No. 23-753

IN THE
Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO,
Petitioner,
v.
ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* PUBLIC WASTEWATER AND STORMWATER AGENCIES AND MUNICIPALITIES SUPPORTING PETITIONER

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INTERESTS OF *AMICI CURIAE*

Amici curiae are municipalities and public clean water utilities from across the country that provide flood and stormwater management, wastewater treatment, water supply, and water conservation services to their communities.[1] They are AlexRenew (Virginia), Boston Water and Sewer Commission, Buffalo Sewer Authority, Citizens Energy Group (Indianapolis), City of Mountain View (California), City of New York, City of Sunnyvale (California), City of Tacoma, Clean Water Services (Washington County, Oregon), District of Columbia Water and Sewer Authority, Greater Peoria Sanitary District (Illinois), Green Bay Metropolitan Sewerage District, Louisville/Jefferson County Metropolitan Sewer District, Massachusetts Water Resources Authority, Metro Water Recovery (Denver), Narragansett Bay Commission (Rhode Island), Northeast Ohio Regional Sewer District, Passaic Valley Sewerage Commission (New Jersey), and Springfield Sewer and Water Commission (Massachusetts).

These municipalities and utilities are joined by several national and state associations, whose members likewise play a critical role in protecting the nation's waters and public health: the National Association of Clean Water Agencies, Association of Missouri Cleanwater Agencies, California Association of Sanitation Agencies, Illinois Association of Wastewater Agencies, North Carolina Water Quality Association,

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[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.

Oregon Association of Clean Water Agencies, South Carolina Water Quality Association, West Virginia Municipal Water Quality Association, and Wet Weather Partnership. These associations' members include hundreds of municipal clean water agencies that own, operate, and manage publicly-owned treatment works, wastewater and stormwater sewer systems, water reclamation districts, and infrastructure relating to all aspects of wastewater collection, treatment, and disposal. Collectively, they provide wastewater and stormwater services to the majority of the nation's sewered population.

Amici or their members have for decades operated under Clean Water Act ("CWA" or "Act") National Pollutant Discharge Elimination System ("NPDES") permits as they provide stormwater and sanitation services to communities throughout the country. *See* 33 U.S.C. § 1342. They play a unique role in NPDES implementation, as, in addition to being subject to their own discharge requirements, many of them are also charged with running NPDES pretreatment programs and illicit discharge and detection programs designed to keep harmful pollutants from entering public sewer and stormwater systems. Like the Petitioner, *amici* or their members depend on their NPDES permits to provide clear notice of the full extent of their CWA compliance obligations. This notice is necessary not only because utilities must rely on their permits as the basis for planning and undertaking major infrastructure investments that directly impact the public's daily lives and pocketbooks, but also because "[t]he CWA is a potent weapon." *Sackett v. EPA*, 598 U.S. 651, 660 (2023). Indeed, *amici* or their members could be subject to "crushing" civil and criminal penalties and injunctive action "even for

inadvertent violations" of their permits. *Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 602 (2016) (Kennedy, J., concurring); 33 U.S.C. § 1319.

This case concerns the legality of generic permit terms that vaguely prohibit actions like "polluting," or "causing or contributing to the violation of water quality standards." Such generic prohibitions leave permittees guessing about whether compliance with all other permit terms—which include numerous detailed obligations that are often the product of a multi-year permitting proceeding—is somehow not enough to constitute compliance with the CWA. Congress expressly sought to avoid this uncertainty when it included a statutory safe harbor found at 33 U.S.C. Section 1342(k), often referred to as the "permit shield," which specifies that "compliance with a[n NPDES] permit" amounts to full compliance with the CWA.

The Ninth Circuit's decision affirming the inclusion of generic water quality prohibitions in permits undermines the certainty provided by the permit shield that is foundational to the NPDES program and leaves *amici*, their members, and other dischargers whose permits include such generic prohibitions exposed to inconsistent, arbitrary, and unpredictable enforcement actions. The resulting uncertainty significantly hampers the ability of communities to efficiently plan, operate, maintain, and invest billions of dollars in essential clean water infrastructure. This in turn threatens local residents—including those in disadvantaged communities—who will be left footing the bill for any unplanned compliance expenditures through increased rates.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1972, Congress enacted the CWA to address significant deficiencies in prior water pollution control statutes. *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972); 33 U.S.C. § 1251 *et seq.* At the heart of the Act is the clear distinction Congress drew between the broadly applicable—but not self-enforcing—water quality goals that states must establish for water bodies, referred to as water quality standards, and the enforceable limits (*i.e.*, effluent limitations) for specific discharges into those water bodies that a permit writer determines are necessary to help achieve those goals. The Ninth Circuit's decision erases Congress's careful and intentional distinction between water quality standards and effluent limitations from the statutory text to the detriment of public clean water agencies and countless other regulated entities.

Under the pre-1972 federal water quality regime,[2] the primary enforcement mechanisms for pollution control were water quality standards that described acceptable levels of pollution in waters that received discharges. That approach to pollution control "proved ineffective" for several reasons: standards "focused on the tolerable effects rather than the preventable causes of water pollution," federal and state governments "awkwardly shared" responsibility for establishing standards, and enforcement was cumbersome. *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202 (1976). Collectively, these

[2] *See* Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965); Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (1948).

problems made "it very difficult to develop and enforce standards to *govern the conduct of individual polluters*." *Id.* at 202-03 (emphasis added).

