain cases effectively creates a "one molecule" rule—that is, any amount of a pollutant discharged into a water body that is not attaining water quality standards can be a permit violation.

As a result of this pattern and practice, Amici's members cannot make prudent and fully informed decisions about what water quality infrastructure to invest in because no amount of pollution control can fully protect them from liability based on instream conditions created by other dischargers in the watershed (including Mother Nature). These generic prohibitions are also easy targets for citizen suits, which can allow third-parties to divert clean water agencies from their long-term plans and ultimately distract from the achievement of water quality goals.

Congress addressed instream water quality control by creating the NPDES permitting program in 1972. 33 U.S.C. § 1251; 33 U.S.C. § 1342; 40 C.F.R. § 122 (2024). The CWA requires any person discharging pollutants into waters of the United States, from a point source, to obtain a NPDES permit. 33 U.S.C. § 1311; 40 C.F.R. § 122(b)(1) (2024). The CWA protects waters that receive those discharges (the "receiving waters") by requiring

NPDES permits to include effluent limits that are either technology-based, or, if needed, water quality based. 33 U.S.C. § 1362(11). The CWA and its implementing regulations have a very specific process for determining whether such water quality based effluent limitations are needed and for developing and implementing them. 33 U.S.C. § 1311(b)(1)(C). EPA has circumvented that process by inserting these generic, "catch all" prohibitions into NPDES permits nationwide.

Worse, the generic prohibitions impose an entirely arbitrary compliance standard that leaves Amici's members without notice as to what is required for compliance and potentially liable for the actions of other dischargers in a watershed. The generic prohibitions disregard the clear obligation EPA has to ensure NPDES permit terms are clear so as to "assure compliance" by the permittee. 33 U.S.C. § 1342(a)(2). Importantly, Amici do not contend that narrative effluent limitations violate the CWA, nor that numeric effluent limitations must be employed in all situations. Far from it. Narrative effluent limitations are a critical part of NPDES permits and are the preferred method in many circumstances, especially for difficult situations such as stormwater management. However, the pattern and practice of EPA of including the types of generic prohibitions at issue in this case in NPDES permits violates the CWA in a manner that puts Amici's members at risk, which in turn inhibits their ability to invest in projects that will protect the environment. Furthermore, the use of generic prohibitions does not provide an actual effluent limitation, neither in numerical or narrative form, on the discharger's point source, as required by the law. *See* 33 U.S.C. § 1311; 33 U.S.C. § 1362(11). Instead, these generic prohibitions

over generalize the water quality of the receiving waters as a whole, directly contrary to the intention of Congress and the statute. Federal Water Pollution Control Act Amendments of 1972 ("FWPCA"), Pub. L. No. 92-500, § 101(a), 86 Stat. 816; 40 C.F.R. § 122.44(k)(3) (2024).

Amici request that the Court hold that EPA is prohibited from issuing permits that circumvent the plain text of the CWA, its implementing regulations, and EPA's own policies and permit writing manuals. These vague, "catch all" prohibitions are unclear, and incapable of being complied with due to the lack of an actual effluent limitation, whether narrative or numerical, being incorporated into the NPDES permit. Coupled with the "potent weapon" that is the CWA and its enforcement regime, these generic prohibitions improperly expose cities and counties to administrative, civil, and criminal penalties without aiding in the effort to improve water quality.

ARGUMENT

I. Cities and Counties work hard to improve water quality and protect the health and safety of their residents.

The primary purpose of a local government is to provide for the health and safety of its citizens. *Bos. Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1877) ("Whatever differences of opinion may exist as to the extent and boundaries of the police power . . . there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens").

Among the most important responsibility of cities and counties is ensuring that there is basic sanitation in the forms of reliable drinking water, sewage treatment, and flood control. *See New Orleans Gaslight Co. v. Drainage Comm'n*, 197 U.S. 453, 460 (1905) ("The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised").

