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* THE NATIONAL ASSOCIATION OF HOME BUILDERS, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., AND THE AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION IN SUPPORT OF PETITIONER

JEFFREY LONGSWORTH
JOHN A. SHEEHAN
Counsel of Record
KAREN BENNETT
EARTH & WATER LAW LLC
1455 Pennsylvania Ave., N.W.,
Ste. 400
Washington, DC 20004
(202) 280-6362
john.sheehan@earthandwatergroup.com

Counsel for Amici Curiae
(additional counsel listed at the end of the brief)

130268

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

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INTEREST OF *AMICUS CURIAE*

The National Association of Homebuilders (NAHB) represents over 140,000 builder and associate members throughout the United States, including individuals and firms that construct and supply single-family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. As part of the construction and development process, its members commonly obtain Clean Water Act (CWA) permits that include both numeric and narrative limitations.[1] NAHB has developed comprehensive familiarity with the CWA's permitting requirements and provides compliance advice to its members. NAHB frequently participates as a party litigant and *amicus curiae* to safeguard the rights and interests of its members.

The Associated General Contractors of America, Inc. (AGC of America) is the nation's largest and most diverse trade association in the commercial construction industry, representing more than 28,000 companies through a nationwide network of chapters in all 50 states, the District of Columbia, and Puerto Rico. AGC of America's member firms are engaged in building, heavy, civil, industrial, utility, and other construction for both public and private property owners and developers. These construction activities on land and water often require Clean Water Act permits before proceeding. AGC of America works to ensure the continued success of the commercial

1. Pursuant to this Court's Rule 37.6, Amici state that no part of this brief was authored by counsel for any party, and no person or entity other than Amici made any monetary contribution to the preparation and submission of the brief.

construction industry by advocating for federal, state, and local measures that support the industry; providing education and training for member firms; and connecting member firms with resources needed to be successful businesses and responsible corporate citizens. AGC of America's goal is to serve its members by advancing the profession of construction and improving the delivery of the industry's services consistent with the public's interest.

The American Road & Transportation Builders Association's (ARTBA) membership includes private and public sector members, that plan, design, build and maintain the nation's roadways, waterways, bridges, ports, airports, rail and transit systems. ARTBA's nearly 8,000 members generate more than $650 billion annually in U.S. economic activity, sustaining more than 4.4 million American jobs. Many ARTBA members directly participate in the federal permitting process and undertake a variety of construction-related activities requiring compliance with the CWA. ARTBA members also restore and preserve wetlands within the scope of transportation construction projects, reflecting the complementary objectives of improving our nation's transportation infrastructure and protecting essential water resources. Consequently, ARTBA's members are directly impacted by CWA permitting decisions, and look to ARTBA for guidance and advocacy on these matters.

STATEMENT ON QUESTION PRESENTED

The question presented is whether the Clean Water Act (CWA) allows the U.S. Environmental Protection Agency (EPA) or a state to impose generic narrative provisions

in National Pollutant Discharge Elimination System (NPDES) permits as "backstops" for protecting water quality standards, and then subjecting permitholders to enforcement actions related to the generic narrative provisions when more specific water quality-based effluent limitations are available and appropriate. Arguably, the generic narrative provisions at issue in this case are not effluent limitations required by the NPDES program and fail to inform the permittee what actions it must take to comply with its permit.

As the City and County of San Francisco (San Francisco) point out, this Court and the Second Circuit have correctly interpreted the CWA to require EPA and states to develop effluent limitations in permits to protect a water body's designated uses. *Amici*, national construction trade associations, submit this brief to inform this Court about the broad reaching effects on multiple CWA NPDES permitting programs that could be negatively impacted by this Court's decision. Some of these programs may differ from the permit conditions at issue in this case but are still "effluent limitations."[2]

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2. NAHB filed a similar brief in *Entergy v. EPA*, 556 U.S. 208 (2009), explaining how the issues before this Court in that case could impact how NPDES permits were issued to the construction industry. ("In construing section 316(b), the court of appeals has confused more than 30 years of case law interpreting other CWA sections that have more pertinence to the home building process,and has needlessly exposed those sections to new legal challenges. NAHB submits this brief to ensure that, regardless of whether the Court reverses or affirms, the scope of any decision here is limited to interpreting only CWA § 316(b), and does not disturb well-established precedent interpreting other CWA provisions that more directly regulate construction and