Although some states developed discharge permit programs to enforce water quality standards by deriving requirements specific to individual dischargers, not all states did so. *See id.* at 203. This prompted the federal government to revive the permitting program under the Refuse Act of 1899. *Id.*; *see* 33 U.S.C. § 407. That effort fell short because discharge permits were scarce, and those that existed were deficient because, among other things, "[t]he goal of the discharge permit conditions was to achieve water quality standards rather than to require individual polluters to minimize effluent discharge[.]" *EPA*, 426 U.S. at 203. Such vague permit conditions proved unworkable in the absence of precise compliance requirements for individual dischargers because regulators could only determine a discharger's compliance with water quality standards retroactively.

Congress sought to address these inadequacies in the CWA, which created a "major change in the enforcement mechanism of the Federal water pollution control program from water quality standards to effluent limits." S. Rep. No. 92-414, at 7 (1971); *see also Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 515 (2d Cir. 1976) ("[A]lthough water quality standards and effluent limitations are related, . . . the two are entirely different concepts and the difference is at the heart of the 1972 Amendments."). Congress expressed this major change in the plainest of language by distinguishing between discharge-specific "effluent limitations" and the generally applicable "water quality standards" that such effluent limitations must be

"necessary to meet" or "required to implement[.]" 33 U.S.C. § 1311(b)(1). Emphasizing the need for specificity in regulating the conduct of individual dischargers, Congress defined "effluent limitation" to mean "any restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters[.]" *Id.* § 1362(11).

Water quality standards under the CWA, which "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses," are not self-enforcing. 33 U.S.C. § 1313(c)(2)(A). Because these standards broadly apply to water bodies, not individual dischargers, they must be translated into requirements for potential dischargers. *EPA*, 426 U.S. at 205. To that end, Congress established the NPDES program in 1972. NPDES permits are the mechanism for transforming "generally applicable" requirements such as water quality standards "into the obligations (including a timetable for compliance) of the individual discharger." *Id.*

NPDES permits are issued only after an exhaustive permitting process. Among other steps, a permit writer must determine whether specific limits are needed to meet or implement water quality standards by conducting a detailed analysis of whether the proposed discharges "will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard," considering existing permit limits and other sources of pollution. *Id.* § 122.44(d)(1)(i). If the permit writer finds such a reasonable potential, the next step is to develop one or more specific effluent limitations for the pollutant(s)

at issue in the proposed discharge, which must be set at a level that is "derived from, and complies with all applicable water quality standards." *Id.* § 122.44(d)(1) (vii)(A).

The permitting process culminates in the issuance of a permit that describes precisely what the discharger must do to ensure compliance with the CWA. The permit constitutes a final and binding determination by the issuing agency that authorized discharges compliant with the permit's terms will not cause or contribute to an exceedance of applicable water quality standards.

Congress intended NPDES permits to provide both permittees and agencies implementing the CWA finality and certainty. *First*, Congress specified that "compliance with a[n NPDES] permit" amounts to full compliance with the CWA. 33 U.S.C. § 1342(k). In order for this statutory "permit shield" to mean anything, the effluent limitations in permits must be sufficiently specific so that permittees have fair notice of how to ensure that their discharges comply. Generic permit terms such as "do not cause pollution" are subjective and expose permittees to after-the-fact enforcement actions that directly undermine Congress's decision to provide a safe harbor from CWA liability for dischargers acting in good faith and in accordance with their known obligations. *Second*, Congress mandated that all challenges to the issuance or denial of an NPDES permit "shall be made within 120 days from the date of such . . . issuance[.]" 33 U.S.C. § 1369(b)(1)(F). To guard against later collateral attacks on a permit—including by any party arguing that the specific limitations in a permit are insufficient to ensure compliance with water quality

standards—Congress made it clear that an "[a]ction . . . with respect to which review could have been obtained under [§ 1369(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." *Id.* § 1369(b)(2).

The Ninth Circuit's decision upholding generic water quality prohibitions runs contrary to the CWA's text, purpose, and history, undermines Congress's goal of promoting finality, and turns CWA compliance into a moving target. In overhauling the inadequate pre-1972 water pollution control regime, Congress intended for NPDES permit writers to use water quality standards as a basis upon which to determine whether effluent limits are necessary, and, if so, to derive discharge-specific, enforceable effluent limitations. Contrary to this scheme, the Ninth Circuit's decision allows permit writers to treat the water quality standards themselves as independently enforceable "limitations" without clarifying what is expected of an individual discharger to comply. By analogy, while the CWA calls for regulators to set a safe speed limit for a road, the Ninth Circuit's decision would allow them to instead simply instruct drivers to "avoid unsafe speeds," thereby leaving drivers to guess which speeds, exactly, the police—or other drivers—might consider unsafe. In doing so, the Ninth Circuit's decision ignores the statutory distinction between effluent limitations and water quality standards, as well as the CWA's overall design and history, and even the U.S. Environmental Protection Agency's ("EPA") own longstanding interpretations of the NPDES permitting process.

Crucially, for *amici*, generic water quality prohibitions undermine the finality and certainty that

Congress intended to provide through the permit shield provision and the provision mandating that challenges to NPDES permits be brought within 120 days of permit issuance. Under the Ninth Circuit's decision, permittees remain vulnerable throughout the life of their NPDES permits to enforcement actions by regulators and citizen plaintiffs alleging "violations" of unspecified, unknown, and unknowable requirements. Such actions ignore Congress's intent to preclude "'common law' or court-developed definition[s] of water quality" and the "reanalysis of . . . matters [that] have been *settled in the administrative procedure*," such as the determination of whether and what specific effluent limitations are necessary to avoid causing or contributing to a water quality standards violation. *See* S. Rep. No. 92-414, at 79 (emphasis added). These concerns become more acute every day given the increasingly litigious regulatory environment permittees face.

