No. 23-753

In the Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

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

BRIEF FOR THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

ROB BONTA
Attorney General of California
TRACY L. WINSOR
Senior Assistant Attorney General
RUSSELL B. HILDRETH
Supervising Deputy Attorney General
MARC N. MELNICK
BRYANT B. CANNON
Deputy Attorneys General

MICHAEL J. MONGAN
Solicitor General
CHRISTOPHER D. HU*
Deputy Solicitor General

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
455 Golden Gate Avenue
San Francisco, CA 94102-7004
(415) 510-3917
Christopher.Hu@doj.ca.gov
**Counsel of Record*

September 3, 2024

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

INTERESTS OF AMICUS CURIAE

Congress directed EPA to work in partnership with the States to advance the Clean Water Act's goal of eliminating the discharge of pollutants into navigable waters. This system of cooperative federalism reflects the States' traditional power to regulate their water resources. The State of California implements the Act through its State Water Resources Control Board and nine regional water quality control boards. Among other responsibilities, those boards set and enforce water quality standards for bodies of water throughout the State.

As part of this cooperative approach, EPA has authorized California and 46 other States to implement the National Pollutant Discharge Elimination System (NPDES) program. To carry out this program, California's water boards issue permits that allow permit holders to discharge pollutants into navigable waters, subject to certain conditions. As required by Congress, these water boards insist on permit conditions necessary to meet water quality standards. Like their counterparts in other States, they routinely include general narrative prohibitions in their permits to ensure that permit holders do not violate water quality standards for the receiving waters.

The petitioner in this case contends that the Clean Water Act forbids the use of these kinds of general narrative prohibitions. California has an interest in the proper resolution of that statutory question because this kind of prohibition is both consistent with the text of the Act and an important tool for advancing the purposes of the Act. Preventing States from employing such prohibitions would undermine the States' ability to ensure compliance with water quality standards in the water bodies they are entrusted to protect.

In addition to that general interest, California has a specific interest in the particular prohibitions before the Court in this case. One of California's regional water boards—which participated as amicus curiae in the court below—jointly issued the permit that petitioner challenges here. Although no state entity is a party to this proceeding, petitioner is currently engaged in related litigation against the same regional board involving the same permit terms. Petitioner's repeated discharges of untreated and partially treated wastewater will continue to harm the people of California unless controlled through permit conditions like the ones challenged here. The decision in this case will therefore affect the State's ability to protect the San Francisco Bay, the Pacific Ocean, and other bodies of water in and around California.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented is whether the Clean Water Act allows general narrative prohibitions, like those challenged here, which forbid a permit holder from violating applicable water quality standards for the receiving waters. Petitioner contends that it does not, reasoning that the only allowable permit conditions are "effluent limitations, which regulate the nature and contents of a permitholder's discharges at the point source." Pet. Br. 23 (emphasis omitted). As EPA persuasively explains, petitioner is wrong. EPA Br. 18-47. Effluent limitations that conform to petitioner's definition are one important part of the Act's permitting regime. But Congress intended that water quality standards would "supplement effluent limitations," *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992), and general narrative prohibitions of the type at issue

here are a permissible tool—and sometimes an indispensable one—for ensuring compliance with water quality standards.

EPA has comprehensively addressed the question of how to parse the relevant statutory text. This brief focuses on the overall plan of the Act and how it functions in practice. The "achievement of state water quality standards [is] one of the Act's central objectives." *Arkansas*, 503 U.S. at 106. Those standards are often described in general, narrative terms. It is rarely possible to translate every aspect of every applicable water quality standard into detailed effluent limitations for each discharger. Congress nonetheless required permits to contain limitations "necessary to meet water quality standards." 33 U.S.C. § 1311(b)(1)(C). In some circumstances, the best—or only—way to satisfy that requirement is a general narrative prohibition. Preserving that type of prohibition allows permitting authorities to satisfy Congress's directive, while imposing on those who wish to discharge pollutants the responsibility for making reasonable judgments about how to conduct their activities in a manner that will not violate water quality standards. Petitioner's erroneous interpretation would thus eliminate an important regulatory tool that allows permitting authorities to carry out the intent of Congress.

Petitioner's policy arguments are unpersuasive. It complains that it "lacks advanced notice" of how to comply with the challenged prohibitions. Pet. Br. 4. But the permit in this case provides ample notice about both the specific and general limitations on petitioner's discharges. Petitioner fails to identify any actual operational difficulties it has confronted as a result of the challenged prohibitions. And petitioner

appears to concede the propriety of other permit conditions that similarly require it to exercise reasonable judgment to comply with general legal standards concerning the effects of its discharges. Petitioner also invokes the specter of "'crushing consequences'" in enforcement actions and unwarranted litigation surrounding the meaning of general narrative prohibitions. Pet. Br. 21. But no such pattern of abuse has emerged despite widespread use of general narrative prohibitions for decades. On the contrary, California's experience shows that these prohibitions are an effective and common-sense regulatory tool that advances the Act's goal of achieving water quality standards.

ARGUMENT

I. THE CLEAN WATER ACT ALLOWS GENERAL NARRATIVE PROHIBITIONS LIKE THOSE AT ISSUE HERE

To answer the question presented, the Court should "start where [it] always do[es]: with the text of the statute." *Van Buren v. United States*, 593 U.S. 374, 381 (2021). As EPA explains, the relevant text of the Clean Water Act does not prevent permitting authorities from imposing general narrative prohibitions like those at issue here. Consideration of the overall design of the Act, and how it functions in practice, only bolsters that conclusion.

1. Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). That statutory objective includes a "national goal that the discharge of pollutants into the navigable waters be eliminated." *Id.* § 1251(a)(1). To achieve that goal, Congress declared that "the dis-

charge of any pollutant by any person shall be unlawful" unless otherwise permitted by the Act. *Id.* § 1311(a).

Congress also established the National Pollutant Discharge Elimination System program. 33 U.S.C. § 1342. The NPDES program serves as a limited exception to the broad statutory prohibition on discharging pollutants. It allows EPA or an authorized State to "issue a permit for the discharge of any pollutant, or combination of pollutants." *Id.* § 1342(a)(1). Every permit must satisfy requirements contained in the Act. A permit may be issued only "upon condition that such discharge will meet . . . all applicable requirements under section[] 1311." *Id.*; *see id.* § 1342(b)(1)(A) (directing that state permit programs must "apply, and insure compliance with, any applicable requirements of section[ ] 1311").

Section 1311 sets out two main measures for curbing water pollution, both of which must be incorporated into permits to comply with the Act. First, in certain circumstances, the Act calls for "effluent limitations" that require use of technology to control pollution at the point of discharge (also known as the "point source"). 33 U.S.C. § 1311(b)(1)(A). Second—and in addition to technology-based effluent limitations—the Act requires "any more stringent limitation, including those necessary to meet water quality standards . . . or required to implement any applicable water quality standard." *Id.* § 1311(b)(1)(C).

Water quality standards are primarily set by the States, subject to EPA approval. As relevant here, they "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A); *see PUD No. 1 of Jefferson County v.*

Washington Dep't of Ecology, 511 U.S. 700, 714 (1994).[1] As this Court has recognized, "the achievement of state water quality standards [is] one of the Act's central objectives." *Arkansas*, 503 U.S. at 106.

Indeed, before 1972, water quality standards were the primary basis for federal control of water pollution. *See EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202-203 (1976). Congress amended the existing law in 1972 and created the modern Clean Water Act. *See City of Milwaukee v. Illinois,* 451 U.S. 304, 317-318 (1981). Among other things, those amendments required the use of the technology-based effluent limitations described above. *See* 33 U.S.C. § 1311(b)(1)(A); *supra* p. 5. Those effluent limitations are often expressed numerically, restricting "the quantities, rates, and concentrations of specified substances which are discharged from point sources." *Arkansas*, 503 U.S. at 101. They provide the permit holder with precise information about the "specified levels of treatment to which it must conform." *EPA*, 426 U.S. at 204. But Congress did not intend effluent limitations as a wholesale replacement for water quality standards. It instead intended the Act to "achiev[e] maximum 'effluent limitations' on 'point sources,' *as well as* achieving acceptable water quality standards." *Id.* (emphasis added).

Effluent limitations and water quality standards are thus "different concepts," but they may overlap in practice because the Act "permit[s] effluent limita-

---

[1] California law employs the term "'[b]eneficial uses'" to refer to designated uses and the term "'[w]ater quality objectives'" to refer to water quality criteria. Cal. Water Code § 13050(f), (h); *see* Pet. Br. 11 n.4. For the sake of clarity, we use federal terminology in this brief.

tions to be based on water quality standards." *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 515 (2d Cir. 1976). As a result, a single permit may include both "technology-based effluent limitations" and "effluent limitations . . . based on water quality." *EPA*, 426 U.S. at 204-205 (footnote omitted). Effluent limitations in the latter category are often called "[w]ater quality-based effluent limitations." *E.g.*, Pet. App. 10.[2]

2. Petitioner contends that the only permit "limitation" that may be imposed as a permit condition under Section 1311(b)(1)(C) is an effluent limitation that restricts the nature or contents of the permit holder's discharges from its point sources. *See, e.g.*, Pet. Br. 24-34. This brief will not repeat EPA's arguments about why that misconstrues the broad text of Section 1311(b)(1)(C), which authorizes general narrative prohibitions of the type challenged here. *See* EPA Br. 21-31. Instead, we focus on the tension between petitioner's construction and the overall plan and function of the Act. Petitioner ignores important aspects of how the Act is designed to operate. And petitioner's erroneous statutory interpretation would deprive permitting authorities—including California's water boards—of a tool that is often necessary to carry out the intent of Congress.

---

[2] In its opening brief, petitioner defines effluent limitations in a way that excludes the prohibitions challenged here. *See, e.g.*, Pet. Br. 31-34. By contrast, the court of appeals referred to general narrative prohibitions as a type of water quality-based effluent limitations, as did petitioner itself in prior administrative proceedings. *See, e.g.*, Pet. App. 35-36, 431. Regardless of how they are characterized, these prohibitions are permissible "limitation[s]" under Section 1311(b)(1)(C). *See infra* pp. 7-14; EPA Br. 18-47.

a. To begin with, petitioner's argument fails to contend with the fact that water quality standards are often described in general, narrative terms—just as Congress intended.

