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 ORANGE COUNTY COASTKEEPER IN SUPPORT OF RESPONDENT ENVIRONMENTAL PROTECTION AGENCY

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

Amicus Orange County Coastkeeper ("Coastkeeper") respectfully submits this brief in support of the United States Environmental Protection Agency ("EPA") in the case of *City and County of San Francisco v. United States Environmental Protection Agency*. Coastkeeper is a nonprofit clean water organization dedicated to the protection of swimmable, drinkable, and fishable water, and the promotion of watershed resilience throughout our region. For the past 25 years, we have served as proactive stewards of both freshwater and saltwater ecosystems, working collaboratively with diverse groups in the public and private sectors to achieve healthy, accessible, and sustainable water resources.

Together with our program, Inland Empire Waterkeeper, we have been key players in implementing the Clean Water Act ("CWA" or "Act") in our region by commenting on and advocating for the terms to be included in National Pollutant Discharge Elimination System ("NPDES") permits, including Municipal Separate Storm Sewer System ("MS4") permits, industrial permits, and sector-specific NPDES permits unique to our region.

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[1] Pursuant to Rule 37.6, *amicus* represents that this brief was authored by counsel for *amicus* and not by counsel for any other party. Donations made to Orange County Coastkeeper specifically for the preparation and submission of this brief were used for such.

Coastkeeper also has decades of experience enforcing NPDES permits on behalf of our members. Our extensive experience has positioned us as essential contributors to ensuring compliance with the CWA. Through innovative and effective programs in education, advocacy, restoration, research, and enforcement, we strive to uphold the integrity of water quality standards and the health of our watersheds.

Our involvement in this case reflects our vested interest in the proper implementation and enforcement of NPDES permits. We believe that clear, readily understood permit provisions and monitoring requirements are essential to achieving the objectives of the CWA. Our experience in enforcing NPDES permits affirms that fair notice of permittee obligations and robust monitoring are critical to ensuring compliance and protecting water quality.

The EPA's Issuance of well-crafted Combined Sewer Overflow ("CSO") permits is crucial to protecting the public from exposure to raw sewage in their recreational waters. Safe recreational waters are essential for public health and are vital to the economic well-being of many businesses in Orange County and throughout the nation. Tourism, fishing, and water sport industries rely on clean and safe water, and any compromise in water quality due to inadequate CSO permit provisions can have severe repercussions. The EPA's efforts to implement and enforce clear and effective CSO permits are therefore critical not only for protecting

water quality and public health but also for supporting the numerous businesses that depend on clean water.

SUMMARY OF ARGUMENT

As the Second Circuit correctly held in *Natural Resources Defense Council v. U.S. E.P.A.*, 808 F.3d 556 (2d Cir. 2015), NPDES permit limitations are impermissible if they: (1) are too vague for the permittee to figure out if it is in violation, and (2) lack appropriate monitoring provisions that will lead to the generation of information reasonably useful for determining whether the permittee has complied with the permit's limitations. To ensure a workable CWA, this Court should agree with the Second Circuit's *Natural Resources Defense Council* ruling.

Notably, there are many other NPDES permits issued across the nation with narrative limitations on not causing or contributing to an exceedance of WQS that would run afoul of the CWA and the Second Circuit's *Natural Resources Defense Council* approach. For example, the Regional Water Quality Control Boards across the state of California (the state agencies with authority to issue NPDES permits in California) have issued MS4 permits that contain a nearly identical prohibition on discharges that cause or contribute to an exceedance of WQS. These permits often fail to elaborate on which WQS must be met, how compliance will be determined, or

require monitoring such that an enforcement authority may readily determine compliance. Such permit terms violate the CWA's mandate that NDPES permit writers develop limitations necessary to achieve WQS. These vague prohibitions fail because they effectively add no additional limitations on a permittee's discharge and offer no method of determining compliance. The Court should issue a ruling which clarifies that such permit limitations are not a valid exercise of CWA permitting authority.

