No. 23-753

In the Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO,

PETITIONERS,

v.

ENVIRONMENTAL PROTECTION AGENCY,

RESPONDENT.

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

AMICUS CURIAE BRIEF FOR WASHINGTON, MASSACHUSETTS AND ELEVEN OTHER STATES IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTEREST OF *AMICI CURIAE*

Amici, the State of Washington, the Commonwealth of Massachusetts, along with the states of Connecticut, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, Oregon, Wisconsin, the Commonwealth of Pennsylvania, and the District of Columbia (*Amici* States), have powerful economic, environmental, and sovereign interests in the continued use of narrative effluent limitations to ensure compliance with state Water Quality Standards under the Federal Clean Water Act.

As with water quantity, water quality is the lifeblood of a healthy community. Each of *Amici* States have long traditions of enacting and enforcing strong protections for the waters their residents rely on for recreating, fishing, drinking, and providing critical aquatic habitat, and for which *amici* act as stewards. Many of *Amici* States' efforts pre-date the Clean Water Act. And, from headwaters in the Olympic Mountains to Boston Harbor, *Amici* States have been tireless in efforts to balance economic interests with protecting waters within their jurisdictions—including some of the last remaining untouched *and* most critically threatened waters in the Nation.

This case involves regulation of a serious threat to those waters—combined sewer overflows, or CSOs, that risk the health and quality of life for millions of Americans. CSOs are point source discharges that, following heavy rains, can result in releases of raw sewage to rivers, lakes, beaches, and creeks, onto streets and sidewalks and into homes throughout urban areas. By their very nature, these events

typically occur in populated areas and involve discharges into waters that are already stressed significantly by pollution.

Regulation of CSOs and wastewater treatment facilities under the Clean Water Act can be transformative. As just one example, two municipal treatment plants in the Boston area discharged a total of 350 million gallons of untreated wastewater each day into Boston Harbor as of the early 1980s. Di Jin et al., *Evaluating Boston Harbor Cleanup: An Ecosystem Valuation Approach*, Front. Mar. Sci. 5:478, 2 (2018). The cleanup of that heavily polluted waterbody, spurred by Clean Water Act enforcement, has transformed Boston Harbor from the "dirtiest harbor in America" to a "Great American Jewel." *Id*. Communities surrounding Boston Harbor have, as a result, seen a significant economic boost from both regained ecosystem services and economic growth along the waterfront. *Id*. at 10-11.

As permitting authorities under state law and the Clean Water Act, *Amici* States have, along with their federal and local government partners, long sought to address CSO events and other wastewater problems. And because in many states the municipalities that are responsible for stormwater and sewer collection and treatment are also instruments of the states, *Amici* States have remained particularly sensitive to the difficulties municipalities face when it comes to dealing with and preventing CSOs. As a result, *Amici* States have—to the extent permitted by law—steered away from relying solely on strict, numeric effluent limitations for municipal permits in favor of more collaborative approaches. These approaches include using

narrative receiving water limitations as a backstop to ensure that permits (which the Clean Water Act dictates must include conditions necessary to prevent violations of state Water Quality Standards) can effectively address significant water quality issues without overly burdening regulated entities.

Contrary to the allegations of heavy-handed enforcement by Petitioners, the City and County of San Francisco (the City), and *amici* supporting the City, such conditions promote collaboration between regulators and local governments. This collaboration then allows deployment of compliance schedules and adaptive management approaches—tools that promote reasonable timelines for municipalities to install incremental upgrades and enhancements, enabling them to remain in compliance with permit conditions and, in some instances, shielding them from enforcement by states, the Environmental Protection Agency (EPA), and citizen suit plaintiffs. The alternative, forcing regulators to rely solely on strict and rigid permit conditions, or prohibiting CSOs outright, would result in more burdensome limitations being placed within permits and increased citizen suits against both permitting authorities and regulated entities. *Amici* States' interests here are, thus, substantial.

SUMMARY OF ARGUMENT

Like many municipalities throughout the country, the City operates systems that transport untreated domestic sewage, industrial and commercial wastewater, and stormwater run-off to facilities for treatment prior to discharge. During periods of wet weather, however, stormwater can

overrun the system's capacity, causing untreated discharges of combined stormwater and raw sewage—from untold and unknown sources throughout the area—to receiving waters. These events are referred to as combined sewer overflows, or CSOs. During *each* CSO event, literally millions of gallons of human waste and a soup of other dangerous contaminants are discharged unchecked from point sources into waters that are used for swimming, fishing, and recreating, and that provide habitat for countless species. And, as the residents of San Francisco have discovered, during CSO events raw sewage mixed with stormwater can also overflow into streets, sidewalks, businesses, and even into homes.