SUMMARY OF ARGUMENT

The City and County of San Francisco's NPDES permit includes a generic narrative prohibition against causing or contributing to violations of a water quality standard in addition to other detailed effluent limitations specifying the quantities of pollutants San Francisco is authorized to discharge to comply with the CWA. The generic narrative provisions—that the Ninth Circuit referred to as "backstop" provisions—amount to the same CWA enforcement scheme that proved unworkable under the pre-1972 reformulation of the CWA. These provisions fail to provide San Francisco with prior notice of the actions required to ensure compliance with its permit, thereby exposing San Francisco, along with any similarly situated permittees nationwide, to an undeterminable risk of CWA enforcement actions and citizen suits.

The CWA requires EPA and authorized states to clearly specify a permittee's water quality protection obligations through pollutant-specific effluent limitations. These pollutant-specific limitations include technology-based requirements that may and often are set forth as descriptive narrative permit requirements (such as. "best management practices" or specific operational requirements or prohibitions), as well as numerical technology-based and water quality-based effluent limitations when appropriate, as explained in detail below. When a permittee conducts its discharging activities consistent with the effluent limitations in its permit, CWA

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development of housing.") This Court used, in part, information contained in NAHB's *amicus curiae* brief in its final decision in *Entergy*. The construction trade associations raise similar concerns here.

Section 402(k) provides a defense against allegations of non-compliance. However, issuing NPDES permits with generic narrative provisions, such as "cannot cause or contribute to a violation of water quality standards," fails to notify permittees of required actions and undermines the permit shield Congress provided for in the CWA.

The Ninth Circuit's split opinion marks a return to the pre-CWA system of water quality regulations that proved unworkable. *EPA v. California ex rel. State Water Res. Control Bd. (EPA v. California)*, 426 U.S. 200, 202 (1976). Before the CWA was amended in 1972, water quality protection enforcement relied on the attainment of state ambient water quality standards, but the approach was difficult to enforce because of the lack of any specific standard against which a party could measure compliance. Congress revised the CWA in 1972 to require any point source pollutant discharges to jurisdictional waters to be legal when such dischargers are subject to and in compliance with an NPDES permit. See 33 U.S.C. § 1311(a).

Under this revised approach, Congress shifted the burden to EPA and states to ensure that state water quality standards are met through pollutant-specific effluent limitations in NPDES permits, providing permittees with certainty against enforcement actions. See 33 U.S.C. § 1342(a)(2). *Arkansas v. Oklahoma*, 503 U.S. 91, 96 (1992). Going forward, the expectation was that EPA and states would issue permits authorizing discharges of pollutants consistent with the restrictions expressed in the permit as pollutant-specific effluent limitations. 33 U.S.C. § 1362(11); *E.I du Pont de Nemours v. Train*, 430 U.S. 112, 119-20 (1977) (Justice Stevens clearly indicating that those limitations were translated into obligations of the

discharger through their inclusion in an NPDES permit.). Where a permittee acted within the effluent limitations set forth in the permit, they were afforded certainty that the government would not bring an enforcement action or that they would not have to defend themselves against litigation for the permit term. See, *Piney Run Preservation Ass'n v. Cnty. Commissioners of Carrol Cnty.*, 268 F.3d 255 (4th Cir. 2001). The Ninth Circuit's opinion inappropriately shifts that burden to permittees and strips them of the protections Congress intended.

San Francisco's challenge to the NPDES permit issued by EPA is necessary because the permit includes unclear, generic narrative provisions that put San Francisco in jeopardy of a future permit enforcement action.[3] *Amici* also obtain a variety of NPDES permits and want to make certain that this Court's decision does not upend existing successful permitting approaches, particularly narrative effluent limitations, in "construction general permits" (CGP) issued by EPA and states. Generally, CGPs authorize point source discharges of pollutants associated with ongoing construction-related land disturbing activities through descriptive non-numeric technology-based best management practices, operational requirements and prohibitions, as well as numerical technology-based and water quality-based point source effluent limitations, as appropriate.