However, the Court's ruling should not extend as far as urged by San Francisco and the *Amici* supporting San Francisco. The Court should not agree with San Francisco and these *Amici* that it is *per se* impermissible for NPDES permit limitations to impose restrictions on the effect that a discharge may have on receiving waters. The problem with Petitioner City and County of San Francisco's ("Petitioner or "San Francisco") challenge to its NPDES permit is that it fails to adhere to the central canon of statutory construction, which is to first look to the actual language of the statute to try to discern its meaning. Petitioner does not parse the actual text of the CWA in its argument that limitations that prohibit a discharger from causing or contributing to a violation of Water Quality Standards ("WQS") are *per se* impermissible and that NPDES permitting authorities can only adopt *effluent* limitations in NPDES permits, *i.e.*, limitations on the quality or quantity of pollutants

in a discharger's effluent. This interpretation ignores that Congress used the term "effluent limitations" in the CWA subsections governing the issuance of technology-based discharge restrictions, such as 33 U.S.C. §1311(b)(1)(A) and used the word "limitations" in the CWA subsection that authorizes the issuance of limitations designed to ensure attainment of WQS, 33 U.S.C. §1311(b)(1)(C). It is a canon of statutory construction that when Congress uses two different words or phrases in similar settings, it intends them to have different meanings. The true question presented then, is whether the challenged permit term requiring San Francisco to refrain from causing or contributing to an exceedance of WQS is a valid limitation within the meaning of CWA subsection 301(b)(1)(C), 33 U.S.C. §1311(b)(1)(C).

The use of the word "limitations" in CWA subsection 301(b)(1)(C) authorizes EPA and the States to issue limitations that meet WQS, but only if those limitations are not so vague as to create the two problems identified by the Second Circuit in the NPDES permit ("Vessel General Permit") at issue in *Natural Resources Defense Council v. U.S. E.P.A.*: (1) that the permit was too vague to give the permittee guidance as to what was expected or how to determine compliance, and (2) that in the context of the permit's requirements and monitoring provisions, the permit's water quality limitations could not realistically be enforced. 808 F.3d at 578-82. NPDES permit requirements, *i.e.*, limitations, that sufficiently give the permittee notice of its

obligations and contain appropriate monitoring for permittees or regulators to determine compliance or noncompliance are lawful under the Act and consistent with the Second Circuit's holding in *Natural Resources Defense Council*.

In this setting, San Francisco's challenged permit term is an example of a limitation that is not too vague for San Francisco to know what is expected of it and whether it is causing WQS to be exceeded, hence violating the limitation. Compliance with the limitation can be readily determined given the permit's elaborate and well-framed monitoring requirements. San Francisco's CSO permit conforms to the EPA's Combined Sewer Overflow Policy ("CSO Policy" or "the Policy"), which imposes a myriad of receiving water monitoring and analysis requirements that should have informed San Francisco, and has in fact informed San Francisco, of the information that it needs to know how to comply with the limitation challenged and know, at the time of discharge, whether its discharges cause or contribute to an exceedance of WQS.

While any NPDES permit could be crafted to avoid the defects identified by the Second Circuit, CSO permits specifically avoid these defects because they have been framed to comply with the CSO Policy. The CSO Policy contains a variety of requirements for CSO permits, such as: monitoring of the permittee's effluent to determine the impact on the receiving waters, modeling different sizes of storm events to assess how environmental factors may impact the permittee's discharges, monitoring

of ambient water quality in dry and wet weather, and analysis of the impact of other point and non-point sources of pollution. In essence, the CSO Policy requires the permittee to perform its own analysis to determine the reasonable potential for its overflows to cause or contribute to an exceedance of WQS. Not all NPDES permits have such robust monitoring requirements, particularly for conditions requiring ambient water quality monitoring.[2]

Such detailed permit requirements for CSOs avoid the defects pointed out by the Second Circuit in the Vessel General Permit, but even if such permits did not, in the setting of a permit issued to a Combined Sewer System ("CSS"), pursuant to CWA section 402(q), 33 U.S.C. §1342(q), Congress has expressly authorized the narrative limitation that a discharge not cause or contribute to an exceedance of WQS. The EPA's inclusion of this limitation is a mandate from Congress.

Coastkeeper urges this Court to issue a ruling that provides the regulated community, regulators, and the public notice of a permit's obligations and monitoring requirements such that compliance or non-compliance may be readily ascertained. Such a ruling need not prohibit permit limitations where compliance is based on the quality of the receiving

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[2] Such requirements may make sense for some permits, such as MS4 permits where the permittee has access to the receiving waters and the ability to conduct ambient water-quality monitoring. These permit requirements may not be feasible in other permits, such as an individual NPDES permits that regulate a single, privately-owned business.

waters so long as the limitation provides sufficient notice of the permittee's obligations and requires monitoring sufficient to determine compliance with the permit term.