While national policy, and most municipalities operating combined sewage and stormwater systems, aim for no more than one CSO event per year, the City's National Pollutant Discharge Elimination System (NPDES) permit allows it an average of eight CSOs annually, enabling it to legally discharge large amounts of untreated sewage into surrounding waters. But that generous allowance must still be bounded such that it comports with the Clean Water Act's mandate that discharge permits include conditions necessary to prevent violations of state Water Quality Standards. The City's NPDES permit achieves that balance by, *inter alia*, the use of narrative conditions that require compliance with state standards.

The City's position is both inconsistent with the statutory language and would prevent NPDES permitting authorities from allowing this kind of flexibility in the future. Instead, permitting authorities would be forced to impose more

burdensome prohibitions in NPDES permits so as to ensure compliance with the Clean Water Act, thereby exposing municipalities to higher costs, operational constraints, and liability to third parties.

The Court should reject the City's arguments here and uphold the Ninth Circuit's decision.

I. The Court should adhere to the narrow question at hand, namely, whether general narrative prohibitions to ensure discharges comply with state Water Quality Standards are within the authority granted by Congress in the Clean Water Act. *No* party here questions the use of narrative permit conditions in general, including the City. And multiple *amici* for the City urge the Court to refrain from any ruling that calls their use into question—as do *Amici* States. The consequences of doing otherwise would have profound and drastic impacts on NPDES permits throughout the country.

II. CSOs are a significant source of pollution for millions of Americans, including the residents of the San Francisco region. While the City characterizes itself as the target of an unfair and heavy-handed system, in fact the City is facing liability here because of repeated and systematic failures to execute on multiple of its permit obligations and in a way that has resulted in *confirmed* violations of Water Quality Standards in waters that millions of San Francisco residents and visitors rely upon. Indeed, neither the City nor any of its *amici* point to an actual instance of a permittee otherwise in compliance with permit requirements being penalized for the condition of the receiving waters rather than their own conduct.

III. The City is incorrect on the merits. Compliance with state-defined Water Quality Standards is a foundational requirement for NPDES permits. It is also part of the bedrock of "cooperative federalism" upon which the Clean Water Act is based, whereby Congress expressly preserved the primary rights of states to define and enforce the quality of waters within their respective borders.

To those ends, narrative permit conditions that generally prohibit discharges violating state Water Quality Standards are fully within the authority Congress granted. Section 1311(b)(1)(C) of the Clean Water Act, and its reference to using "any more stringent limitation" to meet state Water Quality Standards, means just what it says. It authorizes any limitation necessary to ensure that a permittee's discharges satisfy state standards, which naturally includes conditions prohibiting discharges that violate those same standards. Section 1311(a) confirms this by prohibiting any discharges except those that comply with, among other things, state Water Quality Standards. Permit conditions expressly prohibiting discharges that would fail to meet Water Quality Standards are squarely within this authority. Indeed, this Court has previously recognized that section 1311(b)(1)(C) goes beyond authorizing imposition of "effluent limits" and recognized that dischargers may be "further regulated" where water quality falls below acceptable levels "despite individual compliance with effluent limitations." *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology (PUD No. 1)*, 511 U.S. 700, 704 (1994); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 122 (2018). The City presents no compelling reason to

depart from this logical conclusion now. And, even if the Clean Water Act did not already grant authority to use general narrative prohibitions, Congress separately authorized their use when it gave EPA's CSO Control Policy, which requires CSO permits to contain narrative conditions mandating compliance "with applicable WQS," the force of law. 59 Fed. Reg. 18,688 at 18,696 (April 19, 1994); 33 U.S.C. § 1342(q)(1). The conditions at issue here are fully authorized.

IV. Finally, narrative conditions requiring compliance with Water Quality Standards make sense. It is often difficult to know all potential pollutants and all potential discharge sources at the time of permit issuance. As EPA has noted, "to include in the permit a list of every pollutant or combination of pollutants that conceivably might be contained in the applicant's wastestreams, and to determine which of those pollutants the Agency considered appropriate for discharge . . . . would be an unduly burdensome and costly, and ultimately, impractical [approach]." *In re Ketchikan Pulp Co.*, 7 E.A.D. 605, 618 1998 WL 284694 (E.P.A. May 15, 1998). But this burdensome, costly, and impractical approach is exactly what the City proposes here. The result would be added burdens and more onerous conditions on permittees with, paradoxically, *fewer* environmental protections.

The Court should affirm the decision below.

ARGUMENT

I. NO PARTY HERE QUESTIONS THE GENERAL USE OF NARRATIVE PERMIT CONDITIONS

This case presents a narrow question: does the Clean Water Act authorize NPDES permits that include general or, as the City labels them, "generic" prohibitions to ensure discharges comply with state Water Quality Standards? As discussed herein, the answer to that question is an emphatic "*yes*."