When operating correctly, these systems manage the full range of the hydrologic cycle and protect the public from catastrophic flooding, illness, and death. They also help minimize the impacts of human activity on the environment because a failing environment is also a danger to public health. 33 U.S.C. § 1251; 33 U.S.C. § 1342; 40 C.F.R. § 122 (2024); *See also* Kyriaki Remoundou & Phoebe Koundouri, *Environmental Effects on Public Health: An Economic Perspective*, Int. J. Environ. Res. Public Health (Aug., 2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2738880/.

Cities and counties take these responsibilities seriously and invest heavily in the infrastructure necessary to maintain appropriate levels of sanitation. This case is illustrative. The City and County of San Francisco spent more than $2 billion (in 2017 dollars) implementing an integrated plan for wastewater management, and another $7 billion implementing a Sewer System Improvement Program, a 20-year initiative to enhance the reliability and performance of its wastewater system. *City & Cnty. of San Francisco v. EPA*, 75 F.4th 1074, 1084 (9th Cir. 2023); *See also* Excerpts of Record (ER) at 4-ER-964, *City & Cnty. of San Francisco v. EPA*, 75 F.4th at 1074 (9th Cir. 2023) (No. 21-70282). Each of these investments continued to

enhance the City and County's system to handle sludge at their Oceanside Water Pollution Control Plant, upgrades to the Westside pump station, and construction of a water recycling project. *Id.* In addition to the physical construction undertaken, the City and County performed "cost-benefit analyses, evaluating the feasibility of further reducing [Combined Sewer Overflow ("CSO")] discharges to public beaches." *Id.*

Local governments across the country are making similar significant investments. In the Nation's Capital, DC Water is spending more than $800 million constructing a tunnel which will reduce CSO discharges directly into the Potomac River by conveying the flows of the existing CSOs to DC Water's wastewater treatment plant. *DC Water's Potomac River Tunnel Project*, DC Water, https://www.dcwater.com/projects/potomac-river-tunnel-project (last visited July 19, 2024). Harris County, Texas, intends to spend approximately $20 million studying the feasibility of a similar project. *Countywide Large Diameter Tunnels for Stormwater Conveyance*, Harris County Flood Control District, https://www.hcfcd.org/Z-08 (last visited July 19, 2024).

Other agencies are spending billions to reduce their reliance on the need to discharge wastewater by investing in recycled water projects. Examples include the partnership between the Metropolitan Water District of Southern California and the Los Angeles County Sanitation Districts, which will invest more than $8 billion in a recycled water project to serve the greater Los Angeles area and the Hampton Roads Sanitary District's SWIFT project, which will invest approximately $2.5 billion to take highly treated wastewater and add it to the Potomac

Aquifer, the primary source of groundwater throughout eastern Virginia. *Pure Water Southern California*, The Metro. Water Dist. of S. Cal., https://www.mwdh2o.com/building-local-supplies/pure-water-southern-california/ (last visited July 19, 2024); *SWIFT – Sustainable Water Initiative for Tomorrow*, Hampton Rds. Sanitation Dist., https://www.hrsd.com/swift (last visited July 19, 2024).

Local governments are making these investments because it protects the health and safety of their residents and ensures compliance with the CWA. Congress' intention when creating the NPDES permitting program was "to restore and maintain . . . the Nation's waters." FWPCA § 101(a), 86 Stat. 816; *Cnty. of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 170 (2020). The CWA is structured to provide an enforcement shield for dischargers who implement projects and control their discharges in accordance with applicable permit requirements. 33 U.S.C. § 1342(k). Investments made to attain compliance are rewarded with certainty regarding enforcement. Unfortunately, EPA's pattern and practice of issuing permits with generic prohibitions has removed that protection and exposed cities, counties, and public utilities to enforcement actions regardless of how much they invest.

The investments and dedication made by local governments to comply with their NPDES permits requires time and money and allows the local governments to uphold the Congressional intent of the CWA. Because generic prohibitions—like the ones issued by EPA in this case—undermine the CWA's permit shield, they stand in the way of prudent CWA investments and planning by local governments, and thereby fail to implement

the intention of Congress with regards to the NPDES permitting program.

II. Generic "cause or contribute" prohibitions are inconsistent with the structure of the CWA and undermine efforts to address clean water.

