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 *AMICUS CURIAE* HAYDEN AREA REGIONAL SEWER BOARD, SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus Hayden Area Regional Sewer Board (HARSB) is a rural sewer district that serves about 16,000 residents in and around the municipality of Hayden, Idaho.[1] HARSB collects and treats wastewater from these residents, then discharges the treated wastewater to the Spokane River under a Clean Water Act permit issued by the Idaho Department of Environmental Quality (IDEQ).

HARSB's permit directs it to "comply with" certain Idaho water-quality standards. These water-quality standards relate to the condition of the receiving water, rather than to HARSB's discharge, and are vague, prescribing (for example) that surface waters of the state be free from hazardous materials "in concentrations found to be of public health significance."

Like San Francisco's permit, this condition in HARSB's permit purports to hold HARSB responsible for the condition of the receiving waters, which HARSB does not (and cannot) control. And the prescribed condition of those receiving waters is vague as applied to HARSB's discharge.

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[1] No party or counsel for a party wrote any part of this brief. No person other than *amicus* and its counsel made any financial contribution to the preparation of this brief.

HARSB administratively appealed this condition of its permit, among others. That appeal is pending.[2]

The Court's resolution of the question presented in this appeal is likely to govern the outcome of HARSB's ongoing administrative appeal of this portion of its permit. HARSB has an acute interest in the outcome of this case.

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[2] *Hayden Area Reg'l Sewer Bd. v. Idaho Dep't of Env't Quality*, Agency Case No. 0125-24-01, https://www.deq.idaho.gov/public-information/laws-guidance-and-orders/petitions-for-review-and-precedential-orders/. After certiorari was granted in this case, HARSB filed an amended petition that is not yet reflected on the publicly available docket.

SUMMARY OF THE ARGUMENT

HARSB's Clean Water Act permit contains effluent limitations that regulate the type and quantities of constituents that HARSB may discharge. These effluent limitations regulate HARSB's discharge; were derived using discharge- and discharger-specific data; are subject to reasonable timelines for implementation; and are calculated to ensure compliance with Idaho's water-quality standards.

HARSB's ratepayers—all 16,194 of them—have funded over $38 million in improvements to its wastewater facility to meet these effluent limitations. HARSB's investments, in turn, improve water quality.

HARSB's permit also directs it to comply with Idaho's narrative water-quality criteria. These criteria, which are part of Idaho's water-quality standards, prescribe the condition of the surface water rather than of HARSB's discharge. HARSB does not, and cannot, control the condition of the surface water of the state. And the prescribed conditions are vague as applied to HARSB's discharge, requiring (for example) that surface waters of the state be free from "hazardous materials in concentrations found to be of public health significance." IDAHO ADMIN. CODE r. 58.01.02.200.01.

HARSB cannot plan, fund, and implement improvements to its wastewater-treatment facility to ensure compliance with this provision of its permit. As a result, HARSB is exposed to the risk of liability

for violating this provision of its permit, but that risk of liability does not improve water quality.

Incorporating water-quality standards, wholesale, into individual discharge permits is inconsistent with the text and structure of the Act.

The Clean Water Act distinguishes effluent limitations from water-quality standards. "Effluent limitation[s]," as defined in the Act, are "restriction[s] . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters." 33 U.S.C. § 1362(11). Effluent limitations in a discharger's permit must be calculated to "meet water quality standards." 33 U.S.C. § 1311(b)(1)(C).

"Water quality standards" are standards, consisting of designated uses and criteria to meet those uses, established by a state and approved by EPA that prescribe the condition of navigable waters within the state. *See* 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.3(i).

This textual distinction is confirmed by the Act's structure. Discharge permits and the effluent limitations within them are developed through an extensive process that includes public notice, public comment, and the opportunity for administrative appeal and judicial review. When this process is complete, the terms of the permit are binding on the discharger and on the public.