As noted above, water quality standards include designated uses and water quality criteria based on those uses. 33 U.S.C. § 1313(c)(2)(A). Designated uses are broad, overall objectives such as "'[r]ecreation'" or "'[c]ommerce and navigation.'" *E.g.*, *PUD No. 1*, 511 U.S. at 706 n.1. Water quality criteria, too, "are often expressed in broad, narrative terms," using "open-ended" language. *Id.* at 716. Only one provision of the Act requires water quality criteria to be reduced to "specific numerical criteria." 33 U.S.C. § 1313(c)(2)(B). That provision applies to certain toxic pollutants. *See id.*; *see also id.* § 1317(a)(1) (identifying list of pollutants); *PUD No. 1*, 511 U.S. at 716 (recognizing this feature of the Act). Aside from that provision, the Act does not preclude the use of narrative water quality criteria.[3]

To the contrary, Congress signaled that water quality criteria can and often should be defined in general terms. It directed that "standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of" the Act. 33 U.S.C. § 1313(c)(2)(A). States have followed that guidance. For example, a prior decision from this Court addressed state water quality criteria that specified certain numeric criteria—but also broadly stated that "[t]oxic, radioactive, or deleterious material concentrations shall be less than those which may affect public

[3] Consistent with the Act, EPA regulations direct States to establish "narrative criteria" for water quality "where numerical criteria cannot be established *or* to supplement numerical criteria." 40 C.F.R. § 131.11(b)(2) (emphasis added).

health, the natural aquatic environment, or the desirability of the water for any use," and that "[a]esthetic values shall not be impaired" in ways that "offend the senses of sight, smell, touch, or taste." *PUD No. 1*, 511 U.S. at 706 n.1 (internal quotation marks omitted); *see id.* at 716 (observing that water quality criteria may be "based on . . . 'aesthetics'").

California has followed the same approach, including in its state Ocean Plan, which lists water quality standards for the Pacific Ocean. The Ocean Plan includes numeric water quality criteria, such as quantitative limits on fecal coliform that are intended to protect the safety of water recreation. J.A. 33-34. But other criteria take a narrative form, such as the requirements that "[f]loating particulates and grease and oil shall not be visible," and that discharges of waste "shall not cause aesthetically undesirable discoloration" of the ocean surface. *Id.* at 37.

b. Petitioner also ignores the reality that it is rarely possible to translate every aspect of applicable water quality standards into effluent limitations tailored to the discharger.

"[T]he achievement of state water quality standards" is "one of the Act's central objectives." *Arkansas*, 503 U.S. at 106. Permit conditions based on those standards are intended as a "supplement[ ]" to "strict technology-based effluent limitations." *EPA*, 426 U.S. at 205 & n.12 (footnote omitted). They ensure that permit holders "may be *further* regulated to prevent water quality from falling below acceptable levels." *Id.* (emphasis added); *see also* 33 U.S.C. § 1311(b)(1)(C) ("more stringent limitation[s]" must be imposed when "necessary to meet water quality standards"); *Arkansas*, 503 U.S. at 101 (recognizing that water quality "standards supplement effluent limitations"); *cf. PUD*

No. 1, 511 U.S. at 713-717, 723 (holding that project certification permits issued under a separate provision of the Act may require conduct "consistent with" applicable water quality standards).

In some circumstances, it may be possible to translate a water quality standard into a permit condition defined in terms that are specific to the permit holder. For example, a water quality standard for the Sacramento and San Joaquin river basins states that "[a]ll waters shall be maintained free of toxic substances in concentrations that produce detrimental physiological responses in human, plant, animal, or aquatic life." *Water Quality Control Plan (Basin Plan) for the California Regional Water Quality Control Board*, *Central Valley Region* at 3-15 (2019), https://tinyurl.com/2z9cr65c. One of California's regional water boards recently addressed that standard when issuing a municipal wastewater permit to the City of Manteca. *See Waste Discharge Requirements for the City of Manteca*, *Wastewater Quality Control Facility*, Order No. R5-2021-0003 at 5-6 (Cal. Reg'l Water Quality Control Bd., Central Valley Region, Feb. 18, 2021), https://tinyurl.com/3a5v7z24. In developing the permit, the regional water board found that ammonia levels in untreated domestic wastewater had a reasonable potential to harm aquatic life and thus exceed the relevant water quality standard. *Id.*, Attachment F at 46-51. The board then calculated numeric ammonia limitations for the permit holder that were designed to avoid exceedance of the toxicity standard. *Id.* at 51; *see also id.* at 59-63 (providing further detail on calculations).[4]

---

[4] That example implicates a federal regulation requiring permitting authorities to develop "effluent limits for [a] pollutant" if the (continued…)

But "water quality standards 'often cannot be translated into effluent limitations,'" a reality that "Congress recognized" when it amended the Act to make water quality standards and effluent limitations "complementary provisions." *Nw. Env't Advocs. v. City of Portland*, 56 F.3d 979, 989 (9th Cir. 1995). For example, consider a water quality standard requiring that "[a]esthetic values shall not be impaired" in ways that "offend the senses of sight, smell, touch, or taste." *PUD No. 1*, 511 U.S. at 706 n.1, 716 (internal quotation marks omitted). That broad requirement "cannot be expressed quantitatively" in an effluent limitation. *City of Portland*, 56 F.3d at 989. And neither petitioner nor its amici have explained how that kind of requirement could be expressed effectively in a specific, narrative limitation restricting "the nature or contents of a permitholder's discharges from their point sources." Pet. Br. 19. Water quality criteria that broadly prohibit alteration of conditions like "[t]he natural taste, odor, and color of fish, shellfish, or other marine resources used for human consumption," *e.g.*, J.A. 39 (Ocean Plan), present similar challenges.

