No. 23-753

IN THE

Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

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

BRIEF OF AMICI CURIAE SMALL BUSINESS OWNERS AND OPERATORS IN SUPPORT OF RESPONDENT

KEITH P. RICHARD
Counsel of Record
RICHARD L. QUALEY
ARCHIPELAGO
One Dana Street, 4th Floor
Portland, Maine 04101
(207) 558-0102
krichard@archipelagona.com

Counsel for Amici Curiae

332447

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

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES:

Cited Authorities

STATUTES AND OTHER AUTHORITIES:

Cited Authorities

Cited Authorities

Cited Authorities

Page

Page

Cited Authorities

Page

Page

INTERESTS OF *AMICI CURIAE*

Amici curiae are small business owners and individuals whose livelihoods depend on having clean water, protected from pollution.[1] *Amicus curiae* include a commercial fisherman, a commercial lobsterman, a shrimp purchaser, oyster farm owners, and water dependent tourism business owners. Narrative water quality standards incorporated into National Pollutant Discharge Elimination System ("NPDES") permits protect the livelihoods of *amici* by ensuring that polluting facilities do not jeopardize ecosystems that are integral to the survival of *amici*'s businesses.

SUMMARY OF ARGUMENT

Small businesses throughout the United States rely on clean water and functioning ecosystems. Water quality that complies with the Clean Water Act ("CWA" or "the Act") protects the livelihoods of business owners and employees in water-dependent sectors of the Nation's economy, including commercial fishing, lobstering, shrimping, oyster farming, and tourism. In 2022 alone, the U.S. commercial fisheries and seafood industry generated roughly $54.0 billion in sales, $20.2 billion in income impacts, and $28.6 billion in value-added impacts, and it supported 832,000 full- and part-time jobs (not including imports).[2] That same year, the

1. No counsel for any party authored this brief in whole or in part, and no person or entity has made any monetary contribution to the preparation or submission of the brief other than *amici curiae*, their members, or their counsel.

2. Nat'l Marine Fisheries Serv., U.S. Dep't of Com., Fisheries Economics of the United States 2022 NMFS-F/SPO-248A at 6 (2024).

U.S. recreational fishing industry generated roughly $138 billion in sales, $45.1 billion in income impacts, and $74.9 billion in value-added impacts, and it supported 691,613 jobs.[3] Water quality issues such as nutrient pollution, bacteria pollution, and chemical pollution harm the daily and long-term operations of businesses in those sectors.

Congress's only named objective in the CWA focuses on water quality. 33 U.S.C. § 1251(a). In enacting the 1972 Clean Water Act ("CWA") and in passing the 1977 amendments to the Act, Congress recognized the profound impact of the water-dependent industries on the Nation's economy, noting that good water quality supports the Nation's "vital industries,"[4] and poor water quality causes "severe economic hardship."[5] It is the objective of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* Narrative permit provisions that incorporate water quality standards are an essential part of the NPDES permitting system and vital to achieving the statute's purpose. In order to achieve this lofty objective, the permits may contain "any more stringent limitation, including those necessary to meet water quality standards[.]" 33 U.S.C. § 1311(b)(1)(C).

Eliminating the narrative permit provisions would remove an important backstop in permits that enable state and federal agencies to protect the public in general, but also smaller business owners from economic losses resulting from a permittee's violations of water quality

3. *Id.* at 11–12.

4. 117 Cong. Rec. 38864 (1971).

5. 123 Cong. Rec. 38978 (1977).

standards. Often, numeric permit limits do not alone provide compliant water quality since those limits do not address all the pollutants that harm water quality. In baseball, the catcher may call the pitch, but they have no control over what happens between the mound and the plate. A rogue pitch, a foul tip, an errant catch—in order to protect the observing public, there is a backstop behind home plate. In the same way, numeric limits do not account for changing conditions in the ecosystem—narrative provisions do. Narrative provisions that incorporate codified state water quality standards thus provide an important tool, not only for permitting authorities to ensure that permits comply with the text and the objective of the CWA, but also for supporting small businesses throughout the Nation.

ARGUMENT

I. SMALL BUSINESSES DEPEND ON CLEAN WATER, WHICH IS SAFEGUARDED BY NARRATIVE WATER QUALITY STANDARDS INCORPORATED INTO CLEAN WATER ACT PERMITS.

Narrative provisions in National Pollutant Discharge Elimination System ("NPDES") permits safeguard water quality and protect small businesses throughout the United States. In San Francisco Bay, the waters off the coast of Massachusetts, the Gulf of Mexico, the Great Bay estuary in New Hampshire, and other coastal locations throughout the United States, small businesses and individuals benefit from the pollution prevention "backstop" only available through the inclusion of narrative NPDES permit provisions. *See San Francisco v. EPA*, 75

F.4th 1074, 1093 (9th Cir. 2023). Narrative provisions in NPDES permits with numeric effluent limitations are an essential means of ensuring that permitted facilities do not degrade water quality and harm small businesses. And narrative provisions in NPDES permits that lack numeric effluent limits for pollutants of concern are the *only* means of water quality protection.[6]

The petitioner incorrectly labels narrative provisions that incorporate codified state water quality standards as "unfair." *Pet. Br.* 6. But there is nothing unjust, impartial, or deceptive[7] about requiring a facility to comply with *known* state laws. Rather, unfairness arises under the present circumstances when a permit—which is required to "provide for compliance" with the Clean Water Act ("CWA" or "the Act"), *see* 40 C.F.R. § 122.4 (a)—authorizes pollution that harms water quality and the small businesses that depend on clean water. Without narrative provisions, small businesses are left vulnerable, completely at the whim of major polluters like the City and County of San Francisco. When major polluters don't

6. *See* Alabama Dep't Env't Mgmt., Final Permit for MetalPlate Galvanizing 7th Ave, NPDES Permit No. AL0080403 (failing to include numeric effluent limits for zinc in a zinc galvanizing facility's permit); Maine Dep't Env't Prot., General Permit – Net Pen Aquaculture, Maine Pollutant Discharge Elimination System Permit No. MEG130000, Maine Waste Discharge License #W009020-6H-D-R (2014) (failing to include numeric effluent limits for aquaculture pollutants of concern—like nutrients, total suspended solids, dissolved oxygen, or biological oxygen demand—in net pen aquaculture general permit).