In this case, the Ninth Circuit's split decision disrupts the long-established CWA enforcement framework

3. See EPA enforcement action alleging San Francisco violated its Bayside permit based on Generic Prohibitions identical to those challenged in this case. Complaint *United States v. City & Cnty. Of San Francisco*, No. 3:24-cv-02594 (N.D.Cal. May 1, 2024).

Congress created in 1972 and harkens back to a pre-1972 approach that will increase litigation exposure for tens of thousands of regulated parties covered by the NPDES permit program. While we agree with San Francisco that this Court should overturn the Ninth Circuit's ruling, *Amici* submit this brief to ensure that, regardless of whether the Court reverses or affirms, the scope of any decision in this matter does not disturb the well-established precedent of using descriptive non-numerical narrative effluent limitations, as appropriate, in construction-related NPDES permits.

I. STATEMENT OF THE CASE

A. The Clean Water Act Permitting Program is Expansive and Complex

The Clean Water Act's permitting program is expansive and complex, regulating "discharges" of "pollutants" from "point sources" to "navigable waters." Congress recognized that addressing point source discharges from diverse industries and municipalities would require EPA to develop sector-specific programs tailored to focus on the unique point source discharges associated with each, including stormwater discharges. See, 33 U.S.C. §§ 1342(p)(3)(A) Industrial discharges; (B) Municipal discharge; 1342(p)(4)(A) Industrial and large municipal discharges; (B) Other municipal discharges; (5) Identifying other stormwater discharges to be regulated; (6) Issuing regulations and requiring state stormwater programs; and 1342(q) Combined sewer overflows.[4]

4. Unlike more traditional wastewater discharges that are fairly constant over time, stormwater discharges are highly

The Act prohibits the discharge of a pollutant by any person from any point source to navigable waters except when authorized by a permit issued under the National Pollutant Discharge Elimination System. 33 U.S.C. §§ 1311(a), 1342 (making the permit, not the ambient water quality standard, the instrument for managing and restricting discharges). See *EPA v. State Water Resources Control Board*, 426 U.S. 200, 206 (1976) (finding an NPDES permit transforms generally applicable effluent limitations and other standards, including those based on water quality, into the obligations of the individual discharger.). Administrative and judicial enforcement of permits relies on the requirement that every NPDES permit is statutorily required to set forth effluent limitations that are restrictions on the quantities, rates, and concentrations of chemical, physical, biological, and other constituents which may be discharged from point sources into navigable waters. 33 U.S.C. § 1342. Compliance with the permit is deemed compliance with the CWA. 33 U.S.C. § 1342(k).

NPDES permits may be either individual or general. An individual permit is tailored to the site-specific conditions of a single discharger, such as San Francisco, whereas a general permit applies to multiple sites and operators that conduct similar operations and generate similar types of discharges. Both individual and general permits are based on the permit writer's professional knowledge of those types of activities and discharges. *See* EPA, NPDES Permit Writers' Manual (NPDES

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episodic, variable, and seasonal, requiring NPDES permits for stormwater discharges to have to be more flexible and allow the permittee to adjust their compliance program for likely variations.

Manual) 3.1 (Sep. 2010). The permitting authority carries the burden of developing NPDES permits that set forth appropriate technology-based and water quality-based effluent limitations, whether numerical or descriptive non-numerical, as necessary and appropriate. Permit holders who comply with general permits are not liable under the CWA for discharges from regulated activities.

B. NPDES Permits are Enforced Through Numeric and Non-Numeric Requirements Specified in the Permit

Congress has granted EPA and states broad flexibility in crafting NPDES permits to achieve a desired reduction in point source pollutant discharges. This includes setting uniform effluent limitations through industry-wide regulations (promulgated as effluent limitation guidelines or ELGs) rather than developing them on an individual basis during the permit issuance process. These limitations are translated into obligations for the discharger through their inclusion in an NPDES permit. *See Nat. Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1380 (D.C. Cir. 1977); *E.I. du Pont de Nemours v. Train*, 430 U.S. 112, 119-20 (1977).