Given those challenges, permitting authorities are often unable to capture all of the relevant water quality standards in specific effluent limitations tailored to a permit holder's discharges. *See generally* Healy, *Still Dirty After Twenty-Five Years: Water Quality Standard Enforcement and the Availability of Citizen Suits*, 24 Ecology L.Q. 393, 421-423 (1997). But per-

---

pollutant's discharge "will cause" or has "the reasonable potential to cause" an exceedance of water quality standards. 40 C.F.R. § 122.44(d)(1)(i), (iii). But that requirement does not apply in other circumstances and does not preclude the use of general narrative prohibitions. *See* EPA Br. 39-40.

mitting authorities cannot abdicate their responsibility under the Act to protect water quality standards. *See* 33 U.S.C. § 1311(b)(1)(C). General narrative prohibitions fill this gap, serving as a backstop or "'safety net'" that allows permitting authorities to address "water quality violations that a permittee causes due to unanticipated circumstances or changes to effluent quality." *In re City of Lowell*, 18 E.A.D. 115, 176, 181 (EAB 2020); *see* Healy, *supra*, at 428-429 (noting that specific effluent limitations might not be sufficient to protect water quality standards because "conditions in receiving water may change during the five-year term" of the permit).

In petitioner's view, however, that important tool is unavailable. Petitioner asserts that Section 1311(b) only allows effluent limitations that govern "'quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources," Pet. Br. 31 (quoting 33 U.S.C. § 1362(11)) (emphasis omitted), or that use narrative language to "restrict the nature of a point source's discharges," *id.* at 33 n.22; *see id.* at 43 n.34. That flawed interpretation cannot be squared with Congress's plan or with decades of actual practice.

Indeed, Congress has signaled that general narrative prohibitions may be particularly appropriate in the context of combined sewer systems like the one at issue here. Congress amended the Clean Water Act in 2000 to mandate that permits for combined sewer systems "conform to the Combined Sewer Overflow Control Policy" promulgated by EPA. 33 U.S.C. § 1342(q)(1). A "primary objective" of that policy "is to meet" water quality standards. EPA, Combined Sewer Overflow (CSO) Control Policy, 59 Fed. Reg. 18,688, 18,694 (Apr. 19, 1994) (CSO Control Policy).

The policy requires permits for combined sewer systems to include both numeric and narrative requirements, such as a requirement to "monitor and collect sufficient information to demonstrate compliance with" water quality standards. *Id.* at 18,696. In some circumstances, the policy *requires* a general narrative prohibition—"expressed in the form of a narrative limitation"—that requires the permit holder to "[c]omply with applicable" water quality standards. *Id.* Petitioner offers no convincing argument for reconciling Congress's express approval of that policy with the contention that the same type of limitation is forbidden.

c. Finally, petitioner fails to appreciate that when water quality standards cannot be satisfied using discharger-specific effluent limitations alone, it is typically dischargers who are best positioned to ensure compliance with the general terms of those standards.

Permit holders understand their own operations. They know (or should know) what they are discharging from their point sources. And they normally have the best real-time knowledge of how those discharges could affect the receiving waters—including because they are required, under the terms of their permits, to closely monitor their own activities. *See, e.g.*, 40 C.F.R. § 122.41(j), (*l*); Pet. App. 174-176, 190-238. If circumstances arise during the life of a permit that threaten to impair water quality standards, permit holders are typically the entities best positioned to respond *before* standards are violated. Although they must report to the permitting authority much of the monitoring data they collect, there is often a delay of a month or longer. *See, e.g.*, Pet. App. 101-102, 238-239.

Petitioner defends its interpretation on the ground that it would enhance flexibility for permit holders. *See, e.g.*, Pet. Br. 47-48. If petitioner's interpretation prevailed, however, it would compel permitting authorities to develop additional, detailed restrictions to comply with 33 U.S.C. § 1311(b)(1)(C). That would deprive permit holders of the ability to make their own informed decisions about how to comply with general narrative prohibitions. It would delay and further complicate the permitting process. It would increase compliance costs for permit holders—including as a result of additional monitoring and reporting requirements. *See, e.g.*, 40 C.F.R. § 122.44(i)(1)(i). And because of the inherent difficulty involved in translating broad water quality standards into specific effluent limitations, *see supra* pp. 11-12, those new and additional limitations might be more burdensome than existing permit limitations, as permitting authorities err on the side of caution in carrying out their statutory responsibility to impose "any more stringent limitation . . . necessary to meet water quality standards." 33 U.S.C. § 1311(b)(1)(C).

To take one example, the Ocean Plan mandates that "[f]loating particulates and grease and oil shall not be visible." J.A. 37. Petitioner's Oceanside Permit directs petitioner to adopt certain measures to minimize its discharge of solid and floatable materials, Pet. App. 123, but does not require petitioner to eliminate all substances that might potentially float from every discharge. Instead, the general narrative prohibition allows petitioner to decide how to comply with the water quality standard for floating particulates. *See id.* at 97. If permitting authorities were forced to translate that standard into a specific effluent limitation, however, they might have to do so in a way that denies petitioner that flexibility.