7. *Unfair*, Merriam-Webster, https://www.merriam-webster.com/dictionary/unfair#:~:text=1,%2C%20 partiality%2C%20 or%20deception%20%3A%20unjust (last visited Aug. 26, 2024).

comply with the provisions of their NPDES permits, it is small businesses that suffer.

A. Narrative Permit Provisions that Protect Water Quality Benefit Commercial Fish and Shellfish Harvesters.

The commercial fishing industry relies on clean water to sustain the livelihoods of small businesses and boat owners. John Mellor,[8] a 61-year-old lifelong commercial fisherman, operates a 40-foot boat named "High Hopes" in San Francisco Bay. Over the course of his fishing career, John has fished for salmon, herring, crab, rockfish, sablefish, and halibut. John is a member of both the San Francisco Herring Association and the San Francisco Crab Boat Owner's Association. One hundred percent of John's income comes from fishing. Over the course of John's life and career, he witnessed the decline of the herring fishery in the San Francisco Bay as a result of sewage discharges from the local wastewater treatment plants.

The herring industry operates on a quota system: fishermen are limited to catching a certain amount of fish and fish eggs based on the previous year's spawning biomass. In the past, the herring fishery in San Francisco was incredibly competitive, and according to John, "massive" amounts of fish would come into the Bay to breed. For many years, John filled his quota of herring

8. *See* Tara Duggan, *There Will Be No Commercial Herring Catch in SF Bay This Year*, San Francisco Chronicle (Jan. 19, 2019), https://www.sfchronicle.com/food/article/Commercial-herring-catch-in-SF-Bay-canceled-this-13545808.php.

eggs in just one or two nights. But more recently, after sewage was consistently pumped into the Bay during the rainy winter season, the herring disappeared—they stopped spawning in San Francisco Bay and chose new locations to spawn in Northern California and Oregon. As a result, fishing for herring and herring eggs became economically nonviable for John and other fishermen. John is worried about his business and the livelihoods of other small business owners in San Francisco Bay and surrounding coastal areas. Not only has the diminished water quality reduced his ability to fish for herring, but John is also concerned about harms to the fishing industry more broadly due to sewage overflow events and the negative public perception regarding the consumption of local fish. John and the commercial fishing industry thus benefit from the water quality oversight provided by narrative permit provisions.

Similarly, commercial lobstering businesses require uncontaminated water and healthy aquatic ecosystems. Eric Meschino,[9] a lobsterman who owns and operates Smoky Sou'Wester Fishing out of Hull, Massachusetts, depends on water quality that supports a thriving lobster population. Eric's lobstering business provides income to one to two employees each year. Eric's business requires annual permits to fish in state and federal waters off the coast of New England from May through January.

Eric sets his lobster traps in Massachusetts Bay and Cape Cod Bay, which are impacted by wastewater

9. *Board Members*, Lobster Foundation of Massachusetts, https://lobsterfoundationofma.org/board-members/ (last visited Aug. 26, 2024).

treatment plant discharges.[10] Eric is mostly concerned about toxic chemicals like per-and polyfluoroalkyl substances ("PFAS") and pharmaceuticals harming his business and the lobstering industry. Toxic chemicals like PFAS can bioaccumulate, or build up, in food chains after permitted facilities like wastewater treatment plants release them into waterbodies.[11] Those chemicals not only threaten human health,[12] but they also threaten customers' perceptions of seafood, jeopardizing Eric's livelihood. Eric relies on clean water and uncontaminated lobsters that provide a safe and healthful protein source for consumers. PFAS chemicals and pharmaceuticals are often not addressed by numeric limits in facilities' permits.[13] Thus, narrative provisions provide a backstop for addressing toxic pollution that concerns lobstermen like Eric.

---

10. *See* U.S. EPA, NPDES Permit No. MA0103284—Massachusetts Water Resources Authority (2000) at 1 [hereinafter Deer Island Permit] (authorizing discharges "to receiving waters located in Massachusetts Bay, which is adjacent to Cape Cod Bay.")

11. *See* 87 Fed. Reg. 36848, 36849 (June 21, 2022) ("Many PFAS are environmentally persistent, bioaccumulative, and have long half-lives in humans . . . ."); *see also* Kyle A. Thompson et al., *Poly- and Perfluoroalkyl Substances in Municipal Wastewater Treatment Plants in the United States: Seasonal Patterns and Meta-Analysis of Long-Term Trends and Average Concentrations*, 2 ACS ES&T WATER 690, 690 (2022).

12. *See* Nadia Barbo et al., *Locally caught freshwater fish across the United States are likely a significant source of exposure to PFOS and other perfluorinated compounds*, 220 ENV'T RSCH. 1, 8 (2023).

13. *See* Part III(B), *infra*.

The commercial shrimping industry also requires clean water and healthy ecosystems to support the shrimp they catch. Dean Blanchard[14] has been in the shrimp industry for more than forty years and owns and operates Dean Blanchard Seafood Inc. in Grand Isle, Louisiana. Dean has spent his career shrimping and owning and operating a shrimp dock and processing facility in an area slightly west of where the Mississippi River discharges into the Gulf of Mexico. Dean spent his days on the water between 1974 and 1982, but he now spends his time on the dock and at the processing facility, where he purchases much of his product from shrimpers who still operate in the Gulf. Chemical and nutrient pollution discharged by large facilities into the Gulf of Mexico threaten Dean's business. In recent years, this pollution has driven the shrimp away from the areas in which Dean relies for purchasing and processing, causing his market share of warm water shrimp in the United States to fall from ten to eleven percent to two to three percent.