But, at the outset, it is critical to note that all parties, including *amici* supporting the City, agree that the use of narrative effluent criteria is not challenged or at issue here.[1] The City, indeed, itself makes clear that it has "no objection to *narrative effluent limitations*" in general. Pet'r Br. 4. Multiple *amici* supporting the City also strenuously urge the Court to refrain from issuing any ruling that calls into question the use of narrative effluent limitations. *See, e.g.*, Br. of Amicus Curiae Nat'l Ass'n of Homebuilders 7 (asking the Court "not [to] disturb the well-established precedent of using descriptive non-numerical narrative effluent limitations").

Those calls to preserve the ability of permitting authorities to use narrative effluent limitations in general are well founded. As *amicus curiae* Local Government Legal Center points out, "[n]arrative effluent limitations are a critical part of NPDES

[1] Narrative effluent limits impose permit requirements that do not use numeric limits on discharges.

permits and are the preferred method in many circumstances, especially for difficult situations such as stormwater management." Br. of Amicus Curiae Local Gov't Legal Ctr. 5. For example, narrative effluent limitations may require the use of certain "Best Management Practices" or may set out schedules of compliance, whereby permittees improve discharge conditions over time. And, as this Court has previously recognized, permit limitations may—consistent with the Clean Water Act—expressly require permittees to ensure compliance with broad, narrative state Water Quality Standards. *PUD No. 1*, 511 U.S. at 715-16 (citing 40 C.F.R. § 131.3(b)) (cleaned up).

These tools are critically important for ensuring that permits are legally defensible while also avoiding being overly rigid. They are essential for both permitting authorities and permittees alike, and this case does not call them into question. *Amici* States therefore join the City and its *amici* in respectfully submitting that the Court's decision in this case should reflect and not infringe upon this critical and well-established approach to developing effluent limits for NPDES permits.

II. COMBINED SEWER OVERFLOWS ARE A MAJOR SOURCE OF WATER POLLUTION

Most communities in the United States have separate sanitary sewer and stormwater systems, with residential and industrial sewer wastes and stormwater travelling through different pipes to

different treatment facilities.[2] Like San Francisco, however, many cities still utilize a combined sewer system, with both sewage and stormwater travelling through the same pipes. During dry weather, flows are low enough to ensure that all wastewater is routed for treatment before it is discharged. But during rain events, stormwater can overwhelm treatment system capacity; at that point, raw sewage combined with stormwater flows into permitted outfalls that discharge untreated (or minimally-treated) waste to nearby waters. The resulting CSOs are a major source of pollution and public health hazard for over 700 communities throughout the United States.[3]

The facts of this case are an unfortunate example of what can happen when CSOs occur in a system that has not been adequately operated or maintained. The City is not facing enforcement liability here because EPA and California suddenly or arbitrarily decided Water Quality Standards were not being met. Nor is the City facing enforcement because of some independent change in the status of the receiving waters (the Pacific Ocean and San Francisco Bay). The City faces enforcement because it has repeatedly violated numerous specific requirements in its permits and failed to prevent excessive CSO events, resulting in significant water quality problems in the Bay Area—many of which the City's own reports and monitoring have documented.[4] It is these

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[2] https://www.epa.gov/npdes/combined-sewer-overflow-basics.

[3] *Id.*

[4] As documented in the enforcement action involving the City's Bayside permit cited in its merits brief, Pet'r Br. 13 n.6,

many, excessive violations and their direct impacts that led regulators to the inescapable conclusion that the City is also violating the permit requirement that it not cause or contribute to Water Quality Standard violations or otherwise create a nuisance under California law. That conclusion is backed by monitoring data that demonstrates that the City's wastewater facilities are—in fact—discharging wastewater that is causing exceedances of established Water Quality Criteria, including bacteria, dissolved copper, ammonia, and floating particulate matter (e.g., human waste and toilet paper), among others.[5]

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the problems stem from a variety of factors largely within the City's control. Since 2016, the City has discharged approximately *eleven billion* gallons of combined sewage into the waters surrounding San Francisco. Compl. ¶ 70, *United States v. City & County of San Francisco*, No. 3:24-cv-02594 (N.D. Cal. May 1, 2024), https://perma.cc/HT8M-SS35. During that same timeframe, the City also "failed to adequately assess the condition of, and undertake timely repair or replacement of" critical infrastructure, "despite being aware that infrastructure was leaking, past its useful life, or otherwise required replacement or repairs." *Id.* ¶ 136. This includes leaks from pipes that the City knew were discharging untreated effluent into a creek for five years. *Id.* The City's failure to maintain infrastructure has also led to discharges of sewage into residential basements, streets, and sidewalks. *Id.* ¶ 141. The City has also failed to comply with other permit requirements, including by failing to operate at "required flow rates or design capacities; failing to maximize treatment at wet weather facilities; and failing to operate facilities at all." *Id.* ¶ 129. This includes, at times, discharging untreated sewage "to San Francisco Bay, its tributaries, or the Pacific Ocean when [the City's] systems *had capacity to treat the combined sewage*." *Id.* (emphasis added). Most of these issues are documented by the City's own reports and monitoring.