II. PETITIONER'S POLICY CONCERNS ARE UNPERSUASIVE

Petitioner asserts that the challenged conditions are "unfair, unworkable, and . . . not an effective way to protect the waters of the United States." Pet. Br. 6. It fails to substantiate those policy arguments and they are contrary to actual experience.

A. The Challenged Permit Provides Fair Notice of Petitioner's Obligations

Petitioner first contends that the Oceanside Permit places it "in an impossible situation," Pet. Br. 52, by depriving it "of advance notice of [its] obligations," *id.* at 45. But the permit explains petitioner's obligations in detail. And the surrounding circumstances illustrate why it was necessary to include the general narrative prohibitions challenged by petitioner—and why petitioner is best situated to determine how it will achieve the water quality standards addressed by those prohibitions.

1. Petitioner acknowledges that the challenged permit "comprises over 100 pages of detailed requirements for San Francisco's discharges and includes both technology- and water quality-based effluent limitations." Pet. Br. 15. During dry weather, the permit imposes technology-based numeric effluent limitations for discharges from a specified wastewater treatment facility. Pet. App. 91-92, 283-284. Other technology-based numeric limitations apply when petitioner produces recycled water. *Id.* at 93-94, 284-285. The permit additionally imposes effluent limitations based on water quality standards along with corresponding monitoring and reporting requirements. *Id.* at 95-96. Petitioner must conduct chronic toxicity tests to ensure compliance with those limitations. *Id.* at 96, 217-225.

Different requirements apply during wet weather, when petitioner must comply with limitations contained in its "Long-Term Control Plan." Pet. App. 97. Among other things, that plan requires petitioner to "store or treat wet weather flows to the maximum extent practicable." *Id.* at 128. Petitioner may discharge partially treated sewage into the ocean only if influent flow requirements are met. *Id.* at 128-130. And once a storm subsides, petitioner must take other steps to prevent or minimize discharge of partially treated sewage. *See id.* at 130-131.

The permit contains additional requirements regarding petitioner's operation of its sewer system. For example, petitioner must abide by a set of "nine minimum controls" drawn from the CSO Control Policy. Pet. App. 93, 112-127; *see* CSO Control Policy, 59 Fed. Reg. at 18,691, 18,696; *supra* pp. 12-13. Those minimum controls require petitioner (among other things) to maximize the amount of wastewater that receives treatment before being discharged and minimize the amount of "solid and floatable materials" that it discharges. Pet. App. 122-123. Further provisions require pre-treatment of sewage, *id.* at 109-110, and obligate petitioner to monitor receiving waters for levels of certain bacteria (such as fecal coliform), *id.* at 226-228.

Although these requirements provide detailed instructions for the day-to-day operation of petitioner's sewer system, they do not fully satisfy the permitting authorities' obligation to include any limitations "necessary to meet water quality standards." 33 U.S.C. § 1311(b)(1)(C). In particular, the requirements summarized above do not anticipate every way in which petitioner's future activities might lead to an exceedance of water quality standards during the five-year

life of the permit. That was a legitimate concern for the permitting authorities, particularly given petitioner's discharge of at least 100 million gallons of combined stormwater and wastewater during the term of its prior permit. Pet. App. 533. To address the gap between specific limitations and potential violations of water quality standards, EPA and California's regional water board included a pair of general narrative prohibitions in the permit. Like similar prohibitions in other permits, "they serve as 'backstops' in the event that more specific limits or provisions prove inadequate." *Id.* at 435.

The first challenged prohibition, titled "Receiving Water Limitations," bars petitioner's discharge from causing or contributing "to a violation of any applicable water quality standard[s] . . . for receiving waters." Pet. App. 97. The applicable standards are set forth in the regional water board's Water Quality Control Plan (Basin Plan) for the San Francisco Bay Basin, *id.* at 264-268, and the state Ocean Plan (as modified by a 1979 State Water Resources Control Board order), *id.* at 268-274, 288. Both plans list designated uses and water quality criteria, as required by the Act. *See generally* J.A. 22-230; Basin Plan, *supra*, https://tinyurl.com/5ycznvtv.

The second challenged prohibition is part of a set of standard provisions imposed by California's regional water board. *See* Pet. App. 334-335. Petitioner objects (in part) to the requirement that "[n]either the treatment nor the discharge of pollutants shall create pollution, contamination, or nuisance as defined by California Water Code section 13050." *Id.* at 339; *see* Cal. Water Code § 13050(k), (*l*), (m) (defining the relevant terms); *see, e.g.*, *City of Modesto Redevelopment Agency v. Super. Ct.*, 119 Cal. App. 4th 28, 37-39

(2004) (interpreting "nuisance"). Petitioner does not appear to contest the prohibition on creating "contamination" or "nuisance." *See* Pet. Br. 15-16. But it objects to the prohibition on creating "pollution" because part of the definition of "pollution" can "include 'alteration of the quality of the waters of the state . . . which unreasonably affects . . . [t]he waters for beneficial uses.'" *Id.* at 16; *see supra* n.1. A different part of the definition of "'[p]ollution'" includes "'contamination.'" Cal. Water Code § 13050(*l*)(2).