Permitting authorities start with the categorical ELGs in developing NPDES permits and supplement those technology-based effluent limitations with other limitations that can be expressed as numeric pollutant restrictions or specific narrative requirements to implement various management practices, when a numeric limit is not feasible. *Nat. Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1380 (D.C. Cir. 1977); See *Citizens Coal Council v. EPA*, 447 F.3d 879, 865 (6th Cir. 2006) (EPA

may impose narrative requirements because "effluent limitations are not limited to numeric discharge[ ] restrictions".); *Waterkeeper All., Inc. v. EPA* 399 F.3d 486, 502 (2d Cir. 2005) (numeric effluent limitations in the form of required management practices meet the CWA's definition of "effluent limitations").

Although EPA usually establishes quantitative or numerical effluent limitation guidelines, EPA and states may also promulgate best management practices, which are qualitative or non-numerical effluent limitations that are still technology-based because they are derived from the technology standards prescribed by the CWA. 33 U.S.C. § 1251 et seq.; *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 486 (2005); 40 C.F.R. § 122.44(k)(3). Only when technology-based effluent limitations are insufficient to maintain or achieve water quality standards in the receiving water body consistent with designated uses, does the Act require NPDES permits to include additional water quality-based effluent limitations. 33 U.S.C. §§ 1312(a), 1314(l). EPA and state regulators have the responsibility to determine the correct mix of precise numeric and descriptive non-numeric effluent limitations, including any additional water quality-based effluent limitations, that they then incorporate into NPDES permits.

C. Water Quality-Based Effluent Limitations Are Triggered When Technology Limits are Not Sufficient to Address a Specific Water Quality Concerns

The CWA requires NPDES permits to include additional water quality-based effluent limitations when technology-based effluent limitations are insufficient to

control point source pollutant discharges to attain or maintain water quality standards. *Natural Res. Def. Council, Inc. v. EPA* (*NRDC II*), 808 F.3d 556, 564 (2d Cir. 2015). Water quality-based effluent limitations are set "based upon the amounts and kinds of pollutants in the water in which the point source discharges" (*e.g.*, the receiving water.) *Natural Res. Def. Council, Inc. v. EPA* (NRDC I), 822 F.2d 104, 110 (D.C. Cir. 1987).

Like technology-based effluent limitations, water quality-based effluent limitations are incorporated into the NPDES permit such that the permittee has notice of what is required of them. The CWA guarantees that compliance with the effluent limitations of a permit will be deemed to be compliance with the CWA, even if the pollutants in the point source discharges would reach waters already in violation of existing water quality standards. *Arkansas*, 503 U.S. at 107.

D. Incorporating Technology and Water Quality Provisions into General Permits

Descriptive narrative effluent limitations implemented through best management practices are a valuable tool for regulators to protect against receiving water quality problems, particularly where numeric limitations are infeasible such as where point source discharges may be associated with large land areas and sporadic or hard to control flows. Examples include certain agricultural enterprises, such as concentrated animal feeding operations, and large-scale construction and municipal stormwater management systems.

General permits are particularly reliant on the ability to utilize descriptive narrative standards as

technology-based effluent limitations due to the vast scope of the types of discharges covered and the "general" nature of the permit. For example, EPA and states have developed general permit programs and technology-based effluent limitations for industrial stormwater (including construction that disturbs 5 acres of land or greater), small construction activities (that disturb between one and five acres of land), small municipal separate storm sewer systems (MS4s), certain boat or vessel discharges, concentrated animal feeding operations, pesticide use, and aquaculture, among others, all of which rely on incorporating best management practices as the primary discharge control and implementation tools.[5]

In the case of regulated construction stormwater point source discharges, EPA has promulgated categorical, activity-specific Construction and Development effluent limitations guidelines (C&D ELGs). See 40 C.F.R. Part 450. These ELGs require construction site operators to implement eight different narrative "erosion and sediment controls;" three different "pollution prevention measures;" other narrative controls related to "dewatering," "soil stabilization," and "surface outlets;" and the ELGs identify four specific "prohibited discharges." See 40 C.F.R. 450.21. All of the control measures and prohibitions are specific to certain actions, and none are generic provisions similar to the generic narrative provisions that are the subject of this case.