[5] *Id.* ¶¶ 109-116.

And, as with any enforcement action, EPA and California bear the burden of establishing that the City's discharges do indeed cause or contribute to violations of Water Quality Standards. 33 U.S.C. § 1319(d). The facts of this case thus provide no support for the City's and *amici*'s arguments that the challenged permit conditions lead to unjust and heavy-handed enforcement.

As in this case, a permittee's violations of Water Quality Standards do not occur in a vacuum. They almost always accompany significant violations of other permit conditions and are supported by monitoring data—frequently the permittee's own data—showing that the permittee's discharges are *actually* causing pollution in excess of permit requirements and easily identifiable water quality benchmarks. Thus, at bottom, dischargers like the City face enforcement because of the pollution they cause and not, as the City suggests, Pet'r Br. 24, because the waters they discharge into are already polluted.

III. THE CLEAN WATER ACT AUTHORIZES NARRATIVE PERMIT LIMITATIONS PROHIBITING DISCHARGES FROM VIOLATING WATER QUALITY STANDARDS

A. Compliance With State-Defined Water Quality Standards Is a Bedrock Principle of the Clean Water Act and NPDES Permits

The Clean Water Act is built on a foundation of cooperative federalism: states and the federal government share responsibility for addressing water quality impacts, but within a framework that also preserves states' traditional roles in protecting the waters within their respective borders. 33 U.S.C. § 1251(b); *see also Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (the Clean Water Act "anticipates a partnership between the States and the Federal Government, animated by a shared objective"). Indeed, the Clean Water Act begins by declaring that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . ." 33 U.S.C. § 1251(b).

Within this cooperative framework, the Clean Water Act employs a two-pronged approach to water quality regulation. First, states retain authority to develop Water Quality Standards for their waters above federally established baseline requirements. Indeed, it was "Congress' intent to cast the states in

the featured role" in promulgating those standards. *American Paper Inst. v. EPA*, 996 F.2d 346, 349 (D.C. Cir. 1993). States tailor Water Quality Standards to each category of their water bodies covered by the Act, and the standards are comprised of three fundamental elements: (1) the designated uses for the water body (e.g., recreation, water supply, habitat); (2) criteria to protect those uses; and (3) "antidegradation" provisions that both prohibit backsliding on existing uses and protect waters of exceptional value. 33 U.S.C. § 1313; 40 C.F.R. §§ 130.2(d), 131.6. While EPA may disapprove of Water Quality Standards that do not meet minimum federal requirements, Congress expressly authorized states to develop Water Quality Standards more stringent than federal standards. 33 U.S.C. § 1370.

Second, and critical here, Congress prohibited the discharge of any pollutant by any person except in compliance with permits issued by EPA or authorized states under the NPDES. 33 U.S.C. § 1311. And Congress required that NPDES permits *must* include various types of effluent limitations as well as "any more stringent limitation necessary to meet water quality standards"—in other words, NPDES permits must ensure compliance with state Water Quality Standards. *See, e.g.,* 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d) (requiring all NPDES permits to include "any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards . . . necessary to . . . [a]chieve water quality standards . . . including State narrative criteria for water quality"); *see also Arkansas*, 503 U.S. at 105 (noting that, "[s]ince 1973, EPA regulations have provided that an NPDES permit

shall not be issued when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states" (cleaned up)).

B. The Clean Water Act Authorizes the Receiving Water Condition Challenged in This Case

The Clean Water Act fully authorizes narrative conditions that generally prohibit discharges that will cause or contribute to a violation of Water Quality Standards.

First, the Act's text expressly allows such conditions. Congress deliberately chose in section 1311(b)(1)(C) to use the broader phrase "any more stringent limitation" when authorizing EPA and states to require the achievement of those conditions "necessary to meet water quality standards," rather than the narrower term "effluent limitations,"[6] which is also required to be included by sections 1311(b)(1)(A) and (B).[7] *See* 33 U.S.C. § 1311(b)(1)(A)-(C); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (courts presume Congress intended different terms to mean different things). And a limitation necessary to ensure that a permittee's discharges do not violate Water Quality Standards

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[6] "Effluent limitation" is defined as a state- or EPA-established restriction "on quantities, rates, and concentrations of chemical, physical, biological, and other constituents." 33 U.S.C. § 1362(11).