2. Petitioner asserts that these prohibitions make it "impossible to know precisely what rules apply." Pet. Br. 47 (internal quotation marks omitted). But there is no confusion about which water quality standards apply: those standards are found in the Ocean Plan and Basin Plan, Pet. App. 264-274, 288, subject to certain specified exceptions, *infra* pp. 24-25. Petitioner has not identified any particular provision of those standards that it thinks is unclear, or any way in which the general prohibitions requiring compliance with those standards are interfering with its current operations. And petitioner concedes that other parts of the permit feature "wide-ranging" and "detailed requirements" that explain how it must operate its combined sewer system. Pet. Br. 15; *see, e.g.,* Pet. App. 91-97, 112-131.

Petitioner instead contends that it should not be held directly accountable for the *effects* of its discharges on the receiving waters. It imagines a world in which "permitholders can know from the face of their permits what they must do to comply," Pet. Br. 47, by looking solely to end-of-pipe effluent limitations "within the four corners of their permits," *id.* at 52. But there is nothing exceptional about a legal regime that requires permit holders to exercise reasonable

judgment about compliance with general legal standards addressing the effects of their conduct.

Indeed, many aspects of the Oceanside Permit that are not challenged by petitioner similarly require petitioner to make such judgments by monitoring and addressing the effects of its conduct on the surrounding environment. For example, petitioner appears to accept the requirement that it not create "nuisance" as defined under California law. Pet. App. 339. That requirement turns (among other things) on whether petitioner's conduct "[i]s injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." Cal. Water Code § 13050(m)(1). Other provisions require petitioner to evaluate "how combined sewer discharges affect receiving water quality," Pet. App. 133; to "take all reasonable steps to minimize or prevent any discharge in violation of this Order that has a reasonable likelihood of adversely affecting human health or the environment," *id.* at 167; and to monitor an area of the Pacific Ocean and "identify any environmental effects of the discharge on receiving waters, sediment, or aquatic life," *id.* at 228-229.

Additional permit terms—also not challenged by petitioner—require petitioner to determine how to comply with broad narrative requirements in the face of unpredictable future events. During wet weather, for example, petitioner must "minimize combined sewer discharges," "maximize pollutant removal," and "store or treat wet weather flows to the maximum extent practicable." Pet. App. 128. Likewise, petitioner must "maximize" the amount of wastewater that receives treatment and "minimize" the amount of "solid and floatable materials." *Id.* at 122-123.

The prohibitions challenged here similarly direct petitioner to make reasonable judgments to ensure compliance with general standards governing the waters that receive its discharges. Consider the numeric water quality criteria for fecal coliform, for example. J.A. 33-34. The Oceanside Permit requires petitioner to monitor levels of fecal coliform at several locations in the receiving waters—a requirement that petitioner does not challenge. Pet. App. 226-228; *see also* J.A. 33 (Ocean Plan provision directing that compliance with standards "shall be determined from samples collected at stations" that are "representative of the area" where the permit holder discharges pollutants into the receiving water). If those monitoring efforts reveal that fecal coliform levels are close to exceeding the numeric criteria at some future point in the lifespan of this permit, it would hardly be "unfair" or confusing (Pet. Br. 6, 48) to expect petitioner to adjust its conduct to avoid a violation of those criteria.

Likewise, petitioner is well situated to comply with the requirement that discharges of waste "shall not cause aesthetically undesirable discoloration" of the ocean surface. J.A. 37; *see supra* p. 13. The Oceanside Permit already requires petitioner to "monitor to determine the occurrence *and apparent impacts* of combined sewer discharges," Pet. App. 127 (emphasis added); *see also id.* at 208-209, 211-214; to post warning signs where members of the public may encounter such discharges, *id.* at 124-126; and to perform regular inspections of its point sources, *id.* at 115-116. If petitioner's discharges are causing discoloration of the receiving waters, petitioner will likely be the first to know.[5]

---

[5] Although petitioner invokes the possibility of "[c]ontributions to (continued…)

B. Petitioner's Concerns About Enforcement Actions Are Overstated

Petitioner also expresses concern that EPA and private plaintiffs will invoke general narrative prohibitions "as a sword" and inflict "'crushing consequences'" to "harm permitholders" who lack an adequate understanding of their obligations. Pet. Br. 5, 21; *see id.* at 48-52. Real-world experience does not bear this concern out, and petitioner neglects to mention exemptions that make enforcement actions for violations of the challenged provisions of the Oceanside Permit unlikely.

1. General narrative prohibitions have existed since the 1970s. They have been widely employed, including in multiple permits governing petitioner's sewer system. *See infra* pp. 26-27. The Ninth Circuit has allowed plaintiffs to enforce them through citizen suits for nearly 30 years, and other courts have also allowed such actions. *City of Portland*, 56 F.3d at 986; *see, e.g.*, *Ohio Valley Env't Coal. v. Fola Coal Co., LLC*, 845 F.3d 133, 142 (4th Cir. 2017). If the use of general narrative prohibitions encourages excessive litigation by EPA, the States, or private plaintiffs, that would be apparent by now. Petitioner has identified no such evidence.

Petitioner instead complains that some permit holders have been "unable to assert permit shield defenses based on their compliance with the specific terms in their permits," citing several cases in support of that complaint. Pet. Br. 49; *see id.* at 49-50 & n.38.

---

a receiving water from multiple sources," Pet. Br. 47, there are no other dischargers in the area covered by the Oceanside Permit that could plausibly cause a violation of these standards. *See also* EPA Br. 45.