In addition to the C&D ELGs, EPA's construction stormwater general permit (CGP) relies upon highly descriptive best management and good housekeeping

5. For links to all of EPA's NPDES permits, see https://www.epa.gov/npdes/all-npdes-program-areas.

practices, pollution prevention plans, visual inspections, and annual reporting requirements to effectively address stormwater pollutant discharges from regulated sites. For example, EPA's CGP includes the following types of descriptive non-numeric permit requirements:

- Develop a Stormwater Pollution Prevention Plan (SWPPP) and keep it up to date.

- Complete and submit a Notice of Intent (NOI) to EPA via the NPDES eReporting Tool (NeT).

- Implement erosion and sediment controls and pollution prevention practices throughout the entire construction project.

- Conduct required inspections to verify compliance with permit. Inspections may only be conducted by a qualified person who has either: (1) completed the EPA construction inspection course and passed the exam, or (2) holds a current construction inspection certification or license from a program that covers the same core material as EPA's inspection course.

- Conduct routine maintenance and take corrective action to fix problems with controls or discharges.

- Complete documentation of all site inspections, dewatering inspections, and corrective actions.

- Comply with turbidity monitoring requirements for dewatering discharges to sensitive waters (if applicable).

- Comply with any State, Tribal, or territory-specific requirements in Part 9 of the permit.[6]

EPA incorporates more site-specific water quality-based effluent limitations when technology-based effluent limitations may not fully protect the water quality of various jurisdictional receiving waters. This process is more difficult in general permits than in site-specific individual permits but can be achieved without the types of generic narrative provisions contained in San Francisco's individual permit. For example, EPA's CGP incorporates many water-body specific controls that become water-quality-based effluent limitations if a discharger has point source discharges into any of those designated water bodies. One specific example illustrates how the permitting authority (here EPA) sets forth water quality-based effluent limitations for certain federal lands in the State of Washington (over which EPA retains permitting authority):

> Discharges to segments of waterbodies listed as impaired by the State of Washington under Section 303(d) of the Clean Water Act for turbidity, fine sediment, phosphorus, or pH must comply with the following numeric effluent limits:

6. https://www.epa.gov/npdes/2022-construction-general-permit-cgp

Parameter identified in 303(d) listing	Parameter Sampled	Unit	Analytical Method	Numeric Effluent Limit
•Turbidity •Fine Sediment • Phosphorus	Turbidity	NTU	SM2130	25 NTUs at the point where the stormwater is discharged from the site.
High pH	pH	su	pH meter	In the range of 6.5–8.5

[Source: https://www.epa.gov/system/files/documents/2022-01/2022-cgp-final-permit.pdf at 94]

E. There is an Important Overlap Between Construction General Permits and Municipal General Permits.

EPA's permitting authority can be more limited than in the CGP scenario when it attempts to apply strict water quality-based effluent limitations. Congress specifically directed EPA to issue permits to municipal separate storm sewer systems (MS4s) containing "controls to reduce the discharge of pollutants to the maximum extent practicable (MEP), including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator

or the State determines appropriate for the control of such pollutants." While Congress did not specifically define MEP, it is clear that any requirement that forces MS4s to meet specific water quality standards, "in addition to" meeting the MEP exceeds EPA authority under 33 U.S.C. § 1342(p)(3)(B)(iii) that requires municipalities to control pollutants only to MEP. See *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999)(Congress did not mandate strict compliance with state water quality standards, but provided EPA with limited discretionary authority contained in 33 U.S.C. § 1342(p)(3)(B)(iii)).

Furthermore, at the same time Congress developed the MS4 permitting mandates, it also established a permitting program for stormwater associated with industrial activity. 33 U.S.C. § 1342(p)(3)(A). That section provides "Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title." *Ibid.* (emphasis added). In other words, industrial stormwater permits are subject to more traditional NPDES permitting effluent limitations, including both technology-based and water quality-based permit requirements of CWA sections 301 and 304. Congress, however, used different language for MS4 permits in section CWA 402(p)(3), limiting EPA to the MEP standard without otherwise mandating strict adherence to any specific effluent limitations, including water quality based requirements.[7] Therefore, the

7. Note: Even within the NPDES industrial stormwater permit program, implementation of water-quality based effluent limits has presented significant challenges to EPA and state permitting authorities due to the lack of wet weather-specific water quality criteria and the fact that the existing criteria are dependent on steady-state, low-flow conditions not present during storm events.

structure of the Act itself requires that non-numeric, best management practices incorporated into permits must be recognized as sufficient to meet the water quality standards those permits are specifically designed to protect.