What is commonly referred to as the "Clean Water Act" is the result of a complete rewriting in 1972 of the FWPCA. FWPCA § 101(a), 86 Stat. 816; *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981). The regulatory shift that occurred in 1972 was dramatic. The 1972 amendments underscore why generic "cause or contribute" prohibitions are fundamentally inconsistent with the structure of the CWA.

First enacted in 1948, the initial version of the FWPCA—like these generic prohibitions by EPA at hand—focused on receiving water conditions rather than conditions that each discharger could control. The 1948 FWPCA "employed 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 v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202 (1976). This resulted in a confusing system which did not specify the obligations of each individual discharger, but instead relied on conditions in the receiving water to which a discharger, as well as others, was somehow obligated to "collectively conform." *Id.* at 204-05. This receiving water-based structure made it "very difficult to develop and enforce standards to govern the conduct of individual polluters" and instead required backwards enforcement by starting from an "over polluted

body of water to determine which point sources are responsible . . .” *Id.* at 202, 204.

In sharp contrast to the previous receiving water-based approach, the 1972 amendments to the CWA focused on regulating the specific “obligations” of individual dischargers to meet certain requirements or to take certain specific actions at the point of discharge to control the quality of the water leaving their system. FWPCA § 101(a), 86 Stat. 816.

The CWA amendments established the NPDES permitting program, which prohibits the discharge of any pollutant unless that discharge conforms with the terms and conditions of a permit that allows the discharge to occur. *See* 33 U.S.C. § 1311(a). NPDES permits specify what a permit holder’s discharges must meet in order to be in compliance. This includes, in the first instance, “technology-based” effluent limitations that are determined according to the best available or practicable technology for reducing pollution at the point of discharge. *E.I. du Pont de Nemours v. Train*, 430 U.S. 112, 121 (1977); *Our Children’s Earth Found. v. EPA* 527 F.3d 842, 848 (9th Cir. 2008)*; Waterkeeper Alliance. v. EPA*, 399 F.3d 486, 491 (2d Cir. 2005). Only when technology-based limits alone are insufficient, NPDES permits also include certain water quality-based effluent limitations derived in a specific manner that is dictated by EPA regulations and policies. Although water quality-based effluent limitations may be in a narrative form, they still focus on the controllable actions of the individual discharge so that the means of compliance are clear and enforceable. 33 U.S.C. § 1311(b).

A generic prohibition to not "cause or contribute" to a water quality violation in the receiving water is fundamentally at odds with the structural shift represented in the enactment of the 1972 amendments to the CWA. Congress amended the CWA in 1972 to specifically move away from permit holders being directly responsible for the water quality standards of the receiving waters and instead moving to make each permit holder responsible for their own discharges and ensuring they meet effluent limitations set forth in the permit. FWPCA § 101(a), 86 Stat. 816. Congress's intent to eliminate the focus on the type of water quality-based approach represented by the FWPCA could not be clearer. In fact, it expressly repealed the "causing or contributing" language included in the 1948 FWPCA for the discharger-specific approach contained in the CWA. *See* 33 U.S.C. § 1160(c)(5) (1970).

The pattern and practice of using generic prohibitions is thus expressly contrary to Congress's intent. Generic prohibitions do not tell an individual discharger how they need to control their discharges to comply with their permits. The effect of generic prohibitions is that individual dischargers are held jointly and severally responsible for the condition of receiving waters regardless of their individual actions or contribution. Cities, counties, and public utilities are left spending resources chasing unnecessary and, in some cases, impossible goals that they cannot achieve.[3]

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3. This is a particularly pernicious problem when these generic prohibitions are included in general NPDES permits. *See* Jeffrey M. Gamba, *Generally Illegal: NPDES General Permits Under the Clean Water Act,* 31 Harv. Env't L. Rev. 410, 441 (2007). It is also entirely inconsistent with the CWA's regulatory approach to municipal stormwater NPDES permits, which

This Court's decision in *Los Angeles Cnty. Flood Control Dist. v. Nat. Res. Def. Council*, 568 U.S. 78 (2013), and its aftermath illustrates the very significant problem with this approach and shows why and how this approach can undermine clean water efforts. The case was initiated over allegations that the Los Angeles County Flood Control District was violating permit prohibitions that are identical to those at issue in the instant case—a generic prohibition on discharges from the County's stormwater collection system ("MS4") "that cause or contribute to the violation of the water quality standards or water quality objectives." *Nat. Res. Def. Council v. Cnty. of Los Angeles*, 725 F.3d 1194, 1199 (9th Cir. 2013).