[7] This is especially true when it comes to a statute attempting to tackle a problem described by its chief sponsor as "a cancer which threatens our very existence." 118 Cong. Rec. 16,882 (1972).

surely must include conditions prohibiting discharges that violate those very standards. *See* 33 U.S.C. § 1311(b)(1)(C).

Next, the City misreads section 1311(a) of the Act as indicating an intent to exclude narrative permit prohibitions needed to ensure compliance with state Water Quality Standards. Pet'r Br. 34-35. Section 1311(a) does nothing of the sort and, in fact, supports the inclusion of such conditions. As noted, section 1311(a) makes it unlawful to discharge a pollutant without complying with the limitations set out in section 1311 and other enumerated sections of the Act. *See* 33 U.S.C. § 1311(a) (referencing compliance with, in addition to section 1311, sections 1312, 1316, 1317, 1342, and 1344). But section 1311(a) also includes a mandate that discharges comply with Water Quality Standards, as this Court has previously confirmed. *See PUD No. 1*, 511 U.S. at 713 (citing the plain language of 33 U.S.C. § 1311(b)(1)(C) and clear statements of legislative history that "'[s]ection [1313] is always included by reference where section [1311] is listed'" (citation omitted)). As a result, section 1311(a) is properly read as prohibiting any discharges except in compliance with, among other things, state Water Quality Standards established under section 1313. *See PUD No. 1*, 511 U.S. at 713; 33 U.S.C. § 1311(a). Permit conditions that expressly prohibit point source discharges that would violate Water Quality Standards are, thus, squarely within the authority contemplated by Congress.

These limitations need not be strict effluent limitations. As EPA points out, Resp. Br. 19-21, this Court previously confirmed that section

1311(b)(1)(C)'s reference to "other limitation" encompasses limitations that are "related to the discharge of pollutants" but not falling "within the precise statutory definition of 'effluent limitation.'" *Nat'l Assn' of Mfrs.*, 583 U.S. at 122. The Court then cited section 1311(b)(1)(C) as a "concrete example[]" of such a limitation, and described precisely the basis on which EPA and California applied the limitation challenged here: i.e., such limitations are sometimes necessary when "technology-based effluent limitations cannot meet water quality standards, treatment standards, or schedules of compliance." *Id.* at 122-23 (cleaned up).

Nor does the Court's decision in *PUD No. 1* stand for the proposition that permit conditions must always be via strict effluent limits. For one, *PUD No. 1* involved Water Quality Standards themselves, as applied through state water quality certifications under section 1341 of the Act, not NPDES permit conditions. *See PUD No. 1*, 511 U.S. at 714-16. But in construing the appropriate scope of those standards, the Court recognized that, as it would again years later in *National Association of Manufacturers*, that "state water quality standards provide a 'supplementary basis . . . so that numerous point sources, despite compliance with effluent limitations, may be *further regulated* to prevent water quality from falling below acceptable levels.'"[8] *Id.* at 704

[8] The Court did not have occasion to opine on the level of specificity required because the specificity of Washington's flow limitation was not at issue in the case. The Court, however, went on to agree that, while meeting specific criteria in Water Quality Standards "*generally*" ensures that such standards will be met, "in some circumstances, [specific] criteria alone are insufficient."

(emphasis added) (quoting *EPA v. California*, 426 U.S. 200, 205 n.12 (1976)). These decisions support permit conditions, like those at issue here, that kick in when a permittee's discharges are failing to do the very thing an NPDES permit is trying to accomplish: ensure compliance with Water Quality Standards.

Finally, even if the Clean Water Act did not already expressly authorize general narrative prohibitions against violating Water Quality Standards, Congress expressly authorized such conditions in the specific context of CSO permits when it codified EPA's CSO Control Policy. *See* 33 U.S.C. § 1342(q)(1) (requiring CSO permits to "conform to the Combined Sewer Overflow Control Policy signed by the [EPA] Administrator on April 11, 1994"). EPA's CSO Control Policy specifies that Phase I NPDES permits such as the City's must include a provision requiring municipalities to "[c]omply with applicable WQS . . . *expressed in the form of a narrative limitation*." 59 Fed. Reg. at 18,696 (emphasis added). Thus, Congress separately authorized such conditions when it came to CSOs when it gave the CSO Control Policy the force of law. *See* 33 U.S.C. § 1342(q)(1). Codification of the CSO Policy is also telling of how

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PUD No. 1, 511 U.S. at 715 (citing 40 C.F.R. § 131.3(b)). Because of this, the Court noted that "criteria are often expressed in broad, narrative terms, such as 'there shall be no discharge of toxic pollutants in toxic amounts.'" *Id.* at 715-16 (cleaned up). And the Court went on to reject a challenge to applying such criteria because the Clean Water Act "permits enforcement of broad, narrative criteria." *Id.* at 716. As discussed below, *supra* pp. 22-28, sometimes the most effective and flexible means of enforcing Water Quality Standards is via conditions requiring that discharges meet those standards.