The most significant threat to Dean's business is degraded water quality resulting in "dead zones" in the Gulf of Mexico. The dead zones are caused by chemicals and nutrients that flow into the Gulf from various upstream sources of pollution, including chemical plants. Because oxygen levels plummet in dead zones, the shrimp Dean normally relies on for his business are forced to flee and are pushed towards the shore in search of oxygen. Ultimately, the shrimp even jump up onto the beach and

14. *Dean Blanchard Seafood, Inc.*, Wild American Shrimp, https://americanshrimp.com/suppliers/dean-blanchard-seafood/ (last visited Aug. 26, 2024).

die.[15] This phenomenon has become increasingly worse in the Gulf as water quality declines, leaving few shrimp left for the shrimpers Dean purchase from to catch. Without clean water supporting a healthy shrimp population, Dean will not be able to continue to operate his business.

Oyster farmers also rely on good water quality to sustain their businesses. For example, David Berlinsky and Evan Clough run Granite State Shellfish, which farms oysters in Durham, New Hampshire and sells them to the "half shell market." The half shell market supplies oysters for customers to consume raw. Because they are selling raw oysters, a seafood product that is extremely sensitive to water quality conditions, David and Evan are especially concerned about maintaining excellent water quality for their farm and business.

The summer of 2023 was troubling for Granite State Shellfish because of water quality concerns. Due to sewage pollution and resulting high bacteria levels, the oyster farm was forced to shut down every month for one or two weeks at a time. As a result, business sales took a major hit. Narrative provisions are essential for avoiding devastating effects on small business owners like David and Evan. For example, over the fifteen years that

---

15. *See* Endre Szalay, *Breathing Life into the Dead Zone: Can the Federal Common Law of Nuisance Be Used to Control Nonpoint Source Water Pollution*, 85 Tul. L. Rev. 215 (2010) (citing Nancy N. Rabalais, R. Eugene Turner & William J. Wiseman, Jr., Gulf of Mexico Hypoxia, A.A. "The Dead Zone," 33 Annual Rev. Ecology & Systematics 235, 244 (2002)); *see also* John D. Sutter, *Minnesota Farmer Battles Gulf 'Dead Zone*,' CNN (Aug. 30, 2010), https://www.cnn.com/2010/TECH/innovation/08/30/gulf.dead.zone.minnesota.farm/index.html.

David has been running Granite State Shellfish, he has noticed improvements in water quality when wastewater treatment plants have upgraded their pollutant treatment systems. And those upgrades are often a result of the plant's narrative water quality provisions, at least in part.[16]

B. Narrative Permit Provisions that Protect Water Quality Benefit Tourism Businesses.

The tourism sector also depends on CWA-compliant water quality to succeed and to sustain the livelihoods of business owners and employees. Permitted facilities

---

16. For example, the City of Portsmouth commented on the Draft NPDES Permit that EPA issued to it in 2023, advocating for EPA to remove a narrative provision similar to those that petitioner challenges here, and requesting that EPA not require compliance with water quality standards until after the City implements its Long Term Control Plan ("LTCP") for combined sewage overflow discharges ("CSOs"). Env't Prot. Agency, Response to Comments, NPDES Permit No. NH0100234, Peirce Island Wastewater Treatment Facility, Portsmouth, New Hampshire at 51–52 (2023). In denying that request, EPA first noted that LTCP development and abatement schedules for CSO pollution has occurred through enforcement actions and then referenced the importance of narrative water quality standards, stating that EPA policies underscore the importance of ensuring that CSO discharges achieve state water quality standards including those that are narrative." *Id.* (citing NPDES Permit Writer's Manual, EPA at 9-16 to 9-17 (Sept. 2010); Combined Sewer Overflows: Guidance for Permit Writers, EPA Office of Water, at 3-36 to 3-37, 4-27 (Sept. 1995)) ("The CSO Guidance specifically states that 'in addition to performance standards designed to meet WQS, the permit writer should include narrative permit language providing for the attainment of applicable WQS.'")

discharging pollution affect businesses like charter boat companies and guided tour operators that conduct their businesses in and on our Nation's waters.

For example, Captain Peter Whelan[17] is a registered Maine Guide with a Coast Guard Captains License who owns and operates Shoals Fly Fishing and Light Tackle, a charter boat company that takes guided tours fly fishing on the New Hampshire and Maine coast, including in Portsmouth Harbor, Great Bay, and Little Harbor in New Hampshire, and near Piscataqua, York, Kittery, and Kennebunk in Maine. Captain Whelan often takes tourists fishing in the mouth of the Piscataqua River, a critical part of the Great Bay estuary that tidally connects the inland Great Bay with the Gulf of Maine. Captain Whelan's business depends on water quality and ecosystem health. When water quality is good, eelgrass grows. Eelgrass provides a habitat for small baitfish, which feed the migratory predator fish (like bluefish and striped bass) that Captain Whelan's clients seek to catch. But when water quality is bad, eelgrass declines, reducing available habitat for baitfish, and, in turn, the migratory predator fish that feed on them. The result is that Captain Whelan is left with fewer fishing spots to take his clients. Therefore, if water quality suffers, in Captain Whelan's words: "I don't have a business."