The County was required to assess compliance at monitoring stations within the Los Angeles and San Gabriel Rivers. The Ninth Circuit held that pollution levels within the rivers as measured at the monitoring stations established a violation of the County's generic prohibition. In a unanimous decision, this Court reversed and remanded on the grounds that flows within the rivers did not constitute a discharge. *Los Angeles Cnty. Flood Control Dist.* 568 U.S. at 83.

Despite this Court's reversal, on remand, the Ninth Circuit relied on the same generic "cause or contribute" language to hold the County responsible for the conditions in the Los Angeles and San Gabriel Rivers. The Ninth Circuit reasoned as follows:

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employs a "maximum extent practicable" standard that does not require strict compliance with water quality standards. 33 U.S.C. § 1342(p)(3)(B); *Def. of Wildlife v. Browner,* 191 F.3d 1159, 1165-66 (9th Cir. 1999).

> If the District's monitoring data shows that the level of pollutants in federally protected water bodies exceeds those allowed under the Permit, then, as a matter of permit construction, the monitoring data conclusively demonstrate that the County Defendants are not "in compliance" with the Permit conditions. Thus, the County Defendants are liable for Permit violations.

Nat. Res. Def. Council, 725 F.3d at 1206-07.

The effect of the decision has been dramatic. The County of Los Angeles is now responsible for ensuring that the bacteria levels in the Los Angeles and San Gabriel Rivers are low enough to safely allow full body immersion, regardless of the fact that the Rivers are fenced and channelized, and public access is prohibited.[4] If the Rivers do not meet this standard, the County can be found to be in violation the CWA—even if the primary source of pollution is another discharger or natural conditions in the environment.[5] To avoid that

4. California Regional Water Quality Control Board Los Angeles Region, *Los Angeles River Watershed Total Maximum Daily Load*, 16 (July 15, 2010). Pursuant to this designation, the River must have bacteria levels that are low enough to allow for full body immersion. *Id.* at 4.

5. Water quality standards often have questionable technical accuracy and/or feasibility. For example, water quality standards apply even if the source of pollution is naturally occurring. EPA, EPA-820-R-15-001, *A Framework for Defining and Documenting Natural Conditions for Development of Site-Specific Natural Background Aquatic Life Criteria for Temperature, Dissolved Oxygen, and pH: Interim Document* (Feb. 2015), describes the options for a state to go through to account for naturally occurring

outcome, the County is spending more than $1.5 billion to address bacteria levels in flood control channels that will never be used by the general public. *See Los Angeles River Watershed Total Maximum Daily Load*, *supra* at 81. Those resources could be dedicated to projects and infrastructure that will provide greater benefit to the human and natural environment.

The Los Angeles County example is not unique, nor is the issue limited to California. *See Nw. Env't Advocates v. City of Portland,* 56 F.3d 979, 990 (9th Cir. 1995) (allowing for direct citizen enforcement of water quality standards against a discharger based on a generic prohibition)*; Gill v. LDI,* 19 F.Supp.2d 1188, 1195 (W.D. Wash. 1998) (granting summary judgment to plaintiffs in a citizen suit action based on a generic prohibition); *Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 562 (2d Cir. 2015) (rejecting EPA's inclusion of such a generic prohibition.). Of course, the Court need look no further than the facts of this case. Petitioner is spending substantial public funds chasing a vague and ever-changing standard.

The cost of compliance with these generic prohibitions is significant and open ended, and causes cities, counties, and public utilities to spend significant sums of money, in some cases billions of dollars on infrastructure projects that may not improve the environment. The approach is fundamentally at odds with the basic structure of the CWA, and should be rejected.