This process is undermined if permitting authorities merely direct permittees to comply with water-quality standards. Congress meant what it said in defining "effluent limitations"—they really are restrictions on constituents from point sources that are calculated to meet, but do not merely parrot, water-quality standards. *See* 33 U.S.C. § 1362(11); *id.* § 1311(b)(1)(C). And there would be no need for this extensive, discharge-focused, up-front process if the agency could merely direct dischargers to comply with water-quality standards.

Wholesale incorporation of water-quality standards into individual permits, as the EPA has done with San Francisco and IDEQ has done with HARSB, is inconsistent with the Act's text and structure and imposes the risk of crushing liability on dischargers for circumstances outside their control. Yet the Ninth Circuit's decision empowers permitting authorities to do just that. The decision below should be reversed.

ARGUMENT

I. Wholesale incorporation of water-quality standards occurs in many permits, including for small dischargers with limited resources like HARSB.

HARSB is a small sewer district with an annual budget of around $11.2 million that serves around 16,194 customers in and around the municipality of Hayden in Northern Idaho.[3] HARSB operates a wastewater treatment plant that collects wastewater from its customers; treats it; and discharges the treated wastewater to the Spokane River pursuant to a Clean Water Act NPDES (now IPDES) permit (Permit).[4]

Over the past two permit cycles,[5] HARSB has spent over $38 million in improvements to its

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[3] Hayden Area Reg'l Sewer Bd., *Official Minutes* (Sept. 21, 2023), www.harsb.org/news/09212023.htm.

[4] The original NPDES permit was issued by EPA in 1989. Idaho Dep't of Env't Quality, Fact Sheet at 11, Idaho Pollutant Discharge Elimination System Discharge Permit No. ID0026590 (June 1, 2024), www2.deq.idaho.gov/admin/LEIA/index.html?view=folder&id=3064. The NPDES permit was converted into an Idaho Pollutant Discharge Elimination System (IPDES) permit after Idaho obtained permitting primacy from EPA in 2018. IDEQ issued a new IPDES permit in April 2024. Idaho Dep't of Env't Quality, Idaho Pollutant Discharge Elimination System Permit No. ID0026590 (Apr. 29, 2024). HARSB administratively appealed the Permit in May 2024.

[5] NPDES permits last for five years, but are administratively extended so long as a timely renewal application is filed. Due to

wastewater treatment plant, funded primarily by customers through the rates paid for service. Improvements included installation of ultra filtration membranes, tertiary clarification, biosolid drying technologies, and other infrastructure necessary to meet the numeric effluent limits in the permit. *See* Fact Sheet at 11; HARSB Petition for Review at 2 (May 24, 2024), *Hayden Area Reg'l Sewer Bd. v. Idaho Dep't of Envt'l Quality*, Agency Case No. 0125-24-01.[6]

HARSB's Permit contains numeric effluent limitations. For each regulated pollutant, the effluent limitations identify the amount of the pollutant that may be discharged, expressed in terms of concentration, mass, or both; and explains the time-period for which those limits are measured, such as "monthly average," "weekly average," or "annual average." *See* Permit at 8–11.

IDEQ derived these effluent limitations by identifying the relevant water-quality standards; considering the characteristics of HARSB's discharge; and calculating the amount of each pollutant that HARSB could discharge to meet the water-quality standards. *See* Fact Sheet at 32–48.

Recognizing that HARSB could not immediately meet these limitations, through several permit cycles EPA and IDEQ created compliance schedules, as

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a backlog, HARSB's prior permit, issued in 2014, remained in effect until the Permit was issued in June 2024. *See* Fact Sheet at 11.

[6] https://www2.deq.idaho.gov/admin/LEIA/api/document/download/22133.

authorized by the Act, to provide HARSB sufficient time to plan, engineer, fund, and construct the capital improvements necessary to meet these numeric limits. *See* EPA, National Pollutant Discharge Elimination System Discharge Permit No. ID0026590 at 11–12 Dec. 1, 2014 (2014 Permit);[7] Permit at 7, 10, 34; Fact Sheet at 73.