But there is nothing remarkable about the proposition that compliance with *some* terms in a permit does not immunize a permit holder when it is alleged to have violated a different (and more general) term in the same permit. Three of the enforcement actions cited by petitioner merely establish that basic proposition. *See Nat. Res. Def. Council, Inc. v. County of Los Angeles*, 725 F.3d 1194, 1204-1207 (9th Cir. 2013); *Swartz v. Beach*, 229 F. Supp. 2d 1239, 1271-1272 (D. Wyo. 2002); *Nw. Env't Advocs. v. City of Medford*, 2021 WL 2673126, at *5 (D. Or. June 9, 2021). The other two cases demonstrate only that determining liability for violating a general narrative prohibition sometimes requires "judicial fact finding," Pet. Br. 49—hardly a novel phenomenon, and certainly not one that establishes "unfairness," *id.* at 48; *see Fola Coal*, 845 F.3d at 137-138; *Nat. Res. Def. Council v. Metro. Water Reclamation Dist. of Greater Chicago*, 175 F. Supp. 3d 1041, 1062 (N.D. Ill. 2016).[6]

While disputed facts may sometimes lead to prolonged litigation, in other circumstances general narrative prohibitions allow for prompt resolution of obvious, clearly injurious, and acknowledged violations of water quality standards. In one example involving the same regional water board that issued the Oceanside Permit, a local water district allegedly discharged over 100,000 gallons of chlorinated potable water, killing various species of fish. *In re Marin Municipal Water District*, Order No. R2-2018-1004 at 1

[6] In practice, instead of focusing on costly litigation about disputed facts, citizen suits are often based on a permit holder's admitted violation of an effluent limitation that the permit holder has publicly reported to the permitting authority. *See, e.g.*, *Sierra Club v. Union Oil Co. of Cal.*, 716 F. Supp. 429, 434 (N.D. Cal. 1988).

(Cal. Reg'l Water Quality Control Bd., S.F. Bay Region, Apr. 9, 2018), https://tinyurl.com/yr7hp86b. The relevant permit did not contain an effluent limitation for chlorine concentrations in potable water that applied to such unplanned discharges. Nevertheless, the fish kill exceeded toxicity criteria for the receiving waters, thereby violating the general narrative prohibition in the permit. *Id.* Based on that prohibition, the water district and the regional water board promptly agreed to resolve the matter. *Id.* at 2. The water district stipulated to a modest penalty, with part of that penalty suspended pending completion of a remediation project. *Id.* at 2-5. Another case involving alleged discharges of chlorinated potable water led to a similar stipulated resolution. *See In re East Bay Municipal Utility District*, Order No. R2-2017-1031 at 1-14 (Cal. Reg'l Water Quality Control Bd., S.F. Bay Region, Oct. 23, 2017), https://tinyurl.com/3jex7j4z.

When violations of general narrative prohibitions cannot be resolved out of court, enforcement actions to ensure compliance with water quality standards are appropriate tools to advance the purposes of the Clean Water Act. A prominent California example is the Los Angeles stormwater litigation discussed in *County of Los Angeles*, 725 F.3d 1194. The permit in that case generally prohibited violations of applicable water quality standards. *Id.* at 1199. The flood control district's own monitoring data revealed 140 separate violations of the standards, "including excessive levels of aluminum, copper, cyanide, zinc, and fecal coliform bacteria." *Id.* at 1200. That undisputed evidence established a permit violation. *Id.* at 1210.

More recently, EPA and one of California's regional water boards sued petitioner after years of dialogue

failed to remedy petitioner's repeated permit violations—including violations of the general narrative prohibitions in the Bayside Permit, which governs the eastern half of petitioner's sewer system. *See* Complaint ¶¶ 93-98, *United States v. City & Cnty. of San Francisco*, No. 3:24-cv-02594 (N.D. Cal. May 1, 2024) (ECF No. 1). Petitioner now expresses confusion about why that action was brought and what "it must do to avoid the risk of liability." Pet. Br. 51. As the complaint details, however, petitioner's repeated discharges during combined sewer overflows exposed "surfers, swimmers, and others recreating on beaches" to "untreated sewage, which contains pathogens and high enterococci and E.coli bacteria levels." Compl. ¶ 1. The complaint not only alleges a violation of a general narrative prohibition, it identifies the water quality standards at issue. *See, e.g.*, *id.* ¶¶ 106, 110. It also explains that petitioner's self-reported monitoring data for the receiving waters helped demonstrate violations of those standards. *See id.* ¶¶ 90, 109. That action (which is currently stayed while the parties pursue mediation) exemplifies why general narrative prohibitions should remain available as a backstop in cases involving allegations of conduct that imperils the "integrity of the Nation's waters." 33 U.S.C. § 1251(a).

2. Petitioner's complaints about unfair and excessive enforcement actions ring particularly hollow in the context of this dispute over the Oceanside Permit. Although neither the petition for a writ of certiorari nor the opening brief acknowledges it, petitioner enjoys significant exemptions from complying with the water quality standards that would normally apply to discharges covered by that permit.