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pollutants. If the cause of the elevated levels of "natural" pollutants can be attributed to human activity at all, then the corresponding water quality criteria cannot be set to "natural" background levels.

III. Generic prohibitions violate the CWA because they do not comply with the requirement for establishing narrative or numeric water quality based effluent limitations.

The CWA is an end-of-pipe based statute that focuses in the first instance on technology-based effluent limitations and, if those alone are insufficient, water quality-based effluent limitations. 33 U.S.C. § 1311(b)(2)(A). Instead of focusing on broad impacts to receiving waters, Congress created a process through which NPDES permits could be tailored to control impacts by individual discharger using technology-based and, if necessary, on water quality-based effluent limitations derived in a very specific manner. FWPCA § 101(a), 86 Stat. 816; 33 U.S.C. § 1311. In the way intended and set forth by Congress, each discharger is aware of its specific obligations and parameters and is free to focus on its individual efforts to meet those obligations. 33 U.S.C. § 1251(a); *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. at 203 (*citing* S. Rep. No. 92-414, at 5 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668. The CWA mandates that all NPDES permits include technology-based effluent limitations that regulate the means of treatment and specific pollutions. 33 U.S.C. § 1311(b)(2)(A); 40 C.F.R. § 122.44(a)(1) (2024). The CWA also mandates the inclusion of water quality-based effluent limitations to ensure that receiving waters can attain applicable standards, if technology-based limitations alone are insufficient. 40 C.F.R. § 122.44(d)(1)(vii)(A) (2024); *E.I. du Pont de Nemours*, 430 U.S. at 121; *Our Children's Earth Found.,* 527 F.3d at 848*; Waterkeeper All.*, 399 F.3d at 491.

EPA regulations and policies set forth in its permit writing manuals describe in detail how water quality-based effluent limitations are to be incorporated into NPDES permits. 40 C.F.R. § 122.44(d) (2024)[6]; *See also* EPA, EPA-833-K-10-001, *NPDES Permit Writers' Manual* (2010). This process requires a detailed assessment of "the amounts and kinds of pollutants in the water in which the point source discharges." *Nat. Res. Def. Council v. EPA*, 822 F.2d 104, 110 (D.C. Cir. 1987). Through this process, specific effluent limitations that are designed to help achieve specific water quality standards are developed. Standards can be numeric or narrative. In either case, the effluent limitations must be specific and describe the particular activities or results to ensure the permit holder's discharges meet the effluent limitations and what must be satisfied in order to achieve compliance. *See* 33 U.S.C. § 1362(11); *EPA v. California*, 426 U.S. at 204-05. The EPA has a duty and obligation to see that permits can "*ensure* that every discharge of pollutants will comply with all applicable effluent limitations and standards." *Waterkeeper All.*, 399 F.3d at 498 (emphasis in original).

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6. The "cause or contribute" language in the generic prohibitions appears to have its origins in this regulation, but its use in the generic prohibitions is contrary to its original intent and purpose. 40 C.F.R. § 122.44(d)(1)(i) (2024) requires consideration of water quality based requirements when the permitting agency determines based on evidence that a discharge has "the reasonable potential to cause, or contribute to an excursion above a narrative or numeric criteria . . ." Thus, even before a water quality based effluent limit is developed, there needs to be a very fact specific analysis of the nature of the discharge and the nature of the receiving water. The generic prohibitions ignore this requirement and essentially resurrect the "causing or contributing" language that Congress repealed in the FWPCA. *See* 33 U.S.C. § 1160(c)(5).

The pattern and practice of EPA, to impose generic prohibitions against "causing or contributing" to "any water quality standard violation" ignores the detailed requirements that must be employed to derive numeric or narrative effluent limitations from individual water quality standards. They are simply dropped into permits as a catch-all prohibition and provide zero guidance on how an individual permit holder must control their discharge, leaving the permit holder unable to determine what will allow them to meet compliance for their permit terms.[7] Worse, the generic prohibitions do not account for existing conditions of a receiving water. A blanket prohibition will hold one discharger liable for discharges into a water body even if the primary cause of the exceedance is another discharger or naturally occurring conditions. If Congress had intended for a single discharger to be responsible for the pollution by many, Congress would not have undertaken the arduous task of amending the CWA in 1972.