The permit terms at issue here are no outliers. Generic prohibitions against "causing or contributing to the violation of water quality standards" are frequently included in NPDES permits. At particular risk are *amici* and other public utilities charged with running large-scale critical infrastructure systems that provide vital environmental and human health services to communities nationwide with limited public dollars. Public utilities invest millions, if not billions, of public dollars to maintain and improve their stormwater and wastewater systems to ensure compliance with the CWA. When meeting compliance obligations may entail tearing up city streets or investing the hard-earned money of disadvantaged ratepayers, it is critical that those compliance obligations not be a moving—and mutable—target. Simply stated,

when public investments are inefficient because regulatory requirements change midstream, rates charged to the public increase. Generic prohibitions in permits risk the imposition of ever-changing regulatory requirements on *amici* and are therefore fundamentally incompatible with sound infrastructure investment and the affordable provision of public clean water services.

This Court should reverse the decision below and clarify permit writers' obligations under the CWA to establish clear, discharge-specific effluent limitations that fully apprise regulated entities of their compliance obligations.

ARGUMENT

I. THE CWA DOES NOT AUTHORIZE GENERIC WATER QUALITY PROHIBITIONS IN DISCHARGE PERMITS.

A. Generic water quality prohibitions are inconsistent with the CWA's plain text.

The statutory analysis "begin[s], as always, with the text." *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 391 (2017). Because the statutory text here is straightforward, that is "where the inquiry should end." *Commonwealth of Puerto Rico v. Franklin Cal. Tax Free Tr.*, 579 U.S. 115, 125 (2016) (citation omitted). CWA Section 301(b)(1) plainly illustrates the distinction between the specific effluent limitations that apply to a permittee's discharges, and the water quality standards that apply to the water bodies that receive not only the permittee's discharges, but also pollutants from other sources. *See* 33 U.S.C. § 1311(b)(1). Under that provision, permit writers

must establish "effluent limitations" that are "necessary to *meet* water quality standards . . . established pursuant to any State law or regulations . . . or any other Federal law or regulation, or required to *implement* any applicable water quality standard[.]" *Id.* (emphasis added). Congress further defined "effluent limitation" to mean "any restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, . . ., including schedules of compliance." *Id.* § 1362(11). Read together, these provisions require permit writers to take the broad and ambitious goals articulated in water quality standards and translate them into tangible, concrete actions that entities seeking to discharge into navigable waters must take to ensure they are doing their part to attain those goals.

Generic water quality prohibitions that merely tell permit holders to avoid causing or contributing to violations of water quality standards, or to avoid creating pollution, contamination, or nuisance, eliminate the Act's core distinction between effluent limitations and water quality standards. Generic prohibitions do not tell dischargers what is "necessary to meet" or what is "required to implement" applicable water quality standards, 33 U.S.C. § 1311(b)(1)(C), nor do they specify any restrictions on "quantities, rates, and concentrations" of pollutants. *Id.* § 1362(11). Rather than translate water quality goals into concrete requirements necessary to meet or implement those goals, generic prohibitions impermissibly merge two distinct statutory concepts by effectively treating water quality standards as discharge-specific limitations that a permittee must somehow meet. Generic prohibitions also eliminate the flexibility Congress

provided by explicitly including "schedules of compliance" in the definition of "effluent limitation." *See id.* § 1362(11). By definition, such schedules allow permittees to take incremental steps "leading to compliance with an effluent limitation, other limitation, prohibition, or standard." *Id.* § 1362(16). That flexibility is impossible if a permittee must immediately and at all times comply with a generic command to avoid violating water quality standards.[3]

This Court and many others have recognized the importance of preserving the textual distinction between discharge-specific effluent limitations and a receiving water's broadly applicable water quality standards. *See, e.g.*, *EPA*, 426 U.S. at 204–05 (the CWA marked a shift away from water quality standards governing all dischargers to "restriction[s] . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are

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[3] Generic prohibitions are also sometimes troublingly included in NPDES permits for municipal separate storm sewer systems (MS4s), which several *amici* operate. Because Congress recognized that such systems have little practical ability to control what pollutants flow into stormwater drainage systems, it specified separate NPDES requirements for MS4s. Rather than require strict compliance with water quality standards, CWA Section 402 instead sets out a different standard for MS4s. MS4s must only implement "controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods[.]" 33 U.S.C. § 1342(p)(3)(B)(iii). Including generic water quality standards-based prohibitions in MS4 permits effectively writes the "maximum extent practicable" requirement out of the CWA and leaves the door open for the imposition of impracticable, if not impossible, requirements on these public systems, contrary to Congress's intent.

discharged from point sources") (citation omitted); *Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 350 (D.C. Cir. 1993) ("[W]ater quality standards by themselves have no effect on pollution; the rubber hits the road when the state-created standards are used as the basis for specific effluent limitations in NPDES permits."); *Nat. Res. Def. Council, Inc. v. EPA*, 16 F.3d 1395, 1399 (4th Cir. 1993) ("Water quality standards are a critical component of the CWA regulatory scheme because such standards serve as a guideline for setting applicable limitations in individual discharge permits."); *Trs. for Alaska v. EPA*, 749 F.2d 549, 557 (9th Cir. 1984) ("Effluent limitations are a means of *achieving* water quality standards.").