Thirteen wastewater treatment plants discharge into rivers that feed into the New Hampshire waters where Captain Whelan takes chartered tours. Combined sewer overflows from those wastewater treatment plants

17. *Home*, Shoal's Fly Fishing and Light Tackle, https://shoalsflyfishing.com/ (last visited Aug. 26, 2024).

contribute to degradation of water quality and harm the Great Bay ecosystem. The Great Bay has lost roughly half of its eelgrass, removing prime baitfish habitat, and reducing the location options for Captain Whelan's charter boat. In the past, during major rain events, the Piscataqua River turned from blue to almost brown as a result of combined sewer overflows from wastewater treatment plants and stormwater runoff from land. Captain Whelan was forced to cancel tours, and he is extremely concerned about the future of his business and supports narrative prohibitions in NPDES permits as a backstop to numeric effluent limits that alone do not protect water quality.

In addition to fishing charters, kayaking and paddling businesses depend on clean water. Peter Sawtell[18] owns and serves as Lead Kayaking Instructor for Seven Rivers Paddling. Peter runs guided kayak and paddleboard tours of the tidal waterways and rivers near Portsmouth, Newcastle, and Newmarket, New Hampshire. The business provides paddle sports opportunities for both tourists and people who live in nearby communities. Water quality is important for Peter's business because during his kayaking and paddling tours, groups often swim and recreate in the water. Peter has lost business because of water quality issues in the past, both because he has had to cancel tours and because poor water quality has deterred customers from signing up for tours.

For example, Peter's company has been negatively impacted by poor water quality near Jenness Beach in New Hampshire, when waterways have been closed

18. *A Bit About Us,* Seven Rivers Paddling, https://www.sevenriverspaddling.com/about-us (last visited Aug. 26, 2024).

for swimming due to poor water quality. Peter has also stopped bringing paddling and kayaking groups to a portion of the Lamprey River because bacteria levels make it unsafe for swimming. Peter's livelihood depends on having water quality that allows for safe paddling and swimming. Narrative permit provisions that incorporate water quality standards ensure that EPA can adequately address pollution from facilities that cause or exacerbate water quality violations that threaten Peter's business.

II. THE CLEAN WATER ACT AUTHORIZES PERMITTING AGENCIES TO INCLUDE NARRATIVE WATER QUALITY STANDARDS IN NPDES PERMITS.

A. Congress Recognized the Clean Water's Act's Objective of Water Quality Improvement as Important for Small Businesses.

The Clean Water Act declares a single "objective" that focuses on protecting water quality: "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." *See* 33 U.S.C. § 1251(a). To accomplish that objective, Congress established interim goals that also emphasize the Act's commitment to securing clean water. *Id.* § 1251(a)(1)-(2) (setting interim goals that (1) "the discharge of pollutants into the navigable waters be eliminated by 1985;" and (2) "that wherever attainable," water quality should "provide[] for the protection and propagation of fish, shellfish, and wildlife and provide[] for recreation in and on the water" by 1983.).

The 1972 statute and its 1977 amendments envision the NPDES permitting system to achieve its ultimate

water quality objective, not as a program solely intended to provide permitted facilities with assurances against enforcement actions. *See Env't Prot. Agency v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 204 (1976) (emphasis added) ("[T]he Amendments are aimed at achieving maximum 'effluent limitations' on 'point sources,' *as well as achieving acceptable water quality standards.")*; *City of Milwaukee v. Illinois & Michigan,* 451 U.S. 304, 318 (1981) (citing S. Rep. No.92-414, at 95, 2 Leg. Hist. 1511) (emphasis in original) ("The 'major purpose' of the Amendments was 'to establish a *comprehensive* long-range policy for the elimination of water pollution.'"); *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., MD*, 268 F.3d 255, 265 (4th Cir. 2001) ("[D]espite the CWA's shift in focus of environmental regulation towards the discharge of pollutants, water quality standards still have an important role in the CWA regulatory scheme.")

Congress recognized the interdependent relationship between water quality and economic security for small businesses when enacting the Clean Water Act in 1972 and when amending the Act in 1977. In the Senate debates on the legislation that became the Clean Water Act of 1972, one Senator referred to water quality protection as essential for "vital industries."[19] The 1971 Senate Report for this legislation stated that saltwater intrusion, another water quality issue, "must be accounted for and controlled" because it "often devastates the commercial shellfish industry."[20] In 1977, in the House debates on the Act's amendments, one Representative highlighted the

19. 117 Cong. Rec. 38864 (1971).

20. S. Rep. No. 92-414, at 3706 (1971).

"severe economic hardship" that fishermen faced because of toxic water pollution.[21] Compliant water quality remains essential today for the "vital industries" discussed in Part I, above—commercial fishing, lobstering, shrimping, oyster farming, and tourism.

B. The Challenged Narrative Provisions are Necessary to Achieve Compliance with the Clean Water Act because Numeric and Specific Narrative Provisions do not Address All Pollutants or Changing Water Quality Conditions.

To achieve the Clean Water Act's water quality objective, section 301(b) requires permits to include both numeric effluent limits *and* "any more stringent limitation, including those necessary to meet water quality standards . . . required to implement any applicable water quality standard established pursuant to this chapter." 33 U.S.C. § 1311(b)(1)(A)–(C); *see also San Francisco v. EPA*, 75 F.4th 1074, 1089 (9th Cir. 2023). Permitting authorities may not issue a final permit that fails to "provide for compliance with the applicable requirements of CWA[.]"40 C.F.R. § 122.4(a).

Narrative permit provisions that prohibit water quality standard violations fall within the statutory requirement for permits to include "any more stringent limitation" that is "necessary to meet water quality standards" under CWA section 301(b)(1)(C). *See Resp. Br. in Opp. to Cert.* 12. In *National Association of Manufacturers v. Department of Defense*, this Court

21. 123 Cong. Rec. 38978 (1977).

recognized that "limitation" under section 301(b)(1)(C) means an "other limitation," not an "effluent limitation." 583 U.S. 109, 122-23 (2018). There, this Court described the "limitation" in section 301(b)(1)(C) as a "concrete example[] of the type of 'other limitation' Congress had in mind" when providing jurisdiction for review of EPA actions "approving or promulgating any effluent limitation *or other limitation*[.]" *Id.* at 121-22 (emphasis added); *see also* 33 U.S.C. § 1362(17). In *National Association of Manufacturers*, this Court refused to "override Congress' considered choice by rewriting the words of the" Clean Water Act. *Id.* at 128. (internal citation omitted). The Court should similarly refuse to rewrite the Act here.