Congress views the need for narrative limitations requiring compliance with Water Quality Standards outside of the CSO context. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (finding that "[w]here . . . 'Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation,'" the Court "cannot but deem that construction virtually conclusive").

Amici States do not contend that a permitting authority could simply include generic conditions and nothing else to avoid doing the often complex, but necessary, task of crafting conditions to ensure compliance. Nor have EPA and California done so here. But there are cases where such conditions, working in tandem with specific limitations, are appropriate and necessary to strike the proper balance between protecting water quality and preserving permittee flexibility. The EPA and California conditions at issue here are well within the authority Congress bestowed in the Clean Water Act.

C. The Challenged Conditions in the City's Permit Are Not Vague and Provide Ample Metrics for Compliance

The prohibitions against violating water quality standards in the City's permit are also sufficiently clear and provide the City with everything it needed to ensure compliance with the permit's conditions.

As the Ninth Circuit noted below, the City's permit specifies, among other things, the percentage of combined wastewater that the City must capture during wet weather, the flow rates that the City must

meet before CSO discharges, and the likelihood of rain triggering the need to maximize secondary treatment capabilities. App. 36; *see also* App. 117-24. The City's permit also sets out detailed operation and maintenance requirements for critical infrastructure the City needs to ensure the treatment system functions properly, App. 112-17, and contains a cap on CSO events, limiting the City to an average of eight CSOs per year. J.A. 17; App. 97. The City also had ample notice of the state Water Quality Standards that applied to its stormwater operations. Those standards, which included requirements to protect the Pacific Ocean and San Francisco Bay, were documented in both in the Fact Sheet for the City's permit and detailed in response to the City's comments on its proposed permit. *See, e.g.*, App. 516. Those standards, in turn, provide detailed, specific limitations with which the City's discharges must comply. *See, e.g.*, J.A. 22-226 (i.e., the Water Quality Control Plan for Ocean Waters of California, setting out detailed limits and levels of water quality characteristics).

These conditions, and the specific standards that expressly govern the City's discharges, provide more than enough detail for the City to know when violations may be occurring. *Contra* Pet'r Br. 47 (claiming that the challenged narrative standards are vague and leave the City to guess whether it has violated the permit). And when the City, as EPA and California have documented, fails to adequately maintain infrastructure, fails to run its systems at full treatment capacities, fails to meet flow rate requirements, fails to close out work orders on pipe repairs, and otherwise fails to take the actions

required to limit CSO events, it should be on notice that violations of Water Quality Standards may well be occurring.

Moreover, awareness of a receiving water limitation violation does not depend on whether the discharger understands that those receiving waters are, or are not, in current compliance with Water Quality Standards. For example, applicable and easily identifiable standards prohibit the City from discharging floating debris like human waste and toilet paper. J.A. 46-50; *see also* Pet'r Br. 11 (conceding that such narrative limits are lawful). If, after the City exceeds its averaged allotments of CSO events for the year, the City discharges floating debris to the Pacific Ocean, it has violated the receiving water limitation in its permit regardless of whether such debris is already present in the receiving waters (i.e., independent of whether Water Quality Standards are already met). And the City benefits from the flexibility provided by these narrative conditions, like the ability for the City to perpetuate up to eight CSO events per year (on an averaged basis) or other provisions like "mixing zones." Those types of conditions allow a permittee to discharge even when the receiving waters do not meet Water Quality Standards at the point of discharge due to other actors, background conditions, or even the permittee's own discharges. *See* App. 97; J.A. 17.

Permit conditions that prohibit permittees from causing or contributing to an exceedance of Water Quality Standards focus solely on a permittee's discharges and work to curb those discharges *before* the permittee discharges wastewater that causes or contributes to an exceedance of a Water Quality

Standard—exactly the framework envisioned by the Clean Water Act.[9] It does not, as the City suggests, Pet'r Br. 24-34, work backward from a Water Quality Standard violation to polluting parties that are otherwise in compliance with permit conditions.

IV. NARRATIVE CONDITIONS GENERALLY REQUIRING COMPLIANCE WITH WATER QUALITY STANDARDS ARE CRITICALLY IMPORTANT TO BALANCING THE MANDATE OF ADDRESSING WATER POLLUTION WITH NECESSARY FLEXIBILITY FOR PERMITTEES

A. Water Quality Problems Can Occur Despite Compliance with Numeric Effluent Limitations

NPDES permits must establish effluent limitations, which restrict "quantities, rates, and concentrations of . . . constituents . . . discharged from point sources." 33 U.S.C. § 1362(11). As discussed above, *supra* p. 8, however, and as recognized in the Act, 33 U.S.C. § 1311(b)(1)(C), numerical effluent limitations are not always