As the Second Circuit aptly summarized, "although water quality standards and effluent limitations are related, . . . the two are entirely different concepts and the difference is at the heart of the 1972 Amendments." *Bethlehem Steel Corp.*, 538 F.2d at 515; *accord Va. Elec. & Power Co. v. Costle*, 566 F.2d 446, 451 n.17 (4th Cir. 1977) (acknowledging the "fundamental differences in the statutory scheme between effluent limitations and water quality standards").

B. The CWA's purpose and history confirm that the statute does not authorize generic water quality prohibitions in discharge permits.

The CWA's purpose and history reinforce the textual distinction between effluent limitations and water quality standards. Before the CWA's enactment in 1972, federal water pollution control laws relied on "ambient water quality standards specifying the

acceptable levels of pollution in a State's interstate navigable waters as the primary mechanism in its program for the control of water pollution." *EPA*, 426 U.S. at 202. That standards-based approach was deficient in large part because "[t]he goal of the discharge permit conditions was to achieve water quality standards rather than to require individual polluters to minimize effluent discharge[.]" *Id.* at 203 & n.6 (citing S. Rep. No. 92-414, at 5).

Mindful of these failures, Congress enacted the CWA to address its "dissatisfaction with water quality standards as a method of pollution control," and it replaced that ineffective scheme with a new permitting program that would impose discharge-specific effluent limitations. *Bethlehem Steel Corp.*, 538 F.2d at 515; *see also* S. Rep. No. 92-414, at 7 ("[T]he Federal water pollution control program . . . has been inadequate in every vital aspect[.]"). Congress concluded that there was "[a] critical delay of enforcement" under the prior program in part because regulators could only bring enforcement actions *after* water quality standards had already been violated. *See* S. Rep. 92-414, at 4 (enforcement actions could be brought once "wastes discharged by polluters reduce water quality below the standards"); *see also EPA*, 426 U.S. at 204 (acknowledging that under the prior regulatory scheme, regulators had to "work backward from an overpolluted body of water to determine which point sources . . . must be abated"). Without clear, discharge-specific limits, the prior *ex post* scheme "ma[d]e it very difficult to develop and enforce standards to govern the conduct of individual polluters." *EPA*, 426 U.S. at 202–03.

The CWA "reflects a significant shift in focus from controlling pollution indirectly, through water quality standards, to an emphasis on direct control of effluents. Water quality standards will remain significant in the new program as an index of our progress, but they will serve less as an instrument of that progress." 117 Cong. Rec. 38,722, 38,806 (1971) (Sen. Eagleton); *see also id*. at 38,805 (Sen. Randolph) (The CWA "represent[ed] a major change in the basic philosophy governing our attempts to eliminate water pollution. In altering our approach from standards of water quality to controls based on effluent limitations, we are starting down a new road, one that will reach the same goal but by a more direct and precise route.").

Under the CWA, Congress expected that regulators would use the newly established NPDES permit program to "apply *specific* effluent limitations for each [] source[,]" S. Rep. No. 92-414, at 44 (emphasis added), and water quality standards would serve only as a "measure of program effectiveness and performance, *not a means of elimination and enforcement*." *Id.* at 8 (emphasis added). To ensure consistency with Congress's intent, effluent limitations must apply at the point of discharge, rather than to the receiving water itself.

Congress carefully defined "effluent limitation" to refer to specific and actionable restrictions on individual discharges. *See* 33 U.S.C. § 1362(11). Through this definition, Congress clarified that "control requirements are not met by narrative statements of obligation, but rather are *specific* requirements of *specificity* as to the quantities, rates, and concentration of physical, chemical, biological and other constituents

discharged from point sources." S. Rep. No. 92-414, at 77 (emphasis added).

As this Court has observed, "[t]he history of the 1972 amendments shows that Congress intended to establish 'clear and identifiable' discharge standards." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987) (quoting S. Rep. No. 92-414, at 81). Generic prohibitions against causing or contributing to water quality standard violations, however, make it "virtually impossible to predict the standard for a lawful discharge," and "[i]t is unlikely—to say the least—that Congress intended to establish such a chaotic regulatory structure." *Id.* at 496-97 (internal quotation marks and citation omitted). The Ninth Circuit's decision upholding generic prohibitions conflicts with Congress's deliberate move away from permits that vaguely instruct dischargers to achieve water quality standards and towards permits that impose discharge-specific effluent limitations necessary to ensure receiving waters attain and maintain their applicable standards.

C. Longstanding EPA interpretations correctly recognized the need for discharge-specific limitations.

Historical EPA practice confirms what the text, purpose, and history make clear: to avoid repeating the failures of the pre-1972 federal water pollution control laws and the ineffective discharge permits issued thereunder, Congress intended for permit writers to develop discharge-specific effluent limitations that translate water quality standards into specific restrictions. Those longstanding interpretations are

inconsistent with the interpretation that EPA espouses here and that the Ninth Circuit affirmed.