Narrative provisions that incorporate water quality standards are often "necessary to meet water quality standards." 33 U.S.C. § 1311(b)(1)(C). Numeric and specific narrative effluent limitations are essential to the NPDES permitting scheme, but they do not cover all pollutants that impact water quality, and they do not account for changing conditions in waterbodies. *See PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology,* 511 U.S. 700, 717 (1994) (stating that particular criteria "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."); *Ohio Valley Env't Coal., Inc. v. Marfork Coal Co.*, 966 F. Supp. 2d 667, 685 (S.D.W. Va. 2013) (upholding a permit provision incorporating state water quality standards "[a]s a backstop" that "protects water quality standards that [the permitting agency] did not anticipate would be threatened based on the discharge levels reported in a permit application.")

Pairing numeric limitations with narrative provisions that incorporate state water quality standards ensures that facilities discharging a wide range of pollutants into a constantly changing ecosystem do not violate water quality standards. *See Upper Blackstone Water Pollution Abatement Dist. v. U.S. E.P.A.*, 690 F.3d 9, 14 (1st Cir. 2012) (citing 33 U.S.C. § 1311(b)(1)(C)) ("State water quality standards generally supplement [federal, technology-based] effluent limitations, so that where one or more point source dischargers, otherwise compliant with federal conditions, are nonetheless causing a violation of state water quality standards, they may be further regulated to alleviate the water quality violation.") EPA has included these provisions in "many EPA-issued NPDES permits, both individual permits and widely applicable general permits[.]" *Ohio Valley Env't Coal. v. Fola Coal Co.*, *Brief for the United States as Amicus Curiae,* 2016 WL6524150, at *6.

Requiring compliance with state water quality standards also protects small businesses that rely on clean water. For example, "meet[ing] water quality standards," *see* 33 U.S.C. § 1311(b)(1)(C), often means that facilities cannot discharge toxic substances in harmful amounts. *See* San Francisco Bay Regional Water Quality Control Board, Water Quality Control Plan for the San Francisco Bay Basin § 3.3.18 [hereinafter Basin Plan] ("All waters shall be maintained free of toxic substances in concentrations that are lethal to or that produce other detrimental responses in aquatic organisms."); 314 Mass. Code Regs. § 4.05(5)(e) ("All surface waters shall be free from pollutants in concentrations or combinations that are toxic to humans, aquatic life or wildlife."); La. Admin. Code. 33 IX § 1113(B)(1)(d) ("All waters shall be free

from such concentrations of substances attributable to wastewater or other discharges sufficient to . . . injure, be toxic, or produce demonstrated adverse physiological or behavioral responses in humans, animals, fish, shellfish, wildlife, or plants[.]") N.H. CODE ADMIN. ENV-WQ 1703.21 ("Unless naturally occurring or allowed under Env-Wq 1707, all surface waters shall be free from toxic substances or chemical constituents in concentrations or combinations that . . . (1) Injure or are inimical to plants, animals, humans or aquatic life; or . . . (2) Persist in the environment or accumulate in aquatic organisms to levels that result in harmful concentrations . . . ."). Narrative provisions that incorporate those state standards ensure that permits can protect small business owners who harvest and sell seafood, or business owners who rely on bringing tourists to waterbodies safe for swimming.

In addition, "meet[ing] water quality standards," *see* 33 U.S.C. § 1311(b)(1)(C), means that a facility cannot violate a beneficial or designated use, which often means that a facility's discharges cannot jeopardize a waterbody's ability to support fish and/or shellfish. *See* Basin Plan at § 2.1.4 (establishing a beneficial use of "commercial, and sport fishing," for "[u]ses of water for commercial or recreational collection of fish, shellfish, or other organisms, including, but not limited to, uses involving organisms intended for human consumption or bait purposes."); 314 MASS. CODE REGS. § 4.05(4)(a), (b) ("Where designated for shellfishing . . . these waters shall be suitable for shellfish harvesting . . . .") LA. ADMIN. CODE. 33 IX § 1111(A) (emphasis added) (establishing a designated use of "Oyster Propagation," which is "the use of water to maintain biological systems that support *economically important* species of oysters, clams, mussels,

or other mollusks so that their productivity is preserved and the health of human consumers of these species is protected."); N.H. Code Admin Env-Wq § 1702.17(b), (c) (listing designated uses of "[f]ish consumption, meaning the surface water can support a population of fish free from toxicants and pathogens that could pose a human health risk to consumers;" and "[s]hellfish consumption, meaning the tidal surface water can support a population of shellfish free from toxicants and pathogens that could pose a human health risk to consumers[.]").

Narrative permit provisions, therefore, ensure that permits protect the livelihoods of individuals who rely on having adequate populations of fish and shellfish to sell as food to consumers or to sustain charter businesses.

III. LIMITING AGENCIES' ABILITY TO INCLUDE NARRATIVE PROHIBITIONS IN NPDES PERMITS WOULD HARM CLEAN WATER-DEPENDENT LOCAL BUSINESSES.

A. NPDES Permits with Narrative Provisions Protect Local Economic Interests by Serving as a Backstop When Numeric Limitations Alone Do Not Suffice to Protect Water Quality.

Narrative permit provisions—and the state narrative standards they incorporate—address water quality issues that can persist even when permits contain numeric limits. *See also San Francisco v. EPA*, 75 F.4th 1074, 1092 (9th Cir. 2023). When numeric effluent limits alone do not protect water quality and the small businesses that depend on clean water, narrative provisions incorporating water quality standards provide a legitimate and beneficial

oversight tool for achieving the CWA's stated water quality goal.