The Permit also directs HARSB to comply with certain water-quality standards. In full: "The permittee must comply with all narrative [water quality] criteria at [Idaho Administrative Code r.] 58.01.02.200." Permit at 12.

Several of the referenced water quality criteria turn on the status of the "surface waters of the state" or put another way, the water within the Spokane River, which receives not only HARSB's discharge, but also the discharge from many upstream point- and non-point sources. These quality criteria provide, in relevant part:

> - "*Surface waters of the state* shall be free from hazardous materials *in concentrations found to be of public health significance* or to impair designated beneficial uses." IDAHO ADMIN. CODE r. 58.01.02.200.01 (emphasis added).

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[7] https://19january2021snapshot.epa.gov/sites/static/files/2017-12/documents/r10-npdes-harsb-id0026590-final-permit-2014-42pp.pdf.

- "*Surface waters of the state* shall be free from floating, suspended, or submerged matter of any kind *in concentrations causing nuisance or objectionable conditions* or that may impair designated beneficial uses." *Id.* at 58.01.02.200.05 (emphasis added).

- "*Surface waters of the state* shall be free from excess nutrients *that can cause visible slime growths* or other nuisance aquatic growths impairing designated beneficial uses." *Id.* at 58.01.02.200.06 (emphasis added).

- "*Surface waters of the state* shall be free from oxygen-demanding materials in concentrations *that would result in an anaerobic water condition*." *Id.* at 58.01.02.200.07 (emphasis added).

Wholesale incorporation of these water-quality standards into HARSB's permit creates several problems.

First, the water-quality standards apply to receiving waters of the State, not to HARSB's discharge. HARSB controls only its discharge—a small discharge, at that. It cannot control the actions of other dischargers. So it cannot ensure that "[s]urface waters of the state" meet certain conditions. *E.g.*, IDAHO ADMIN. CODE r. 58.01.02.200.01–.07.

This problem is particularly acute for HARSB. HARSB discharges into the Spokane River downstream from the Bunker Hill Complex Superfund Site. Fact Sheet at 13; EPA, *Fifth Five-Year Review Report for the Bunker Hill Mining & Metallurgical Complex Superfund Facility* at 4 (Sept. 30, 2021).[8] The Bunker Hill Complex is among the nation's largest and most complex Superfund sites. EPA, *Bunker Hill Mining & Metallurgical Complex: Cleanup Activities* (July 17, 2024).[9] Historical mining operations within the Complex resulted in widespread contamination, including contamination of surface waters with heavy metals such as arsenic, lead, and mercury. *Id.*; EPA, *Bunker Hill Mining & Metallurgical Complex: Contaminants of Concern*.[10]

Facilities at the Complex, including water-treatment facilities, continue to introduce pollutants, including heavy metals, into upstream tributaries of the Spokane River. EPA, *Action Memorandum for the Bunker Hill Groundwater Cut-off Wall and I-90 Subsidence, Kellogg, ID*, at 3 (Mar. 18, 2019).[11]

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[8] https://semspub.epa.gov/work/10/100363132.pdf.

[9] https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.Cleanup&id=1000195#bkground.

[10] https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.contams&id=1000195.

[11] https://semspub.epa.gov/work/10/100139927.pdf (noting lead, arsenic, cadmium and zinc are known to be on-site hazardous substances in concentrations that present health hazards to humans or the environment, and it is "known" that groundwater flowing towards upstream tributaries of the Spokane River "carries hazardous substances which are released into" those

HARSB and its ratepayers have invested heavily in the wastewater treatment plant to achieve compliance with the numeric effluent limits in its Permit. Even still, there may well be concentrations of metals, in receiving waters, that are "of public health concern." If so, at least some portion of those metals is introduced upstream of HARSB, including likely contributions from the Bunker Hill Superfund Complex. It's simply impossible for HARSB to ensure that the Spokane River is "free from hazardous materials" in concentrations "found to be of public health significance." IDAHO ADMIN. CODE r. 58.01.02.200.01.