In the initial years of implementing the CWA, EPA emphasized that "both the discharger and the regulatory agency need to have an identifiable standard upon which to determine whether the facility is in compliance. That was the principal [sic] of the passage of the 1972 Amendments." *Nat. Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1378 (D.C. Cir. 1977) (quoting EPA Memorandum on "Impossibility"). More recently, EPA reiterated that "[w]ater quality standards are not directly enforceable, despite commonly held beliefs" and thus, "when standards are not being met, there is no legal requirement for specific measures to be taken by any of the pollutant sources." *See* U.S. EPA, *Watershed Academy Web: Introduction to the Clean Water Act* § 34, https://cfpub.epa.gov/watertrain/moduleFrame.cfm?parent_object_id=2673. "NPDES permittees are required to meet their effluent limits," including those developed during the permitting process to achieve applicable water quality standards, and the failure to do so can trigger enforcement actions. *Id.* But if permittees are complying with the effluent limitations in their permits, they need not speculate on what other specific measures might be required of them that the permit writer did not deem necessary to include. *See generally* 33 U.S.C. § 1342(k).

EPA's decades-old regulations and its related permitting guidance set forth detailed requirements for determining whether a proposed discharge "will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard[.]" 40 C.F.R. § 122.44(d)(1)(i); *see also* U.S.

EPA, *NPDES Permit Writers' Manual*, §§ 6.2 & 6.3 (2010), https://www.epa.gov/sites/default/files/2015-09/documents/pwm_2010.pdf. When a permit writer determines that such "reasonable potential" exists, EPA's regulations and guidance prescribe how permit writers must develop discharge-specific effluent limitations at levels that are "derived from, and compl[y] with all applicable water quality standards." *See* 40 C.F.R. § 122.44(d)(1)(vii)(A); *see also NPDES Permit Writers' Manual*, § 6.4. Permit writers must also catalog and disclose all "data and information used to determine the applicable water quality standards and how that information . . . was used to derive" the specific effluent limitations to provide the "permit applicant and the public a transparent, reproducible, and defensible description of how the permit writer" derived those limitations. *NPDES Permit Writers' Manual*, § 6.4.1.5.

When EPA promulgated these regulatory requirements, it underscored the highly technical and discretionary nature of determining whether a proposed discharge has a reasonable potential to cause or contribute to a water quality standard violation. *See* 54 Fed. Reg. 23,868, 23,872 (June 2, 1989). Permit writers must "use reliable and consistent procedures" and consider the "dilution of the effluent in the receiving water . . ., contributions of the pollutant from upstream point and nonpoint sources, the variability of the pollutant in the effluent, and, when evaluating whole effluent toxicity, the sensitivity of the test species in a toxicity test." *Id.* Judgment calls related to whether a discharge causes or contributes to a water quality standard violation are best left to permit writers with the requisite expertise and experience,

rather than the courts, as Congress intended. *See infra* Section II.A.

EPA has also stressed that "*[b]efore* requiring a water quality-based effluent limit, the permitting authority must have a basis for finding that discharges have the reasonable potential to cause excursions above water quality criteria." 54 Fed. Reg. at 23,873. EPA assured stakeholders that its NPDES regulations "will not result in any unnecessary effluent limits in NPDES permits because the permitting authority must satisfy the procedures in [40 C.F.R. § 122.44(d)(1)(ii)] before establishing [such] limits." *Id.* EPA correctly recognized that under the CWA, permit writers must first determine the actual need for such limitations to protect water quality before imposing water quality-based limitations.

The Ninth Circuit's holding renders these requirements superfluous by allowing permit writers to "simply give up and refuse to issue more specific guidelines" and instead force permittees to find their own way to determine whether their conduct causes or contributes to a violation of a water quality standard. *Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 578 (2d Cir. 2015). Worse still, inclusion of generic water quality prohibitions in permits allows regulators and citizen plaintiffs alike to read requirements into a permit that were not thoroughly vetted or contemplated during the permitting process. Generic prohibitions are not "derived from . . . applicable water quality standards." 40 C.F.R. § 122.44(d)(1)(vii)(A). Rather than treat water quality standards as the goals upon which regulators must base enforceable effluent limits in permits, the Ninth Circuit's opinion improperly conflates the goals themselves with the

means of achieving them. The decision does so in direct contravention of Congress's intent that water quality standards serve only as an endpoint to assess the effectiveness of pollution controls, "not a means of elimination and enforcement." S. Rep. No. 92-414, at 8. Accordingly, the Ninth Circuit's decision severely undermines permitting certainty and unfairly burdens permittees including public clean water utilities.

II. THE NINTH CIRCUIT'S DECISION UNDERMINES CONGRESS'S INTENT TO PROVIDE FINALITY AND REGULATORY CERTAINTY.

Recognizing the Act's fundamental distinction between discharger-specific effluent limitations and generally applicable water quality standards is not an academic exercise. It is key to realizing Congress's goals of providing finality and regulatory certainty in the NPDES program and ensuring that actions to enforce specific permit terms do not involve *de novo* determinations on what additional limitations a permittee must comply with beyond those that permit writers have deemed necessary in the exercise of their best professional judgment. By allowing the inclusion of generic water quality prohibitions in NPDES permits, the Ninth Circuit's decision severely undermines the CWA's permit shield, 33 U.S.C. § 1342(k), and invites enforcement actions that flout the Act's repose provision, 33 U.S.C. § 1369(b).

A. Regulatory Certainty is a Cornerstone of the CWA.

Statutory provisions highlighting the CWA's textual distinction between effluent limitations and water quality standards "cannot be construed in a

vacuum," but instead "must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). The Ninth Circuit's holding not only disregards the plain language of the CWA, it also frustrates Congress's goal of ensuring finality and certainty, which is reflected throughout the Act.