John Mellor's experience in San Francisco Bay and the permit violations identified in the recent enforcement action against San Francisco's Bayside wastewater treatment facility epitomize the benefit of narrative permit provisions. John Mellor has experienced herring populations in the San Francisco Bay plummet because of sewage overflow discharges from San Francisco's wastewater treatment outfalls, and he was forced to stop fishing for herring as a result. The federal Department of Justice and California Regional Water Quality Control Board recently filed an enforcement action to address sewage discharges into the San Francisco Bay from the City's Bayside outfalls. *See Pet. Supp. Br.* at 2-3, *San Francisco v. EPA*, No. 23-753 (2024) (citing Complaint ¶¶ 110-112, *United States v. City & Cnty. of San Francisco*, No. 3:24-cv-02594 (N.D. Cal. May 1, 2024)). That enforcement suit alleges that the Bayside wastewater treatment facility, which discharges into the waters where John Mellor fishes, contravened the narrative prohibition incorporating state water quality standards by discharging pollutants in amounts that violate its beneficial uses (protection of water contact recreation and aquatic life). Complaint ¶¶ 110–13, *United States v. City & Cnty. of San Francisco*, No. 3:24-cv-02594 (N.D. Cal. May 1, 2024), *available at* https://perma.cc/HT8M-SS35. The narrative provision requiring compliance with state water quality standards thus allowed enforcement authorities to address beneficial uses, which are integral components of the CWA that protect small businesses like John's. *See PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology*, 511 U.S. 700, 700 (1994) (citing 33 U.S.C.

§ 1251(a)) (stating that a designated use protecting habitat for fish "directly reflects the Clean Water Act's goal of maintaining the 'chemical, physical, and biological integrity of the Nation's waters.'")

Petitioner laments the "risk" and "predicament" of enforcement authorities using narrative prohibitions to hold the City responsible for discharging "an average of 1.8 billion gallons of combined sewage each year from its combined sewer systems into the Pacific Ocean and San Francisco Bay." *Pet. Supp. Br.* at 1–3 (citing Complaint ¶¶ 76–88, *United States v. City & Cnty. of San Francisco*, No. 3:24-cv-02594 (N.D. Cal. May 1, 2024), *available at* https://perma.cc/HT8M-SS35). But enforcing narrative provisions that require compliance with codified state laws to hold the City accountable for releasing billions of gallons of raw sewage into marine ecosystems is better framed as an action that *mitigates* the risks and predicaments facing the San Francisco Bay ecosystem and the businesses that depend upon its health. The enforcement suit exemplifies that narrative standards facilitate compliance with the statute's stated purpose.

Circumstances in the Great Bay watershed, where Captain Whelan, Peter Sawtell, Evan Clough, and David Berlinsky operate small tourism and oyster farming businesses, also demonstrate the benefits of having a water quality backstop. Thirteen wastewater treatment facilities discharge wastewater into New Hampshire surface waters in the Great Bay estuary.[22] All of those

22. U.S. EPA, NPDES Permit No. NHG58A000—New Hampshire (2020) at 3 [hereinafter Total Nitrogen General Permit].

facilities are subject to numeric limits for nitrogen.[23] All are also subject to numeric limits for total suspended solids and bacteria, among other pollutants.[24] In addition to those numeric limits, the facilities' individual permits or authorizations include narrative provisions that incorporate water quality standards. Like the provisions that petitioner challenges, those narrative provisions provide that "[t]he discharge shall not cause a violation of the water quality standards of the receiving water."[25]

---

23. *Id.*

24. U.S. EPA, NPDES Permit No. NH0101311—City of Dover (2006) at 2 [hereinafter Dover Permit]; U.S. EPA, NPDES Permit No. NH 0100455—Town of Durham (1999) at 2 [hereinafter Durham Permit]; U.S. EPA Authorization to Discharge Under the NPDES Small Wastewater Treatment Facility General Permit No. NHG580012—Town of Epping (2022) at 2–3 [hereinafter Epping Permit]; U.S. EPA, NPDES Permit No. NH0100871—Town of Exeter (2022) at 2 [hereinafter Exeter Permit]; U.S. EPA, NPDES Permit No. NHG581141—Town of Newington (2022) at 2 [hereinafter Newington Permit]; U.S. EPA, Authorization to Discharge Under the NPDES Small Wastewater Treatment Facility General Permit No. NHG580013—Town of Newmarket (2023) at 2 [hereinafter Newmarket Permit]; U.S. EPA, NPDES Permit No. NH0100234—City of Portsmouth (2023) at 2 [hereinafter Pierce Island Permit]; U.S. EPA, NPDES Permit No. NH0100668—City of Rochester (2023) at 2 [hereinafter Rochester Permit]; U.S. EPA, NPDES Permit No. NH0100277—City of Somersworth (2003) at 2 [hereinafter Somersworth Permit]; and U.S. EPA, NPDES Permit No. NH0109000—City of Portsmouth (2022) at 2 [hereinafter Portsmouth Permit].

25. Pierce Island Permit at 10; Rochester Permit at 8; Dover Permit at 4; Exeter Permit at 8; Durham Permit at 5; Federal Permit Somersworth Permit at 12; Portsmouth Permit at 9; Newmarket Permit at 8; Epping Permit at 9; and Newington Permit at 8.

The narrative provisions in the Great Bay permits serve as a necessary backstop to numeric effluent limitations and facilitate the Clean Water Act's fundamental objective of ensuring that permits issued under the Act provide for compliance with water quality standards.