The same is true for phosphorus and other nutrients: upstream point- and non-point sources contribute nutrients to the Spokane River at HARSB's point of discharge. HARSB cannot, in and of itself, ensure that the receiving waters are free from both "excess nutrients that can cause . . . nuisance aquatic growths" and "oxygen-demanding materials in concentrations that would result in an anaerobic water condition." IDAHO ADMIN. CODE r. 58.01.02.200.06 & .07.

Second, the incorporated water-quality criteria are too vague to provide meaningful direction to HARSB about its discharge. What are "concentrations [of hazardous materials] found to be of public health significance?" IDAHO ADMIN. CODE r. 58.01.02.200.01. What steps must HARSB take, or refrain from taking, if any, regarding any hazardous materials *beyond* the

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tributaries; "a phenomenon that has been occurring for decades").

specific effluent limitations that were calculated to meet water-quality standards? *See* Permit at 8–10; Fact Sheet at 32-48.

Similarly, what types, and concentrations, of "floating, suspended, or submerged matter" cause "nuisance or objectionable conditions?" IDAHO ADMIN. CODE r. 58.01.02.200.05. And what is "an anaerobic water condition?" *Id.* at 58.01.02.200.07.

Without knowing what these water-quality criteria mean, as applied to HARSB's discharge—and what steps HARSB must or cannot take regarding them, beyond the specific effluent limitations elsewhere in its permit—HARSB cannot "comply with" them. Permit at 12.

This mirrors the conundrum in which San Francisco finds itself. True, the directive to comply with water-quality standards in HARSB's permit is not as broad as the City's: San Francisco's permit prohibits it from violating *any* applicable water quality standard, Pet. App. 97, while HARSB's Permit directs it to "comply with" all *narrative* water-quality criteria, Permit at 12.[12] But the limits suffer the same fundamental defects.

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[12] Water-quality standards include two components: designated uses and criteria designed to protect those uses. *See* 33 U.S.C. § 1313(c)(2)(A) ("[A State's]water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses."). HARSB's permit directs it to comply with Idaho's narrative water-quality criteria, which are components of Idaho's water-quality standards. IDAHO ADMIN. CODE r. 58.01.02.200.

This buttresses a simple but important point: the problems identified by Petitioners are pervasive. They extend to large, wealthy cities in coastal California and small, cash-strapped rural sewer districts in Northern Idaho.

As explained below, wholesale incorporation of water-quality standards into individual permits exposes dischargers to the risk of Clean Water Act liability, to the detriment of all stakeholders, without improving water quality.

II. Wholesale adoption of water-quality standards into individual permits imposes the risk of liability with no attendant benefit to water quality.

HARSB's permit contains specific, numeric effluent limitations, which allow HARSB to discharge specific amounts of the identified pollutants, and which IDEQ derived through discharge-specific application of water-quality standards. *See* Fact Sheet at 32–48. Many of the numeric limits are, and have been, paired with compliance schedules designed to create a reasonable timeline to achieve them. *See* Permit at 7, 10, 34; Fact Sheet at 73.

These discharge-focused, specific effluent limitations, coupled with achievable timelines, drive HARSB to action. HARSB knows that failure to comply with these limits will expose it to "crushing consequences," *Sackett v. EPA*, 598 U.S. 651, 660 (2023) (cleaned up), while compliance with the limits shields it from liability, 33 U.S.C. § 1342(k). Within this framework, HARSB can formulate a plan to

comply with the effluent limits; articulate the plan to its ratepayers; obtain consent and funding for the plan; and implement the plan, including the necessary capital improvements.

This works—HARSB's scant customer base of 16,000 have funded over $38 million in improvements to the wastewater-treatment facility to meet these effluent limitations. HARSB benefits from the permit shield. And the public benefits from the water-quality improvements that flow from the upgrades to HARSB's facility.