Nitrogen and phosphorous provide one example of this dynamic. They are common ingredients in fertilizers and in runoff from animal feeding operations. When it rains, high levels of these pollutants can be washed into surface waters. Further downstream, a wastewater treatment plant may discharge treated effluent into the same stream. Nitrogen and phosphorous are also commonly present in treated wastewater. If the agricultural runoff causes levels in the stream to exceed applicable standards, the generic prohibitions would prevent the wastewater

7. As the Brief for Petitioner explains in detail, the one purported basis for the authority to impose the generic prohibitions—Section 301(b)(1)(C) of the CWA—does not authorize this approach.

treatment plant from discharging any effluent into the stream. That would not be possible without ceasing all sewage deliveries to the plant, which would prevent all use of the sewage system.

That is not a feasible outcome, and the CWA deals with this scenario by mandating effluent limits to impose discharger-specific requirements. Dischargers are then informed how much pollutant they can release into a receiving water. In this matter, EPA has simply ignored that direction and created a scheme under which it can hold dischargers liable at any time, including for other dischargers' actions.

When concurring in *Rapanos v. United States*, Chief Justice Roberts pointed out that EPA failed to utilize the statutory and promulgated guidance as required by the statute. *Rapanos v. United States*, 547 U.S. 715, 758 (2006) (Roberts, C.J. concurring). EPA has issued regulations and guidance that dictate how EPA must develop water quality-based effluent limitations but has chosen to ignore those requirements in favor of an off the books regulation of its own making. This pattern and practice of imposing generic prohibitions is arbitrary and capricious, violates applicable law, and should be rejected by this Court.

IV. Generic prohibitions are arbitrary and limit the ability of Cities and Counties to prioritize projects

A. Generic "cause or contribute" prohibitions are arbitrary and raise serious questions of due process

Generic prohibitions that create liability for discharges that "cause or contribute" to exceedances of water quality standards raise serious due process issues for cities and counties. Vague standards provide dischargers with no notice as to how to avoid sanctions under the Act. The law requires EPA to "prescribe conditions for such permits to assure compliance." 33 U.S.C. § 1342(a)(2). An ambiguous, generic term, with no narrative or numerical direction to ensure compliance, fails to meet the basic duty of clarity EPA is charged with.

Under the CWA, states set water quality standards for every surface water body in their jurisdiction. 33 U.S.C. § 1313. The standards must include a designated use, such as fishing or body contact recreation, and numeric or narrative criteria for pollutant levels necessary to support that use. 33 U.S.C. § 1313(c)(2)(A). EPA must approve these standards and will only do so if they meet the "fishable, swimmable" goals of the CWA. 33 U.S.C. § 1313(c)(3).

EPA's generic prohibition on discharges that "cause or contribute" to violations of water quality standards creates an arbitrary standard because the ambiguous provisions make it impossible to know how to comply. For one, the generic prohibitions do not import the water quality standards as end-of-pipe limits. An end-of-pipe limit allows a discharger to know that their discharge

needs to meet a specific limit—the established standard—and could base compliance efforts around that target.

Nor do the generic prohibitions create a standard that is higher or lower than the established water quality standard. If the receiving water is not attaining the applicable standard because of other dischargers or natural conditions, then "cause or contribute" could mean the addition of a single molecule or bacterium. Thus, EPA's generic prohibitions create multiple scenarios under which a discharger could be held liable with no standard for compliance. These ambiguous, generic prohibitions not only completely disregard Congress's intention for permits to be attainable, but also disregard the permit shield Congress put in place for those permittees who comply with all permit requirements. 33 U.S.C. § 1342(a)(2), (k). Without clear, achievable permit provisions, a permittee is operating in limbo, with no clear way to meet permit terms, and not knowing of violations until enforcement occurs.