[9] As discussed in Section IV below, violations of receiving waters limitations frequently involve regulators notifying dischargers of problems with their discharges and the triggering of adaptive management conditions with, often, lengthy compliance schedules. Especially in the CSO and municipal stormwater context, those processes serve to shield permittees from citizen suits as they work with regulators to fix those issues leading their discharges to cause or contribute to Water Quality Standard exceedances.

sufficient to protect water quality. The City indeed concedes the point. *See* Pet'r Br. 11 (agreeing that "effluent limitations may be stated . . . narratively"). That is because it is often difficult, or even impossible, to determine all potential pollutant discharges at the time the permit is issued—take CSOs, for example, which collect sewage from unknown sources far and wide. And it takes significant time—and great cost to permittees—to modify a permit that does not adequately protect water quality.[10] As a result, requiring permittees to ensure that their discharges do not violate Water Quality Standards provides a critical backstop to ensure that water quality goals are achieved. Removing that authority would "create[] [a] loophole[]" that would "undermine the statute's basic federal regulatory objectives." *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 185 (2020).

For example, if a permittee's wastewater contains low levels of chloride, it likely will not have a numeric effluent limit, or even a monitoring requirement, for chloride. But if the permittee suddenly discharges high concentrations of chloride due to an upset or other unforeseen circumstance, it would be toxic to aquatic species in violation of Water Quality Standards for toxicity even though it would not violate any specific effluent limits in the permit. While the regulator could, after the fact, seek to modify the permit to address chloride, *see* 40 C.F.R.

[10] As EPA has observed, this also helps permitting authorities avoid the practical pitfalls associated with trying to capture with specificity every conceivable circumstance of dynamic and complex waste discharges within a permit. *In re Ketchikan Pulp Co.*, 7 E.A.D. 605.

§ 122.62, such modifications take significant time to develop and regulators would be hard pressed to curb those discharges until after the modification became effective—at great and often irreparable detriment to receiving waters. A narrative standard that, for example, prohibits discharges that violate Water Quality Standards for toxicity allows regulators and permittees to take immediate action.

This scenario is not hypothetical. Massachusetts recently reached a settlement with a mineral mining facility for alleged discharges that turned over ten miles of the Hoosic River an opaque white from bank to bank and damaged protected riverine habitat. Compl., *Commonwealth of Massachusetts v. Specialty Minerals Inc.*, No. 1:24-cv-11181 (D. Mass., May 3, 2024).[11] Despite over sixty days of alleged instances of white cloudy discharges violating Massachusetts Water Quality Standards, the facility operator's required monitoring identified only one day when the facility's discharge exceeded a numeric effluent limitation. *Id.* at 18. According to the complaint, water samples taken by the Massachusetts Department of Environmental Protection from upstream of, at, and downstream of the facility's outfall on one day of white discharge revealed increases of multiple pollutants. *Id.* at 19. Absent permit conditions prohibiting violations of Massachusetts's state Water Quality Standards, the permittee may have faced little consequence despite several months of allegedly polluting a river enjoyed

[11] https://tinyurl.com/thxpvn4w.

and used by the residents of Massachusetts for fishing, navigating, and recreating. *Id.* at 21-30.

As another example, Washington State established Clean Water Act violations against a gold mine polluting the Buckhorn Mountain watershed in northeast Washington. The violations were based, in part, on a narrative condition establishing a "capture zone," prohibiting any contamination above otherwise pristine background levels from leaving a certain perimeter from the mine and, thus, violating the antidegradation and other provisions in Washington's Water Quality Standards. *Okanogan Highlands All. v. Crown Res. Corp.*, 492 F. Supp. 3d. 1149, 1156-57 (W.D. Wash. 2020). Due to the dynamic nature of mining discharges, combined with the complex hydraulic environment presented by an underground mine situated at the top of a mountain, not all of the mine's discharge points were known, much less monitored. As a result, Washington would not have been able to enforce full compliance with its Water Quality Standards without crafting a narrative permit condition ensuring that the downstream watershed as a whole was not degraded by mining operations.

Given these examples, it is unsurprising that courts, too, have embraced the importance and legality of receiving water limitations in permits to protect water quality. *See Ohio Valley Env'tl Coal. v. Fola Coal Co.*, 845 F.3d 133, 142 (4th Cir. 2017) (upholding the enforceability of a permit prohibiting violations of narrative water quality standards, and noting that "despite the Clean Water Act's shift in focus of environmental regulation towards the discharge of pollutants, water quality standards still

have an important role in the Clean Water Act's regulatory scheme" (cleaned up)); *see also PUD No. 1*, 511 U.S. at 701 (concluding that Washington may impose narrative restrictions under section 1341 of the Clean Water Act and noting that specific numeric criteria such as turbidity "cannot reasonably be expected to anticipate all the water quality issues arising from every activity that can affect the State's hundreds of individual water bodies."). In short, specific, numeric limitations cannot necessarily account for all possible pollutant discharges under a permit, and restrictions against violating Water Quality Standards, as Congress endorsed, *supra* pp. 14-18, can address the problem Congress sought to tackle in the Clean Water Act.