But HARSB's permit conditions based on Idaho's narrative water-quality criteria are vague and turn on the condition of "surface waters" of the state rather than what HARSB can control—the nature and content of *its discharge*. *See* Permit at 12; IDAHO ADMIN. CODE r. 58.01.02.200. These narrative water-quality criteria are effective immediately. Inherent in the nature of a compliance schedule are specific steps for a discharger to ensure its own discharge complies with the permit conditions, but neither the regulated nor regulator knows what HARSB must or must not do to ensure that receiving waters—outside of HARSB's control—meet the water-quality criteria.

So the water-quality-standards incorporated into HARSB's permit do not drive HARSB's behavior. HARSB cannot singlehandedly control the condition of the surface waters of the state. It is only one discharger among many, and the condition of these particular surface waters is heavily influenced by pollution that comes from the upstream Superfund site.

Not only does the vagueness of these conditions leave HARSB in the dark as to whether its discharge complies but it also leaves HARSB unable to identify steps that will, for example, ensure that surface waters of the state meet the conditions prescribed in the narrative water-quality criteria. Under these circumstances, HARSB cannot identify steps that must—or even should—be taken to achieve compliance with these permit conditions. In turn, HARSB cannot formulate a plan; articulate the plan to its ratepayers; obtain consent and funding for the plan; and implement the plan. HARSB is left to cross its fingers and hope that compliance with the specific, numeric limitations also satisfies the incorporated water-quality-standards; that agencies or citizen-enforcers not opportunistically enforce against HARSB; or that, if a judicial enforcement action is brought, the court takes a common-sense approach and doesn't hold HARSB responsible for factors outside of its control.

This does not work—it is detrimental to all parties. Dischargers must live with the risk of liability, because they do not know what specific steps to take to avail themselves of the permit shield. Small dischargers with limited funds are particularly impacted: they cannot make improvements to their facilities "just in case" those improvements might decrease liability associated with incorporated water-quality-standards. Specific, concrete steps with achievable timelines are necessary to drive these small dischargers' behavior.

Agencies tasked with monitoring and enforcing the permits face the mirror image of this issue: it's

less expensive, easier, and entails less litigation risk to monitor and enforce conditions that contain discharger-specific, concrete limitations rather than vague limitations based on the condition of the receiving water. In other words, the receiving-water-focused, vague nature of water-quality-standards, when incorporated into individual permits, creates uncertainty for the agency as well as the dischargers, which impedes monitoring, enforcement, and associated benefits to water quality.

Nor does the public benefit from incorporating water-quality standards into individual permits. For example, the HARSB-discharge-focused, specific, numeric effluent limits in HARSB's permit provide the certainty necessary to make the investments to improve water quality. The water-quality-standards-turned-effluent limits do not. The specter of crushing liability associated with water-quality-standards incorporated as effluent limitations is attenuated from the Act's purpose: improving water quality.

III. Wholesale incorporation of water-quality criteria into individual permits is inconsistent with the text and structure of the Clean Water Act.

A. Wholesale incorporation of water-quality standards into an individual permit does not create an "effluent limitation" as defined in the Act and obliterates the statutory distinction between "effluent limitations" and "water quality standards."

Under the Act, an "effluent limitation" is a "restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents *which are discharged from point sources* into navigable waters." 33 U.S.C. § 1362(11) (emphasis added).

"Water quality standards," by contrast, are state-established and EPA-approved standards that identify designated uses, and criteria to protect such uses, of navigable waters. *See* 33 U.S.C. § 1313(c)(2)(A) (requiring water-quality standards to include designated uses and criteria "of the navigable waters"); 40 C.F.R. § 131.3(i) ("Water quality standards are provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses.").