This Court has categorically rejected an agency's use of vague terms to impose sanctions. *Sackett v. EPA*, 598 U.S. 651, 681 (2023); *Sackett v. EPA*, 566 U.S. 120, 124-25 (2012); *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590 (2016). And here, EPA's use of the generic prohibitions puts dischargers in the same boat. Cities, counties, and public utilities are left without clear pathways to compliance and are therefore unable to invest in infrastructure that would allow them to meet applicable permit requirements. Worse, they are left open to enforcement actions brought by EPA, implementing state agencies, and environmental groups.

B. Enforcement actions (by EPA and citizens groups) cost time and money that could be directed to clean water

Section 309 of the CWA allows the EPA and, implementing states to enforce the requirements of the Act. 33 U.S.C. § 1319. Section 505 of the CWA allows any person to similarly enforce the Act. 33 U.S.C. § 1365. In cases where EPA has written permit conditions that are open to varied interpretation and arguably cannot be complied with, the permit holder is never able to rely on compliance as a defense.

Despite taking the actions necessary to comply with vague permit terms, public agencies are often forced to be party to litigation because the vague standard does not provide a pathway for compliance. For example, the Metropolitan Water Reclamation District of Greater Chicago spent over $2 million in two different cases where generic provisions its permit created a vacuum for enforcement. *See e.g. Nat. Res. Def. Council v. Metro. Water Reclamation Dist. of Greater Chicago*, 175 F.Supp.3d 1041 (N.D. Ill. 2016) Ultimately, as part of a consent decree, the District was required to establish a Green Infrastructure program, which in 2011 was estimated to cost between $25 million and $50 million. EPA, *Metropolitan Water Reclamation District of Greater Chicago Settlement* (Dec. 14, 2011), https://www.epa.gov/enforcement/metropolitan-water-reclamation-district-greater-chicago-settlement. This settlement was not due to a direct failure by the District to meet an effluent limitation, but due to the generic provisions which created ambiguity as to what compliance truly meant.

Similarly, the City of Portland, Oregon's permit contained generic language prohibiting discharges that "cause or contribute" to an exceedance of water quality standards. In *Nw. Env't Advocs. v. City of Portland,* 56 F.3d at 979, a citizen's group filed suit against the City on the grounds that it was violating this prohibition. The District Court found for the citizen group based on contributions of pollutants from the city's confined sewer overflow outfalls. The city estimated that addressing the concerns raised in the suit would cost between $500 million and $1.2 billion on abatement projects.[8]

Defending these enforcement actions takes time and resources that some agencies simply do not have. They find it easier to settle, pay attorneys' fees, and move on. The ultimate result is that resources are expended on lawsuits or projects that may not benefit the environment. In all such cases, EPA has denied public agencies the protection that compliance with permit requirements is supposed to

8. The following cases are additional examples where generic prohibitions in a NPDES permit cost local governments time on money on lawsuits and enforcement, rather than the mission of providing clean sanitation: *Los Angeles Cnty. Flood Control Dist. v. Nat. Res. Def. Council*, 568 U.S. at 78 (2013) (discussed above); *S.F. Baykeeper v. City of Sunnyvale*, No. 5:20-CV-00824-EJD, 2020 WL 7696078 (N.D. Cal. Dec. 28, 2020) (citizen group brought CWA enforcement case against the City for alleged NPDES permit violations); *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, 268 F.3d 255 (4th Cir. 2001) (citizen group brought CWA enforcement case against the County for alleged NPDES permit violations); and *Nw. Env't Advocs. v. City of Medford*, 2021 WL 2673126 (D. Or. July 9, 2021) (citizen group brought CWA enforcement case against the City for alleged NPDES permit violations); *Gill,* 19 F.Supp.2d at 1195 (landowners brought an CWA action against a nearby quarry claiming NPDES violations).

provide. Concurrently, public agencies lose control over how to allocate resources to protect the health and safety of their residents and rate payers. A permit cannot be a fluid document that allows EPA and citizen groups get to decide arbitrarily when a violation has occurred, NPDES permits must be clear and unambiguous so as to assure compliance. 33 U.S.C. § 1342(a)(2), (k).

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's request and reverse the Ninth Circuit's decision.

Respectfully submitted,

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