ARGUMENT

I. INTRODUCTION

With its rugged rocky shores in the north, its Golden Gate and forested central coast, and warm sandy beaches where southern California surf culture was born, California's ecological and cultural heritage is inextricably bound to California's 1,100-mile-long coastline – one of the most diverse coastal ecosystems in the world.[3] Gray whales, humpback whales, blue whales, killer whales and more migrate along this wonderous stretch of the Pacific Ocean, feeding on krill and native salmon that swim their way upstream to breed in rivers whose headwaters originate in the Sierra-Nevada. San Francisco's Ocean Beach extends for several miles along the City's Pacific shore and is heavily used and prized by millions of San Francisco Bay area residents and visitors for surfing some of California's highest quality waves, swimming, fishing, and strolling along the beach. Unfortunately, during large rainstorms which often coincide with the prime surfing season, Petitioner occasionally spews

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[3] Cal. Ocean Prot. Council, Strategic Plan to Protect California's Coast and Ocean 2020-2025 (2020), https://www.opc.ca.gov/webmaster/ftp/pdf/agenda_items/20200226/OPC-2020-2025-Strategic-Plan-FINAL-20200228.pdf.

millions of gallons of raw sewage from its aged sewage system, containing human feces, used feminine products, industrial wastewater, viruses, parasites, and other toxic and harmful substances into the Pacific Ocean.

In California, the ocean economy contributes $44 billion to California's GDP, spanning tourism, various forms of recreation, commercial and recreational fishing, shipping, other industries, and more.[4] Beach closures due to water quality threaten not only the health of the aquatic ecosystems, but the health of the economy—an economy that cannot be separated from the natural environment in which it thrives. Understanding the severe impacts of CSO spills on public health and the aquatic environment, the EPA adopted a CSO Policy in 1994 to create a nationwide strategy for reducing and eliminating the occurrence of such events.

It is true that WQS themselves are not effluent limitations on the level of pollutants in discharged wastewater, but rather requirements on the quality of receiving waters. However, it is permissible to draft both/either end-of-pipe effluent limitations or any other "*limitations,*" including "limitations" on not causing exceedances of WQS so long as the limitation regulates the permittee's conduct in-fact, not merely in principle. To this end, it is enough when a limitation is crafted such that the permittee and enforcement authority can readily

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[4] *Id.* at 2.

determine compliance with the limitation. This is consistent with the Second Circuit's interpretation of the Clean Water Act in *Natural Resources Defense Council*, 808 F.3d 556, but this does not require overturning the permit at issue here because, (1) Petitioner's permit read in context with the myriad of monitoring and analysis requirements provides Petitioner with notice of whether it is in compliance with the permit's limitations, and (2) Congress, by incorporating the CSO Policy into CWA section 402(q)(1), 33 U.S.C. § 1342(q)(1), has explicitly mandated the inclusion of the narrative limitation in the NPDES permit that San Francisco challenges.

II. NPDES PERMIT EFFLUENT LIMITATIONS AND LIMITATIONS MUST NOT BE UNDULY VAGUE, BUT PROVIDED THEY ARE SUFFICIENTLY PRECISE, PERMIT LIMITATIONS CAN INCLUDE RESTRICTIONS ON THE EFFECTS THE DISCHARGES HAVE ON RECEIVING WATERS.

A. Unduly vague NPDES permit effluent limitations and limitations are problematic.

From its decades of commenting upon and advocating for proper NPDES permits and CWA citizen suit enforcement, Coastkeeper knows how critical it is to obtaining CWA goals that NPDES permit limitations be written to be clearly understood by the discharger, EPA and the States,

concerned citizen environmental groups, and the public at large. The Second Circuit in *Natural Resources Defense Council v. U.S. E.P.A.* correctly appreciated the importance of clear NPDES permit requirements and this Court should find *Natural Resources Defense Council* to have been correctly decided. This Court should join with the Second Circuit and find that NPDES permits must be framed in a manner: (1) that provides the permittee sufficient guidance such that its obligations are clear, and (2) that a regulatory agency could and has included in the NPDES permit a means for monitoring compliance with that limitation. Any limitation, be it an effluent limitation or any other NPDES permit limitation, that does not meet this test would conflict with a proper interpretation of the CWA statutory obligation that applies in all NPDES permit contexts to set "any more stringent limitation, including those necessary to meet water quality standards." 33 U.S.C. §1311(b)(1)(C). Any limitation, including any effluent limitation, not meeting this test should be deemed sufficiently vague such that, as the Second Circuit put it, it does not constitute regulating in fact as opposed to in principle. 808 F.3d at 578.