Section 402(k)'s "permit shield" clearly conveys Congress's goal. That section assures permit holders that "[c]ompliance with a permit . . . shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title[.]" 33 U.S.C. § 1342(k). Section 402(k) thus creates a safe harbor from enforcement under CWA sections 1319 and 1365, which authorize civil and criminal actions by the government (Section 1319) as well as citizen suits (Section 1365). As this Court explained, the permit shield "serves the purpose of giving permits finality" by "insulat[ing] permit holders from changes in various regulations during the period of a permit" and "reliev[ing] them of having to litigate in an enforcement action the question whether their permits are sufficiently strict." *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977).

EPA itself has explained that a primary purpose for issuing a permit "is to prescribe with specificity the requirements that a [permit holder] will have to meet . . . so that the facility can plan and operate with knowledge of what rules apply. . .." EPA Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,312 (May 19, 1980). The permit shield "places the burden on permit writers rather than permittees to search through the applicable regulations and correctly

apply them to the permittee through its permit." *Id.* If a permit applicant provides all the necessary information to a permit writer, it is the permit writer's responsibility to develop and incorporate into the permit all limits necessary to comply with the CWA. *Id.* The permittee is entitled to rely on the resulting permit "to know the extent of its enforceable duties." *Id.* Thus, "if the permit writer makes a mistake and does not include a requirement of the appropriate Act in the permit document, the permittee will [not] be enforced against[.]" *Id.*

Section 1369(b) reflects a similar emphasis on finality and certainty. Under that provision, judicial review of the issuance or denial of NPDES permits is available only "within 120 days from the date of such . . . issuance or denial," and issues that could have been raised during that 120-day window "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b). This fixed repose period encourages full and frank participation by all interested parties, including third parties, *at the same time* to ensure effluent limitations protective of water quality are established *before* permit issuance.[4] The 120-day window and the preclusion of subsequent collateral attacks on permitting decisions assures both permittees and permit writers that any concerns over a permit's terms—including, but not limited to, determinations that the authorized discharges do not have the reasonable potential to

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[4] The CWA provides that there be an "opportunity for public hearing" before the issuance of any NPDES permit issues, *see* 33 U.S.C. §§ 1342(a), 1342(b)(3), and that a "copy of each permit application and each permit . . . shall be available to the public." *Id.* § 1342(j).

cause or contribute to an excursion of water quality standards—will be conclusively resolved by a certain date and will not be relitigated, or raised for the first time, in any enforcement proceeding, including citizen suits under 33 U.S.C. § 1365. *See* 33 U.S.C. § 1369(b)(2).

The legislative history reinforces the textual emphasis on finality and regulatory certainty. According to the CWA's chief congressional proponent, Senator Muskie, the "three essential elements" of the 1972 CWA are "uniformity, *finality*, and enforceability." 118 Cong. Rec. 33,692, 33,693 (1972) (emphasis added). As he noted, "[w]ithout these elements a new law would not constitute any improvement on the old." *Id.* Elsewhere, a committee report explains that "[e]nforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay." S. Rep. No. 92-414, at 64. And when Congress enacted the CWA's citizen suit provision, it pointedly denounced "'common law' or court-developed definition[s] of water quality" and made clear that citizen suit enforcement "would not require reanalysis of . . . matters [that] have been *settled in the administrative procedure* leading to the establishment of such effluent" limitations. *Id*. at 79 (emphasis added).

This history illustrates that Congress expected *permit writers* to determine what specific limits are needed to ensure discharges will not run afoul of water quality standards, and that subsequent actions to enforce those limits would be judged based on the "objective evidentiary standard" articulated by those

limits rather than a retrial of what those limits should have included. *Id.*

B. Generic water quality prohibitions undermine the regulatory certainty that the Act's permit shield and repose provisions were designed to provide.

Generic water quality prohibitions gut the CWA's permit shield and repose provisions of their finality-conferring force. The statutory safe harbor premised on compliance with an NPDES permit means nothing if that permit sets undefined and unknowable touchstones of compliance. Congress's directive to bring all permit-related challenges within 120 days, and the preclusion of such challenges in the context of enforcement proceedings, likewise accomplishes nothing if agencies or citizen plaintiffs can perpetually sue permittees alleging that the permittee must do more to avoid causing or contributing to a violation of a water quality standard. Yet that is precisely what the Ninth Circuit's decision allows. Contrary to Congress's intent, enforcement actions will become protracted undertakings involving "court-developed definition[s] of water quality," rather than more limited proceedings requiring "a minimum of discretionary decision making or delay." *See* S. Rep. No. 92-414, at 64 & 79. Under the Ninth Circuit's logic, citizen plaintiffs are not only authorized to challenge permitting decisions and subsequently enforce a permit's terms, they can also rewrite those permit terms at any time throughout the life of the permit.

EPA's justification for opening permit holders up to this kind of *post hoc* enforcement—which the Ninth Circuit accepted—is that permit writers must be able

to include generic prohibitions as a "backstop" to ensure that discharges comply with the CWA. This logic is unpersuasive. App. 36.