The text of the Act thus distinguishes between effluent limitations and water-quality standards: effluent limitations are restrictions on constituents discharged from a point source; water-quality

standards are designated uses and associated criteria that apply to the waters into which a point source discharges. Effluent limitations must be calculated "to meet water quality standards." 33 U.S.C. § 1311(b)(1)(C); *see also* 33 U.S.C. § 1312(a) (requiring permitting agency to establish water-quality-based effluent limits "which can reasonably be expected to contribute to the attainment or maintenance of" water quality). The textual distinction between effluent limitations and water-quality standards occurs throughout the Act, as others have noted.[13]

Consider the citizen-suit provision. It allows citizens to bring suit against persons alleged to be in violation of "an effluent standard or limitation under this chapter" or orders related to effluent standards or limitations. 33 U.S.C. § 1365(a)(1). The Act confers subject-matter jurisdiction on district courts "to enforce such an effluent standard or limitation," and agency orders related to them. *Id.* § 1365(a). The phrase "effluent standard or limitation" includes several limitations, standards, and regulations established under the Act. *See* 33 U.S.C. § 1365(f) (defining "effluent standard or limitation" to include standards or limitations developed under 33 U.S.C. sections 1311, 1312, 1316, 1317, 1322(p), 1341, 1342, and 1345(d)). Notably absent from this list are water-quality standards, which are authorized under section 1313 of the Act.

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[13] *See* Pet.Br. at 34–37.

So effluent limitations and other standards—but *not* water-quality standards—are enforceable by citizen-suit under section 1365(a). This, too, confirms the *bona fide* distinction between effluent limitations and water-quality standards.

The textual distinction between effluent limitations and water-quality standards must be maintained. Effluent limitations are not, and cannot be, water-quality standards. And vice-versa: water-quality standards are not, and cannot be, effluent limitations.

This textual distinction plays out in practice. Take HARSB's permit. IDEQ calculated effluent limitations that restrict constituents in HARSB's discharge. Permit at 8–11. These effluent limitations were based on—and designed to meet—the State's water-quality standards. *See* Fact Sheet at 32–48; 33 U.S.C. § 1311(b)(1)(C). These are *bona fide* effluent limits—they are "restriction[s]" on "quantities, rates, and concentrations" of "constituents which are discharged from [a] point source[] into navigable waters." 33 U.S.C. § 1362.

But IDEQ also directed HARSB to "comply with" Idaho's narrative water-quality criteria. Permit at 12. The narrative water-quality criteria, part of Idaho's water-quality standards, relate to the condition of the "surface waters of the State." IDAHO ADMIN. CODE r. 58.01.02.200. The water-quality criteria are not, *in substance*, restrictions on the quantities, rates, and concentrations of constituents discharged from a point source. They are, *in substance*, criteria that apply to navigable waters, not HARSB's discharge. A

permitting authority cannot transmute a water-quality-standard into an effluent limit by merely ordering a discharger to "comply with" a water-quality standard. Doing so obliterates the distinction between the terms as used in the Act.

B. Wholesale incorporation of water-quality standards into permits is inconsistent with the structure of the Act.

Key structural features of the Act confirm that there is—and must remain—a distinction, *with* a difference, between effluent limitations and water-quality standards.

Others have persuasively identified and explained some of these key features. *See* Pet.Br. at 34–37, 45–48. HARSB's focus is on the extensive up-front permitting process, which, when combined with the permit shield and enforcement structure, confirms that effluent limits must indeed regulate constituents "discharged from point sources" rather than the condition of the receiving water itself. 33 U.S.C. § 1362(11).

The Act establishes significant up-front processes for developing, collecting input regarding, and issuing NPDES permits. Upon receiving an application, the agency must tentatively decide whether to issue a draft permit or, instead, whether to deny the permit. 40 C.F.R. § 124.6(a).[14] Among other things, the agency must then identify the applicable technology-

[14] These federal regulations also apply to states, tribes, and other permitting authorities. *See* 40 C.F.R. § 123.25.

based effluent limitations and, for pollutants that have the reasonable potential to exceed water-quality standards, calculate water-quality-based effluent limitations that derive from, and are calculated to meet, those water-quality standards. *See* 40 C.F.R. § 122.44(a)(1) (technology-based effluent limits); *id.* § 122.44(d)(1)(i) (water-quality-based effluent limits for pollutants with reasonable potential to exceed water-quality standards); *id.* § 122.44(d)(1)(vii)(A) (water-quality-based effluent limitations must be "derived from" water-quality standards).