MS4 NPDES permits also often require municipal operators to control stormwater discharges from active construction operations within the MS4's jurisdiction. These controls may be in addition to or as an alternative to the construction stormwater NPDES permits required by 40 C.F.R. § 122.26(b)(14)(x) or 40 C.F.R. § 122.26(b)(15). The potential for overlap between the CGP and the small MS4 permit programs can present some challenges for permit writers as well as regulated parties. The NPDES general permit for small MS4's in Massachusetts presents a good example of these challenges. EPA remains the permitting authority for the Commonwealth of Massachusetts. Like San Francisco's permit, EPA struggled to find the proper mix of technology-based effluent limitations and water quality concerns and considerations when promulgating the MS4 general permit for small MS4s in Massachusetts.

The Massachusetts small MS4 permit demonstrates that EPA can avoid using generic "backstop" narrative standards and instead create the type of structured approach to protecting water quality that is clear to the permittee, the public, and other parties such as construction site operators. In its small MS4 permit, EPA's first iteration included the same narrative permit term ("ensure discharges do not cause or contribute to an exceedance of water quality standards") at issue in this case. After the permit was challenged in court by many interested parties, EPA removed that generic

narrative provision and replaced it with a more precise process for addressing water quality concerns and a specified methodology for MS4s to follow, including future planned actions the MS4 would take, to implement MEP technology-based effluent limitations and still work to minimize certain pollutant discharges that were causing water quality problems. See Statement of Basis for Proposed Permit Modifications[8] at 4 (explaining that EPA was replacing the permit term "ensure discharges do not cause or contribute to an exceedance of water quality standards" with a more precise and clear process for reducing certain pollutant discharges to help protect water quality).

II. ARGUMENT

A. San Francisco's Vague NPDES Permit Fails to Establish Descriptive Permitting Requirements Necessary to Achieve Compliance.

San Francisco's NPDES permit authorizes the City and County to operate a wastewater treatment and collection system that serves more than 250,000 people in western San Francisco. The permit is both complex and unique, including discharges into the Pacific Ocean and discharges from over 250 miles of combined sewers under a statewide program designed to address combined sewer overflows (CSOs). *San Francisco Public Utilities Commission, San Francisco Wastewater Long Term Control Plan Synthesis.*[9] Consistent with the CWA, San

8. https://www3.epa.gov/region1/npdes/stormwater/ma/ma-small-ms4-2020-mods-sob.pdf

9. San Francisco's Long Term Control Plan is a collection of twenty-three documents. In 2018, San Francisco prepared a

Francisco's permit contained detailed effluent limitations, including numeric and non-numeric best management practices governing San Francisco's complex operation of its CSO control facility.

However, deeming those effluent limitations insufficient for achieving constantly updated jurisdictional water quality standards intended to protect designated uses, EPA added two generic narrative "backstop" provisions, including: (1) that a discharge "not cause or contribute to a violation of any applicable water quality standard. . . ."; and (2) that "no discharge of pollutants shall create pollution, contamination, or nuisance as defined by California Water Code Section 13050." Section 13050(*l*)(1)(A) defines "pollution" to include "alteration of the quality of waters of the state . . . which unreasonably affects . . . the waters for beneficial uses."

These generic provisions do not represent the specific types of technology-based effluent limitations or the more stringent, water quality-based effluent limitations as required by the CWA, nor do they represent descriptive narrative permit requirements—including "best management practices" or specific operational requirements—when numerical effluent limitations are not feasible. 33 U.S.C. § 1311(b)(1)(C). 40 C.F.R. §§ 122.2, 122.44(k)(3). Rather, these generic narrative provisions directly impose the water quality standard itself on the

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summary of these documents in San Francisco Wastewater Long Term Control Plan Synthesis and submitted the Synthesis to the Regional Water Board as part of the NPDES permitting process for its Bayside facilities. San Francisco explained that its "process of planning for, designing, and constructing projects to minimize and control wet weather discharge was iterative and extended for nearly two decades."

permittee in violation of the CWA and the permitting scheme mandated by Congress.