Maintaining a backstop for water quality protection in the Great Bay estuary protects tourism businesses and oyster farming businesses. Even though wastewater treatment facilities in the Great Bay estuary must comply with numeric nitrogen limits, total suspended solids limits, and bacteria limits, small business owners have still suffered because of nitrogen, turbidity caused by suspended solids, and bacteria pollution. Specifically, Captain Whelan has stopped taking his fishing charter boat to some locations in the Great Bay estuary due to eelgrass depletion, which is caused by excess nitrogen and turbidity (or cloudiness that inhibits light).[26] Similarly, Peter Sawtell has stopped taking kayaking and paddling tours to certain portions of the Lamprey River because of high bacteria levels that render the river unsafe for swimming. Evan Clough and David Berlinsky's oyster farm has also shut down, for up to two weeks at a time, due to high bacteria levels that make their oysters unsellable. Reductions in water quality in the water bodies upon which they depend would cause these harms to occur more frequently.

---

26. Howarth et al., *Aquaculture and Eelgrass Zostera marina Interactions in Temperate Ecosystems*, 14 Aquaculture Env't Interactions 15, 20 (2022); James S. Latimer & Steven A. Rego, *Empirical Relationship Between Eelgrass Extent and Predicted Watershed-Derived Nitrogen Loading for Shallow New England Estuaries*, 90 Estuarine, Coastal and Shelf Science 4, 4 (2010).

Thus, numeric limits alone are insufficient to protect water quality and local livelihoods. Permits must include backstop measures to address this shortcoming. By stating that permits must include "any limitation necessary to meet water quality standards," 33 U.S.C. § 1311(b)(1)(C), the Act authorizes permits to include state narrative water quality requirements as a backstop in watersheds like the Great Bay estuary, where water quality issues persist despite specific numeric and narrative permit limits.

B. NPDES Permits with Narrative Provisions Protect Local Economic Interests by Providing Protection from Pollutants that Lack Numeric Limits.

NPDES permit provisions that incorporate narrative standards also protect water quality because many permittees discharge pollutants that lack numeric limits, despite the fact that those pollutants negatively affect water quality. For example, Deer Island Wastewater Treatment Facility—which releases wastewater into Massachusetts Bay, where Eric Meschino operates his lobster business—has a NPDES permit with both numeric and narrative provisions.[27] One of Deer Island's narrative provisions states that the permittee's "discharge shall not cause or contribute to an exceedance of the current state water quality standards, and/or impair any existing or designated water use or cause any significant lowering of water quality[.]"[28]

27. *See* Deer Island Permit at 3–7.

28. *Id.* at 7.

There are no numeric limits in the Deer Island Permit limiting toxic PFAS pollution, nor pharmaceutical chemicals.[29] Eric Meschino, who catches lobsters in waters affected by Deer Island, worries that those toxic pollutants and endocrine disrupters will impact his lobstering business and will harm the lobstering industry generally. Eric is concerned that he, and the industry at large, will suffer from loss of sales due to toxic pollution building up in aquatic animals, which harms consumers' health and impacts the public's perception of seafood. Because NPDES permits in the waters where Eric catches lobsters omit limits for harmful chemicals including PFAS and pharmaceuticals, narrative provisions incorporating state standards provide EPA the ability to address water quality issues that harm and concern small business owners.

---

29. *Id.* at 3. EPA issued a Draft Permit for the Deer Island Wastewater Treatment Facility in 2023 but has not yet finalized the permit. *See* U.S. EPA, Draft NPDES Permit No. MA0103284—Massachusetts Water Resources Authority at 4 (2023). The Draft permit similarly did not contain numeric effluent limits for PFAS or pharmaceuticals in water discharges; thus, the narrative provision incorporating state water quality standards remains necessary to address these pollutants. *See* U.S. EPA, Draft NPDES Permit No. MA0103284—Massachusetts Water Resources Authority (2023) Fact Sheet at 89 ("Although the Massachusetts water quality standards do not include numeric criteria for PFAS, the Massachusetts narrative criterion for toxic substances at 314 CMR 4.05(5)(e) states: 'All surface waters shall be free from pollutants in concentrations or combinations that are toxic to humans, aquatic life or wildlife.'"); *see also id.* at 91 (internal citation omitted) (recognizing that pharmaceuticals can "cause significant reproductive effects at very low levels of exposure" for aquatic life but failing to establish monitoring requirements or limits.)

C. NPDES Permits with Narrative Provisions Protect Local Economic Interests by Serving as a Backstop to Address Changing Conditions in Waterbodies, Especially Where Permits Have Been Indefinitely Administratively Continued.

Narrative water quality standards ensure permits are protective when new threats to water quality emerge. For example, the Gulf of Mexico dead zone, where Dean Blanchard runs his shrimp purchasing and processing operation, changes significantly from year to year. The dead zone results from the build-up of pollutants that are discharged into the Gulf from facilities and agricultural sources along the Mississippi River.[30] Narrative water quality standards in permits issued to facilities in the Gulf allow the permitting authority to protect water quality, as required by the CWA, by accounting for changing conditions in receiving waters. For example, facilities located in Terrebonne Parish, which has extensive coastline along the Gulf, have received general coastal CWA permits from the Louisiana permitting authority.[31] Allowing the permitting authority to include narrative standards in these permits protects the permitting authority's ability to respond to changing water quality as that agency enforces the permits. When chemicals and nutrients are discharged into the Gulf during periods of

30. Ocean Today, *Dead Zone in the Gulf of Mexico*, NOAA, https://oceantoday.noaa.gov/deadzonegulf/.

31. *See e.g.,* Louisiana Department of Environmental Quality, Gen-LAG33-Coastal - LAG33A320—J C Dupont (2021); Louisiana Department of Environmental Quality, Gen-LAG33-Coastal - LAG33A319—J C Dupont (2021).

expansive dead zones, these narrative standards are a tool envisioned by the CWA that the permitting authority can use to respond to those changing conditions.