The Second Circuit *Natural Resources Defense Council* decision was correct that the EPA NPDES Vessel General Permit at issue in that case was invalid due to it being unduly vague. That particular permit failed to identify the WQS at issue and otherwise failed to have enough specificity for the discharger to determine what it needed to do to comply. That permit was further flawed for its lack

of monitoring requirements that would develop the information necessary to determine permit compliance. *Id*. at 583-84. In its many years of environmental protection and advocacy, Coastkeeper has become well aware that there are numerous other NPDES permits issued by EPA or the States that suffer from the vagueness problem identified by the Second Circuit in *Natural Resources Defense Council*. One example is the tentative regional Municipal Separate Storm Sewer NPDES Permit ("Draft Regional MS4 Permit"). Coastkeeper has devoted considerable time and effort to pointing out the flaws with that recently issued draft permit and advocating to the issuing agency, the California Regional Water Quality Control Board, Santa Ana Region ("Santa Ana Regional Board"), that the permit should be reformed. So far, however, these efforts have been futile.

The Draft Regional MS4 Permit will regulate storm water discharges from municipal sewer systems that span three large counties in southern California, with an estimated combined population of 7.76 million people.[5] The permit generally requires compliance with WQS, which as explained herein is not *per se* illegal. However, it fails to meet the Second Circuit's test because it provides only a vague statement of how the discharger might

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[5] U.S. Census Bureau, QuickFacts, https://www.census.gov/quickfacts/fact/table/sanbernardinocountycalifornia,riversidecountycalifornia,orangecountycalifornia,losangelescountycalifornia/BZA115218.

demonstrate compliance—and specifically does not indicate how the monitoring plan called for in the permit will be used to evaluate compliance. For example, the Draft Regional MS4 Permit includes no standards and no methodology for evaluating whether "[t]he discharge from the Permittee's MS4 was controlled to a level that it did not cause or contribute to the exceedance in the receiving water(s)." Cal. Reg'l. Water Quality Control Bd., Santa Ana Region, Tentative National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges of Pollutants in Runoff from the Municipal Separate Storm Sewer Systems in the Counties of Orange, Riverside, and San Bernardino within the Santa Ana Region 28 (2024), https://www.waterboards.ca.gov/santaana/water_issues/programs/stormwater/docs/2024/tentative_ms4_permit_2-29-24.pdf.

Coastkeeper has spent considerable resources attempting to evaluate whether stormwater discharges from the various cities that will be covered by the Draft Regional MS4 Permit will cause exceedances of WQS. In the absence of numeric effluent limitations, or even a methodology for evaluating compliance, a compliance evaluation for these cities is extremely challenging and potentially functionally impossible by Coastkeeper, the municipal permittees, other interested citizen groups, EPA, or the state of California. This state of affairs runs afoul of Congress's intention in enacting the CWA and requiring EPA and the States to issue NPDES permits with pollutant limits that create

"clear and identifiable requirements" to "provide manageable and precise benchmarks for enforcement." S. Rep. No. 92-414, at 81 (1971).

Compounding the problem with the vagueness of the Draft Regional MS4 Permit's restriction on causing WQS exceedances, as noted, the permit lacks any meaningful provision for monitoring compliance with that restriction that would be sufficient to determine whether the municipal permittees are in compliance. This failure, unfortunately repeated in many NPDES permits, conflicts with Congress's intent that NPDES permits must include monitoring provisions that are adequate for determining whether dischargers are complying with the terms of their respective NPDES permits.[6]

Permits analogous to the Draft Regional MS4 Permit or the Vessel General Permit at stake in *Natural Resources Defense Council* are deleterious

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[6] *See* 33 U.S.C. § 1342(a)(2); *Natural Resources Defense Council v. County of Los Angeles*, 725 F.3d 1194, 1207 (9th Cir. 2013) ("[a] NPDES Permit is unlawful if a permittee is not required to effectively monitor its permit compliance."); *see also Natural Resources Defense Council*, 808 F.3d at 583 (finding that Vessel General Permit violated CWA because it did not "contain a mechanism to evaluate compliance" with effluent limitations); *City of Brentwood v. Central Valley Regional Water Quality Control Board*, 123 Cal. App. 4th 714, 723-24 (NPDES permit compliance monitoring serves a dual purpose: first, to allow permittees to assess their own compliance and quickly respond if non-compliance is discovered, and second, to "keep enforcement actions simple and speedy."); *see also* 40 C.F.R. §§ 122.41(j)(1), 122.44(i)(1), 122.48(b).