This approach is contrary to the revised regulatory scheme established by the CWA, where EPA and states are required to translate the *overall* water quality standards for a given jurisdictional body of water into specific obligations of the individual discharger, as expressed as effluent limitations in that discharger's NPDES permit. *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976).

The Act directs regulators to use specific regulatory tools in developing permits that ensure water quality is protected: (1) technology-based effluent limitations determined as best available or best practicable technology for reducing pollutants at the source; (2) additional water-quality-based effluent limitations where technology-based effluent limitations are insufficient to attain or maintain water quality standards; and (3) descriptive "narrative" effluent limitations that specify how particular activities are to be conducted, so as to achieve compliance with the relevant water quality standards.

The various specific effluent limitations contained in the NPDES permit are then subject to "direct administrative and judicial enforcement." *EPA v. California*, 426 U.S. at 205. There is no provision in the CWA for imposing the jurisdictional water's specific water quality standards or objectives themselves directly into a permit. Compliance with these generic narrative provisions is impossible to measure in a permit and threatens to return the NPDES permit program to the ineffective pre-1972 program based solely on unworkable water quality standards, which were

used to guide performance by polluters and to trigger legal action to abate pollution. Id. at 202.

Generic narrative provisions place permittees in a vulnerable position of not knowing up front what is required of them to comply with their permit, at risk of being held liable for discharging even one molecule of a certain pollutant, regardless of the actual condition of the receiving water, and harkens back to a permitting program that this Court and Congress found untenable. See App. 65 Collins, J., dissenting, "Depending on the condition of the receiving water, any amount of discharge of certain pollutants could "contribute" to a violation of water quality standards." *Amici* assert that such generic narrative permit provisions are not "effluent limitations" required by the CWA, and in fact are not permit limitations at all, making them inappropriate for any of the various NPDES permitting programs.

B. Generic Backstop Provisions Undermine the Entire Purpose of NPDES Permits and Should Not Be Allowed

Generic, narrative backstop provisions are not effluent limitations that EPA and states are required to develop and impose on discharges through NPDES permits. 33 U.S.C. § 1311(b)(1)(C). Rather, these non-specific backstop provisions seek to impose the water quality standard itself as the applicable limitation. This approach inappropriately shifts the burden of ensuring the protection of water quality standards and uses to the permittee, contrary to Congress's intent that EPA and states are best positioned to bear that responsibility.

Rather, the NPDES permitting program provides alternatives where the requirements of the permit are found not to be sufficient. For example, NPDES permits may be reconsidered and revised where necessary to incorporate additional limitations and restrictions on discharges. 40 C.F.R. § 122.62 (Modification or revocation and reissuance of permits); 40 C.F.R. § 124.5 (Modification, revocation and reissuance, or termination of permits). These provisions are available to address the very circumstances that drove EPA and the Water Quality Board to include the backstop generic narrative provision, including a change effluent limitations, standards or regulations on which the permit was based or where information was not available.

Essentially, the ability to modify, revoke and reissue a permit eliminates the need for such backstop provisions in any NPDES permit. Moreover, and specific to general permits, is the inclusion of specific triggers requiring additional monitoring, updating best management practices and other compliance measures where additional implementation actions are needed to help protect water quality. Availability of these regulatory tools for addressing water quality exceedances, or a miscalculation in the strength of the permit, further support that there is no place in the NPDES permitting program for generic backstop provisions.