After all this, the agency must publish a draft permit that contains all the proposed conditions, including proposed effluent limitations, as well as a draft fact sheet that explains how the conditions were derived. 40 C.F.R. § 124.6(d) (draft permit), *id.* § 124.6(e) (draft fact sheet). The agency then publishes the draft permit and draft fact sheet and provides notice to the public. *See* 40 C.F.R. § 124.10. During this comment period, any interested member of the public can comment and may ask for a public hearing. *Id.* § 124.11.

After the comment period closes, the agency must consider and respond to all significant comments that were received, 40 C.F.R. § 124.17, and must also include or respond to comments provided by other public agencies, 40 C.F.R. § 124.59.

The agency then publishes the final permit and fact sheet. Members of the public and the permittee can appeal the permit and then seek judicial review. *See* 40 C.F.R. § 124.6(e).

This extensive, up-front process makes sense. The conditions in the permit are the linchpin of the Act. Once the permit is finalized, its conditions are binding on the discharger. Violations of the permit are subject to "crushing consequences," whether through enforcement by an agency or through citizen-suit. *Sackett v. EPA*, 598 U.S. 651, 660 (2023) (cleaned up); 33 U.S.C. § 1365 (CWA's citizen-suit provision).

The permit conditions are also binding on the agency and on the public. So long as the permittee discharges pollutants in accordance with the permit, the permittee is shielded from liability. *See* 33 U.S.C. § 1342(k).

This is true even if a member of the public, or the agency, believe that the limitations in the permit aren't strict enough. *See* EPA Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,312 (May 19, 1980) ("[I]f 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 . . . ."). And citizens can bring a citizen-suit alleging upon violations of effluent limitations, while they cannot bring a citizen-suit alleging that the effluent limitations are inadequate (or to enforce water-quality standards, for that matter). *See* 33 U.S.C. § 1365(a)(1) (authorizing "any citizen" to commence a civil action against any person "who is alleged to be in violation of . . . an effluent standard or limitation under this standard").

The extensive up-front procedure associated with NPDES permits confirms the distinction between

effluent limits and water-quality standards in a few ways.

First, Congress meant what it said when it defined an "effluent limitation" as a restriction on constituents "which are discharged *from point sources* into navigable waters." 33 U.S.C. § 1362(11) (emphasis added). Developing effluent limitations isn't a simple or easy task. It involves significant work, and requires significant process from the permittee, the agency, and the public. Once this process is complete, the effluent limitations are binding on the permittee, the agency, and the public. The extensive up-front process confirms that development of effluent limitations is, and must be, a discharger-specific task that results in specific limitations that apply to particular dischargers.

Second, incorporation of water-quality standards into individual permits would drain the importance from this process. The whole point of NPDES permits is to establish effluent limitations designed to meet water-quality standards. *See* 33 U.S.C. § 1342(a)(1) (authorizing issuance of NPDES permit "upon condition that such discharge will meet" all applicable requirements of the Act). If the agency could just order permittees to comply with water-quality standards, there would be no need for notice, comment, response to comments, an appeal period, and the other processes associated with issuing a permit. And citizen-suits would, in substance, be authorized to enforce water-quality standards rather than effluent limitations.

In short, the extensive process associated with developing NPDES permits is not superfluous. It's a key feature of the Act. Translating broadly applicable water-quality standards into effluent limitations that restrict a permittee's discharge is difficult. It's important. It drives water-quality improvements. And it defines the rights of the permittee and the public alike. Allowing agencies to command individual permittees to comply with water-quality standards undercuts this key structural component of the Act.

CONCLUSION

For these reasons, and the reasons set forth by Petitioner, the Ninth Circuit's decision should be reversed.

Respectfully submitted,

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