Regulators already have longstanding "backstop" authority under EPA's regulations to modify, revoke, or reissue NPDES permits. Where necessary to incorporate any subsequently promulgated limits on toxic pollutants, address material changes in a permit holder's discharges, or correct technical errors, among other reasons, permitting authorities may modify a permit's terms. *See* 40 C.F.R. §§ 122.62–122.63. Such modifications take place outside of the enforcement context; they are undertaken by permit writers, not outside litigants, and they provide permittees fair notice and due process.

Importantly for *amici,* however, EPA's regulations allow for permit modifications to occur in a way which ensures that, consistent with this Court's findings in *E. I. du Pont*, 430 U.S. at 138 n.28, "[i]n general, permits are not modified to incorporate changes made in regulations during the term of the permit."[5] 49 Fed. Reg. 37,998, 38,045 (Sept. 26, 1984). The regulations "provide some measure of certainty to both the permittees and the [EPA] during the term of the permits." *Id.*;[6] *see Gen. Elec. Co. v. EPA*, 53 F.3d 1324,

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[5] As noted above, changes necessary to incorporate limits on toxic pollutants are a critical exception to this general rule, and they provide EPA with "backstop" authority that would not be impacted if this Court reverses the Ninth Circuit's decision.

[6] NPDES permits are limited to five-year terms. 33 U.S.C. § 1342(b)(1)(B); 40 C.F.R. § 122.46. This also helps to ensure that permits are appropriately updated to reflect new regulations in a timely manner without undercutting the finality permits are meant to provide to regulated entities.

1328–29, 1333–34 (D.C. Cir. 1995) (permit writers must give permittees fair notice of their compliance obligations such that permittees are "able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform[.]"); *In re: Ketchikan Pulp Company*, 7 E.A.D. 605, 1998 WL 284964, at *8 (U.S. EPA Environmental Appeals Board, 1998) (quoting *E.I. du Pont*, 430 U.S. at 138 n.28 regarding purpose of permit shield).

The Ninth Circuit's holding that generic water quality prohibitions are acceptable "backstop" provisions likewise ignores the multiple layers of review the CWA provides for ensuring NPDES permits contain all necessary requirements *before* they are issued. EPA and the public have multiple opportunities during the permitting process to review proposed permits, and EPA can ultimately deny the issuance of any permit that does not comply with the CWA. *See* 40 C.F.R. § 123.44.[7] Citizen groups may also challenge an issued permit within 120 days if they do not believe it includes effluent limitations necessary to ensure that the discharge does not cause or contribute to a water quality standard violation. *See* 33 U.S.C. § 1369(b)(1)(F). The numerous opportunities to reject,

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[7] Where water quality standards are not being attained, Congress established a detailed process for regulators to designate waters as "impaired" and set a total maximum daily load on pollutant(s) "at a level necessary to implement the applicable water quality standards." 33 U.S.C. § 1313(d)(1)(C). That process addresses all sources of pollution and further confirms that Congress placed the burden on regulators to determine what is needed to improve water quality. Congress did not intend for individual dischargers to shoulder the burden of ensuring water quality standards are met.

revise, or later update a permit belie the need for any "backstop" authority.

Under the decision below, permittees lack the finality and certainty that Congress intended to provide through the CWA's permit shield and the restrictions on judicial review of permits. Instead, generic prohibitions place permit holders in a perpetual state of having to litigate the question of whether the requirements in their permit are sufficiently strict—the exact position this Court determined Congress sought to avoid with the adoption of 33 U.S.C. § 1342(k). *See E. I. du Pont*, 430 U.S. at 138 n.28.

III. THE NINTH CIRCUIT'S DECISION CREATES SIGNIFICANT UNCERTAINTY FOR COMMUNITIES NATIONWIDE.

This Court should reverse the Ninth Circuit because its misreading of the CWA will have significant consequences for public clean water utilities and the communities they serve nationwide. These utilities need predictability and certainty to plan and pay for the substantial water infrastructure investments necessary to meet the CWA's stringent requirements and improve the quality of our nation's waters. Utilities already face challenges related to replacing aging sewer and stormwater infrastructure, increasing system resiliency in the face of climate change, addressing emerging contaminants, and fending off cybersecurity threats. Generic water quality prohibitions compound these challenges by leaving open the possibility that utilities already complying with the many effluent limitations in their NPDES permits may nonetheless be found by a court to be violating the CWA.

As stewards of public funds, municipal clean water agencies should not be put in the position of planning, financing, and implementing major infrastructure upgrades only to be told months or years later that the goalposts have unexpectedly moved. In its most recent assessment on national wastewater and stormwater capital investment needs, EPA estimated that clean water utilities will require over $630 billion (in 2022 dollars) in capital investments to meet the water quality objectives of the CWA between 2022 and 2041. EPA, *2022 Clean Watersheds Needs Survey Report to Congress*, at 7 (Apr. 2024), https://www.epa.gov/system/files/documents/2024-05/2022-cwns-report-to-congress.pdf. Ultimately, ratepayers must bear these enormous costs. *See* Rachel Layne, *Water costs are rising across the U.S. – here's why*, CBS News (Aug. 27, 2019), https://www.cbsnews.com/news/water-bills-rising-cost-of-water-creating-big-utility-bills-for-americans/. Distorting the NPDES program to allow the imposition of unanticipated additional costs through open-ended permitting requirements would cause these already significant expenses to rise further.