B. General Narrative Prohibitions Are Frequently Used as a Flexible Alternative to Strict Numerical Limits

As discussed above, NPDES permits must contain adequate conditions to ensure that Water Quality Standards are met. *Supra* pp. 12-14. Permits that fail to do so can be—and often are—struck down by challenges from citizens and environmental groups. As EPA has observed, however, there are practical pitfalls associated with trying to capture with specificity every conceivable circumstance of dynamic and complex waste discharges within a permit. *In re Ketchikan Pulp Co.*, 7 E.A.D. at 605, 618. Indeed, as EPA has concluded, "includ[ing] in the permit a list of every pollutant or combination of pollutants that conceivably might be contained in the applicant's wastestreams, and to determine which of those pollutants the [permitting authority] considered appropriate for discharge . . . would be

an . . . impractical [approach]." *Id.* Yet this is precisely the costly and impractical path the City asks this Court to embark upon. This Court should reject the City's request that this Court endorse such a counterintuitive approach.

Indeed, general narrative conditions are used to address situations where a more specific prohibition would deprive the permittee of needed flexibility with no corresponding environmental benefit. For example, some states include temperature limitations for facilities that discharge into salmonid habitat. In such cases, permitting authorities can include conditions that include a prohibition against raising the in-stream water temperature above a certain threshold and require temperature monitoring upstream and downstream of the facility. This arrangement allows the permittee to discharge greater amounts of warmer effluent when the stream is colder or flowing at a higher volume and encourages more caution when the water is warmer. Forbidding the permitting authority from conditioning compliance on the receiving water conditions would force the permitting authority to include much stricter conditions accounting for worst case scenarios in terms of temperature and flow rate to ensure that the permit never authorizes violations of water quality standards. Paradoxically, a win for Petitioners here could result in a net increase in the stringency of NPDES permits more broadly.

In other contexts, receiving water limitations often trigger adaptative management in a variety of permits, both at the federal and state level. Such tools typically involve implementing "additional or alternative practices . . . if existing programs are not

meeting target reductions," *Md. Dep't of Env't v. Anacostia Riverkeeper*, 134 A.3d 892, 916 (Md. Ct. App. 2016). At that point, the "primary emphasis is to shift from rule-based approaches of management towards strategies that emphasize continuous monitoring of circumstances and adjusting decisions accordingly." Melissa K. Scanlan & Stephanie Tai, *Marginalized Monitoring: Adaptively Managing Urban Stormwater*, 31 UCLA J. Envtl. L. & Pol'y 1, 60-61 (2013). In this way, permittees and regulators engage in a dialogue meant to identify problems and chart achievable solutions.

For example, in Washington, when there is a discharge attributable to a Municipal Stormwater permittee that causes or contributes to a violation of Water Quality Standards, the permitting agency is required to notify the permittee of the need for an adaptive management response to identify and address the discharge. 2024 Wash. Phase I Municipal Stormwater Permit §§ S4.F(1) and (2), and p. 84.[12] Washington's standard permit condition then calls on the permittee to review its current stormwater Best Management Practices, work with the state to consider additional measures necessary to address the issue, implement those measures, and report back to Washington on the status of implementation and its effectiveness. *Id.* § (3); *see also Puget Soundkeeper All. v. Wash. Dep't of Ecology*, 2023 WL 5713819, at *3 (Wash. Ct. App. 2023) (describing permitting agency's adaptive management process response as "typically involv[ing] imposing new, stricter best practices requirements" or "no additional action if it determines

[12] https://tinyurl.com/2wkj5ut5.

that the violation is already being addressed"). This process can shield permittees who have violative discharges, but are engaging in adaptive management, against enforcement or citizen suits. And Washington has successfully defended these permit conditions against challenges from environmental groups asserting that more specific—and thus more restrictive—conditions are required. *See, e.g., id.*; *Puget Soundkeeper All. v. Wash. Dep't of Ecology*, 9 P.3d 892 (Wash. Ct. App. 2000).

While some states, including Washington, have state laws that authorize general prohibitions against violating Water Quality Standards, *see, e.g.*, Wash. Rev. Code § 90.48.520 (2024), a ruling here calling such conditions into question will result in more onerous permit conditions, less flexibility in NPDES permitting, and worsened water quality.

CONCLUSION

This Court should affirm the Ninth Circuit's judgment.

RESPECTFULLY SUBMITTED.

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September 3, 2024

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