The Oceanside Permit makes clear that its general prohibition on causing or contributing to an exceedance of water quality standards is subject to "the exception set forth in State Water Board Order No. WQ 79-16." Pet. App. 97; *see id.* at 270-274. That order grants petitioner "an exemption to the Ocean Plan to allow an average of eight [combined sewer] overflows per year." J.A. 16. During those wet-weather overflows, petitioner may discharge combined sewage and stormwater into the Pacific Ocean, and is "excepted from the requirements of the Ocean Plan"—that is, the water quality standards that would otherwise apply—so long as it meets conditions listed in the order. *Id.* at 20. The permit grants a similar exemption from the Basin Plan's prohibition on discharging certain wastewater. Pet. App. 265-268.

With those exemptions in place, it is unlikely that petitioner would face an enforcement action for violating the challenged narrative prohibitions in the Oceanside Permit. Petitioner could conceivably violate the permit by allowing a combined sewer overflow in dry weather, or by failing to follow required procedures during a wet-weather overflow. *See* Pet. App. 122-123, 128-131. In those scenarios, however, petitioner's conduct would already constitute a direct violation of a different term of the permit. *See id.* Petitioner's failure to acknowledge or explain its exemptions from the otherwise applicable water quality standards is further evidence that its assertions about "the crushing consequences" of the challenged permit conditions (Pet. Br. 21 (internal quotation marks omitted)) should be viewed with skepticism.

C. California's Experience Shows That General Narrative Prohibitions Are Workable

Finally, petitioner asserts that general narrative prohibitions are "unworkable." Pet. Br. 6. Regulatory experience in California and other States demonstrates otherwise. *Cf. County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 177-178 (2020) (observing that "longstanding regulatory practice" showed that EPA's approach to a different aspect of the Clean Water Act was "administratively workable").

NPDES permits have long featured prohibitions like the ones challenged here. *See, e.g.*, *Fola Coal*, 845 F.3d at 141-142 & n.5 (discussing examples from West Virginia, New Hampshire, Oregon, California, and Illinois); *City of Lowell*, 18 E.A.D. at 176 (addressing Massachusetts example and noting that "permitting authorities have frequently included" such prohibitions "alongside more specific 'end of pipe' pollutant-specific effluent limits"). In West Virginia, for example, general narrative prohibitions were inspired by similar provisions in surface coal mining regulations and were incorporated into NPDES permits beginning in 1984. *See Fola Coal*, 845 F.3d at 141.

California's experience is consistent with national practice. California was the first State authorized to administer its own NPDES permit program. *EPA*, 426 U.S. at 209. The State's water boards have employed general narrative prohibitions since the 1970s. *See, e.g.*, *Waste Discharge Requirements for Southern California Edison Company, Highgrove Generating Station*, Order No. 74-29 at 7 (Cal. Reg'l Water Quality Control Bd., Santa Ana Region, Dec. 6, 1974). The regional water board that issued the permit at issue here has been using general narrative provisions in most of its individual permits since the early 1990s. Pet. App.

519. California's State Water Resources Control Board and its regional water boards continue to make regular use of permit terms that are functionally identical to those challenged here.

Petitioner, too, has long been familiar with this type of provision. It was subject to general narrative prohibitions from the 1970s through the 1990s, in sewer-related permits that preceded the Oceanside Permit. *See, e.g.*, *Waste Discharge Requirements for Oceanside Treatment Facility and Southwest Ocean Outfall*, Order No. 90-093 at 12 (Cal. Reg'l Water Quality Control Bd., S.F. Bay Region, June 20, 1990); *Waste Discharge Requirements for the Westside Treatment Facility and Southwest Ocean Outfall*, Order No. 88-106 at 14 (Cal. Reg'l Water Quality Control Bd., S.F. Bay Region, June 15, 1988); *Waste Discharge Requirements for City and County of San Francisco, Richmond-Sunset Plant,* Order No. 79-129 at 5 (Cal. Reg'l Water Quality Control Bd., S.F. Bay Region, Oct. 16, 1979); *Waste Discharge Requirements for City and County of San Francisco, Richmond-Sunset Plant*, Order No. 74-164 at 5 (Cal. Reg'l Water Quality Control Bd., S.F. Bay Region, Dec. 6, 1974).[7]

If petitioner's workability concerns were genuine, evidence of regulatory confusion and disarray should have emerged long ago. But petitioner points to no

[7] The same is true for petitioner's permits that preceded the Bayside Permit. *See, e.g.*, *Waste Discharge Requirements for City and County of San Francisco, North Point and Southeast Sewerage Zones*, Order No. 84-28 at 5 (Cal. Reg'l Water Quality Control Bd., S.F. Bay Region, June 20, 1984); *Waste Discharge Requirements for City and County of San Francisco, Southeast Plant*, Order No. 74-163 at 6 (Cal. Reg'l Water Quality Control Bd., S.F. Bay Region, Dec. 6, 1974).

such evidence, relying instead on unsupported assertions about its own confusion. Despite those assertions, petitioner waited for decades to bring this federal challenge—and has never previously invoked the available state-court mechanism for challenging this permit condition. *See* Cal. Water Code § 13330; Pet. Br. 15 n.9; *see generally City of Duarte v. State Water Res. Control Bd.*, 60 Cal. App. 5th 258, 266-268 (2021).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

ROB BONTA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
TRACY L. WINSOR
Senior Assistant Attorney General
CHRISTOPHER D. HU
Deputy Solicitor General
RUSSELL B. HILDRETH
Supervising Deputy Attorney General
MARC N. MELNICK
BRYANT B. CANNON
Deputy Attorneys General

September 3, 2024