Dean Blanchard has experienced the impacts of changing water quality over time. As the Gulf Dead Zone has grown, his business has suffered significant losses. Preserving narrative water quality standards in NPDES permits protects the agency's ability to enforce the heart of the CWA by ensuring that polluters do not cause water quality to fall below acceptable levels. Removing these protections would further threaten the economic wellbeing of Dean Blanchard and similarly situated business owners.

NPDES permit provisions that incorporate narrative standards also provide EPA the ability to address changing conditions in waterbodies when permits remain in effect for longer than their statutory expiration dates. While the CWA authorizes NPDES permits for five years, *see* 33 U.S.C. § 1342(a)(3), (b)(1)(B), permits often remain in effect for longer when they are administratively continued. *Nat. Res. Def. Council v. EPA.*, 915 F.2d 1314, 1319 (9th Cir. 1990) ("NPDES permits are issued for periods of no more than five years, although administrative delays can extend *de facto* the duration of the permits.").[32]

---

32. *See also* Karl S. Coplan, *Of Zombie Permits and Greenwash Renewal Strategies: Ten Years of New York's So-Called "Environmental Benefit Permitting Strategy"*, 22 Pace Env't L. Rev. 1 (2005) (stating that in the 1980s, shortly after the Clean Water Act of 1972's passage, "more than 6,000 undead State Pollutant Discharge Elimination System (SPDES) permits in New York State roamed the State well beyond their statutory expiration date because the State Department of Environmental Conservation (DEC) had not processed permit renewal applications.")

For example, Deer Island wastewater treatment plant operates under an administratively continued NPDES permit, which was issued in 1999 and modified in 2000.[33] That permit discharges into Massachusetts Bay and contains a narrative provision incorporating "current state water quality standards," as discussed above.[34] The Durham and Somersworth wastewater treatment plants' permits were issued in 1999 and 2003, respectively, and are also administratively continued.[35] Both wastewater treatment plants affect the Great Bay estuary in NH, and they both contain narrative provisions incorporating state water quality standards.[36] When permits are administratively continued for long periods of time, narrative water quality standards are an especially important backstop. These provisions can address gaps that arise when unchanging numeric effluent limits remain in effect for several decades.

---

33. *See* Deer Island Permit.

34. Deer Island Permit, at 1, 7. As noted in Part III(B), EPA issued a Draft Permit for the Deer Island Wastewater Treatment Facility in 2023 but has not yet finalized the permit. *See* U.S. EPA, Draft NPDES Permit No. MA0103284—Massachusetts Water Resources Authority at 4 (2023).

35. *See* Durham Permit; *Detailed Facility Report: Durham Wastewater Treatment Facility*, Enforcement and Compliance History Online, https://echo.epa.gov/detailed-facility-report?fid=110006619212 (last updated May 13, 2024) (listing Durham's individual permit at administratively continued); Somersworth Permit; *Detailed Facility Report: Somersworth Wastewater Treatment Plant*, Enforcement and Compliance History Online, https://echo.epa.gov/detailed-facility-report?fid=110020142987 (last updated May 13, 2024) (listing Somersworth's individual permit at administratively continued).

36. Durham Permit at 5; Somersworth Permit at 12.

Facilities with administratively continued permits, like Deer Island's, Durham's, and Somersworth's wastewater treatment plants, have unchanging permit limits but impact water bodies with improving water quality. Thus, when those permits incorporate up-to-date state water quality standards by reference, they ensure facilities can meet the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *See* 33 U.S.C. § 1251(a).

Businesses that operate in Massachusetts Bay, like Eric Meschino's lobstering business, benefit when facilities' permits contain narrative provisions that can ensure compliance with modern water quality standards and improved water quality. Those narrative water quality standards help ensure that permits which are administratively continued remain protective of water quality when conditions change in Massachusetts Bay and when facilities like the Deer Island plant discharge persistent and bioaccumulative toxins like PFAS and polychlorinated biphenyls ("PCBs") into the Bay.[37] The build-up of those pollutants over time presents a serious threat to the lobster

37. U.S. EPA, Draft NPDES Permit No. MA0103284—Massachusetts Water Resources Authority (2023) Fact Sheet at 89 ("EPA is collecting information to evaluate the potential impacts that discharges of PFAS from wastewater treatment plants may have on downstream drinking water, recreational and aquatic life uses."); 87 Fed. Reg. 36848, 36849 (June 21, 2022); Deer Island Permit at 3 (setting limit for PCBs); Agency for Toxic Substances and Disease Registry, ATSDR CASE STUDIES IN ENVIRONMENTAL MEDICINE POLYCHLORINATED BIPHENYLS (PCBS) TOXICITY, U.S. Department of Health and Human Services (2014) at 18–19, 21, https://www.atsdr.cdc.gov/csem/pcb/docs/pcb.pdf.

population and to Eric's business, and narrative provisions provide EPA the authority to address those threats. Similarly, businesses like Captain Whelan's, Peter Sawtell's, Eric Clough's, and David Berlinsky's that operate in the Great Bay estuary benefit from narrative protections in the Durham and Somersworth wastewater treatment plants. Those provisions allow for updated water quality protections despite stagnant permits that have remained effective long past the timeline that Congress envisioned.

CONCLUSION

Amici and similar water-dependent businesses rely on water quality that complies with the Clean Water Act. NPDES permits must ensure compliance with the Act, including compliance with state water quality standards. Narrative provisions incorporating state water quality standards ensure that permits comply with those standards and the Act. In doing so, those narrative provisions provide a water quality backstop that supports small businesses. The judgment of the Court of Appeals should be affirmed.

Respectfully Submitted,

KEITH P. RICHARD
Counsel of Record
RICHARD L. QUALEY
ARCHIPELAGO
One Dana Street, 4th Floor
Portland, Maine 04101
(207) 558-0102
krichard@archipelagona.com

Counsel for Amici Curiae