Such vague narrative provisions are not necessary for water quality standards protection, are not measurable, and are likely to lead to absurd results. For example, while the terms "does not cause an impairment" might be measurable, "does not contribute to an impairment" might mean that the discharge of one molecule of a pollutant

might be "contributing to an impairment," more-or-less creating a total ban on certain pollutants even though the water quality standards or total maximum daily loads for the receiving stream would allow (and the stream could assimilate) much more than a single molecule. See Judge Collins, dissenting at 58 (Noting that in the case of a waterbody that happens to contain pollution levels that exceed the applicable water quality standards, the inclusion of such a narrative condition would automatically make unlawful *any* further discharges of the same pollutant into those waters, automatically triggering the crushing consequences that the CWA provides "even for inadvertent violations.") Moreover, the creation of a complete ban on discharges is contrary to implementation of state water quality planning tools intended to address impaired waters while also allowing stormwater and industrial discharges containing low levels of pollutants, such as Total Maximum Daily Loads. See 40 C.F.R. § 130.7 process for addressing impaired waters through limitations on discharges in NPDES permits.

In the CGP, such backstop or generic narrative provisions will produce absurd results. For example, in the CGP provisions described above that address the 303(d) protections that EPA inserted to protect certain waters in the State of Washington, had EPA instead mandated that regulated construction site discharges could not cause or contribute to a water quality violation, no construction would occur near those waters because no site operator could remove every grain of sand or fine sediment that would cause or contribute to the turbidity concerns related to the 303(d) listings. Those receiving streams already contain pre-existing and natural levels of turbidity, making a prohibition on de minimis levels

of turbidity illogical and unnecessary. In that same example, EPA set forth additional effluent limitations to protect certain Washington State receiving waters that it determined would help improve those waters without prohibiting any discharge from construction sites. More globally, no construction would occur in any watershed in which CWA Section 303(d) listings included any pollutants associated with any construction materials, including for any metals, pH, pesticides, and more, if the permitting authority used the "cannot cause or contribute to" generic narrative backstop provision.

C. The Ninth Circuit Decision Eliminates the Permit Shield

Amici and all other NPDES dischargers rely heavily on the statutory permit shield from CWA liability when they conduct their discharging activities consistent with their permit terms and conditions. 33 U.S.C. §§ 1342(k) establishes that compliance with a permit shall be deemed compliance with . . . sections 1311 (TBELs provision), 1312 (WQBELs provision), 1316 (standards of performance), 1317 (toxic and pretreatment effluent standards), 1343 (ocean discharge criteria).

The scope of the permit shield is broad. For individual permits, the focus is on the permit and the information provided during the application process. For general permits, coverage includes all pollutants within the specified scope of that particular general permit, subject to all pollutants, notification requirements, and other conditions. In both cases, there is a heavy reliance on the contents of the permit and disclosures made during the permit application process.

The Ninth Circuit's opinion, allowing use of generic backstop provisions, undermines the permitee's ability to understand the full scope of permit shield coverage. These backstop provisions lack specific information in both the permit and the information disclosures. Courts have found that the permit shield defense is unavailable when the permittee is not in full compliance with all the terms of its permit. *Ohio Valley Envtl. Coal Co.*, 845 F.3d 133 (4th Cir. 2017). When EPA and states are allowed to incorporate generic provisions that are not clearly defined and measurable, the permit shield does not provide a defense. The Ninth Circuit's decision creates a significant vulnerability for all NPDES dischargers and undermines the protections Congress intended when it created the NPDES permit program. By allowing the use of generic backstop provisions, the decision strips permittees of their certainty and protection, exposing them to unanticipated enforcement actions and citizen suits. This uncertainty is detrimental not only to permittees but also to the integrity of the regulatory framework that relies on clear, measurable, and enforceable permit conditions.

The permit shield is a cornerstone of the CWA's regulatory scheme, providing essential protection and predictability for dischargers that comply with their permits.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

JEFFREY LONGSWORTH
JOHN A. SHEEHAN
Counsel of Record
KAREN BENNETT
EARTH & WATER LAW LLC
1455 Pennsylvania Ave., N.W., Ste. 400
Washington, DC 20004
(202) 280-6362
john.sheehan@earthandwatergroup.com

THOMAS WARD
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th Street, NW
Washington, DC 20005

Counsel for National Association of Home Builders

LEAH PILCONIS
ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.
2300 Wilson Blvd., Ste. 300
Arlington, VA 22201

Counsel for Amicus Curiae the Associated General Contractors of America, Inc.

PRIANKA SHARMA
AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION
250 E. Street, SW
Ste. 900
Washington, DC 20024

Counsel for American Road & Transportation Builders Association

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