Take the following example from this Court's own backyard. In 2019, *amicus* DC Water began design work for the Potomac River Tunnel and in 2024 began mobilization at West Potomac Park. When completed in 2030, the tunnel will improve water quality and aesthetics of the Potomac River for the benefit of all. *See* DC Water's Potomac River Tunnel Project, *available at* https://www.dcwater.com/projects/potomac-river-tunnel-project. This $819 million project, paid for by DC Water ratepayers, involves the construction of a 5.5-mile-long tunnel that is 18 feet in finished diameter and buried approximately 100 feet deep, along

with related facilities, designed to: (i) reduce the number of combined sewer overflows from 74 events during an average year of rainfall to only four; and (ii) achieve a 93% reduction of the approximately 1.063 billion gallons of sewer overflows in an average year of rainfall. *Id.* Of course, a project of this scale, which is just part of DC Water's $2.99 billion Clean Rivers Project, requires numerous road and sidewalk closures, in this case near the scenic and heavily trafficked tidal basin. *See id.*

Given the significant public resources needed to plan and pay for this type of project, as well as the impacts its implementation will have on local residents—a six-year road closure "near a key commuter route," in the case of the D.C. project[8]—it is paramount that regulators provide a clear understanding of the goals a utility must achieve so it can make informed decisions and appropriately balance competing resource demands. Generic water quality prohibitions preclude such certainty. Indeed, a municipality could invest upwards of a billion dollars on new infrastructure to comply with all the specific effluent limits in its NPDES permit, only to be told in an enforcement action years later that a new regulator or citizen plaintiff's group has determined that a larger diameter tunnel is actually what water quality standards demand. This not only upends Congress's carefully

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[8] Jack Moore, *This stretch of road near the Lincoln Memorial will close for 6 years as part of project to keep sewer overflow out of Potomac River*, WTOP News, June 13, 2024, https://wtop.com/dc/2024/06/part-of-ohio-drive-near-the-lincoln-memorial-set-to-close-for-the-next-6-years-as-part-of-massive-sewer-tunnel-project/.

(continued...)

crafted permitting program and threatens the affordable provision of fundamental human health and environmental services, but also subjects public utilities to disparate, after-the-fact enforcement under the CWA's strict liability scheme, 33 U.S.C. §§ 1311(a) & 1342, which is backed by criminal penalties[9] and severe civil fines. *See id.* § 1319(c)-(d); *see also* 40 C.F.R. § 19.4 (EPA may assess civil penalties of up to $66,712 per day for each CWA violation); *Hawkes Co.*, 578 U.S. at 602 (noting that "consequences to landowners even for inadvertent [CWA] violations can be crushing") (Kennedy, J., concurring).

In effect, any citizen or zealous enforcer can usurp the role of permit writer at any time during the life of a permit to the extent they can persuade a court that some new limitation or action is necessary to achieve compliance with water quality standards. This is especially troubling in the context of permits issued to public clean water agencies and municipalities.

Giving citizens the ability to interpret and enforce generic prohibitions undermines the expertise of permit writers, scientists, and other subject matter experts within EPA and state environmental agencies. Unlike regulators, "citizen groups largely lack the engineering and systems expertise that needs [to] be brought to bear in insuring that a remedial action is appropriate to the nature of the violation and that any

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[9] The imposition of criminal penalties for violations of generic prohibitions "gives rise to serious vagueness concerns." *Sackett*, 598 U.S. at 680; *see also id.* ("Due process requires Congress to define penal statutes with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.") (internal quotation marks and citations omitted).

cost imposed will not outweigh the benefit achieved." *See Conservation Law Found., Inc. v. Mass. Water Res. Auth.*, Civ. A. No. 22-10626, 2023 WL 2072429, at *4 (D. Mass. Feb. 17, 2023).

That expertise is paramount in the context of municipal permittees, who are both environmental stewards and stewards of public funds, responsible for providing *affordable* essential services to communities. Thus, any enforcement action involving municipalities and clean water agencies must consider the complexity of wastewater and stormwater systems, the affordability of rates, and the limits of existing technologies. Third-party groups are ill-suited to assess these issues. They also "lack the information and ability to foster optimal compliance with a regulatory scheme as complex and far reaching as the [NPDES program]. . . . In fact, the NPDES regulatory scheme encourages citizens to bring inefficient suits." Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 Mich. L. Rev. 1793, 1812–13 (1993).

Citizen groups also lack accountability that would require them to consider and balance the interests of numerous affected stakeholders, including impacted communities and individual ratepayers. "A [CWA] plaintiff pursuing civil penalties acts as a self-appointed mini-EPA[,]" and "once the target is chosen, the suit goes forward without meaningful public control." *Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC), Inc.*, 528 U.S. 167, 209 (2000) (Scalia, J., dissenting). In contrast to the EPA Administrator and state agency heads—who are political officials answerable to the President (or Governors), legislatures, and the public—citizen groups serve more targeted

interests, and those interests may frequently be at odds with other public concerns. To be sure, citizens have an important right to enforce water pollution control requirements, but not to singlehandedly rewrite them as the Ninth Circuit's decision upholding such open-ended permitting requirements would allow.

Public clean water utilities provide vital human health and environmental services to communities nationwide 24 hours a day, 365 days a year. *Amici* and other public utilities throughout the country work diligently to fulfill their regulatory obligations, including those imposed under the CWA. That they be given clear advance notice of those obligations is not only a fair expectation, but a requirement the text and history of the CWA show Congress demanded. *Amici* ask this Court to reverse the decision below and restore the critical certainty undermined by it.

CONCLUSION

For the foregoing reasons, this Court should reverse the Ninth Circuit's decision.

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