to all interested parties. The permittee lacks fair notice of how to comply with the permit or demonstrate through monitoring compliance with the permit. The NPDES permitting authority must invent, *ex post facto*, metrics for compliance in an enforcement action if WQS are not being met. Citizen enforcement groups and agencies both will be heavily encumbered, perhaps thwarted, in developing the necessarily fact and expert intensive showing that would be needed to attempt to prove that discharges are interfering with the attainment of WQS. Defending against these lawsuits is equally burdensome for permittees, who should be able to exonerate themselves with their own monitoring data, or at least know the merits of a case against them based on their own monitoring information.

Along with the Second Circuit, Coastkeeper acknowledges that it is not always an easy task for EPA or state permitting agencies to translate WQS into end-of-pipe effluent limitations or proscribe best management practices[7]. *Natural Resources Defense Council*, 808 F.3d at 578. However, as the Second Circuit aptly instructed, "[e]ven if determining the proper standard is difficult, EPA cannot simply give up and refuse to issue more specific guidelines." *Id*. Such guidelines could take the form of either end-of-

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[7] Specifying Best Management Practices ("BMPs") is something that NPDES Permitting authorities may adopt. Neither party disputes that BMPs are an appropriate permit limitation. Since the adoption of BMPs as a limitation is not at issue before the Court, analysis of this type of permit limitation is omitted from this brief but may also be subject to the same test advocated for by Coastkeeper.

pipe effluent limitations, within facility BMPs, or receiving water limitations that are reasonably specific such that it is an objective determination as to whether they are being complied with. *Id*. at 565.

B. NPDES Permit Limitations prohibiting an impact on receiving waters are not *per se* impermissible.

Contrary to San Francisco's opening brief arguments, neither endorsement of the *Natural Resources Defense Council* rule, nor due respect for legislative history, mandates that the only permissible limitations in NPDES permits are effluent limitations that restrict the amount or nature of pollutants in a permittee's effluent before or as it is discharged. It is permissible under the CWA for the EPA or the States to issue limitations in NPDES permits that are narrative in nature and/or that impose restrictions on the effect that a discharge can have on receiving waters. However, this is given that the NPDES permit limitation provides the permittee with guidance regarding its obligations and is accompanied with monitoring provisions that are appropriately tailored to generate the information necessary to evaluate whether the discharger is in compliance with its permit.

In attacking "generic prohibitions" in NPDES permits as impermissible, San Francisco's Opening Brief fails to adhere to the first canon of statutory construction that in interpreting a statute, the starting point is the statute's actual language. *Loper*

Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2264 (2024) (first step in interpreting a statute is to study its language to determine whether Congress has directly spoken to the issue presented, or whether the statute is ambiguous and thus must be interpreted according to ordinary canons of statutory construction). San Francisco's argument is fundamentally flawed because it does not parse the actual CWA text at issue—the CWA statutory provision at issue does not use the words "generic" or "prohibitions." This provision has one operative word, and that is "limitations." As discussed below, this term in context allows NPDES permit limitations restricting the impact that discharges have on receiving waters.

The question presented here is not about "generic prohibitions" as characterized by San Francisco, but rather what the term "limitations" means in the context of CWA section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). It is well established in law that words are to be known by the company they keep. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,* 515 U.S. 687, 694 (1995). Critically, in the core CWA provision in which it set out the restrictions on pollutant discharges that EPA and the States could impose in NPDES permits, Congress used the term "effluent limitation(s)" to describe the discharge restrictions that could be set based on available pollution control technologies ("technology-based effluent limitations" or "TBELs.") 33 U.S.C. § 1311(b)(1)(A), (b)(1)(B), (b)(2)(A), (b)(2)(E). However, in setting forth the restrictions that EPA and the States could impose to

ensure WQS attainment ("water quality-based limitations" or "WQBLs"), Congress described the restrictions as just "limitations." It would violate long-settled canons of statutory construction to not heed and ascribe meaning to this different choice of words. Indeed, "'where Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Relatedly, as this Court has repeatedly instructed, "It is our duty 'to give effect, if possible, to every clause and word of a statute.'" *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Inhabitants of the Township of Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); *see also Williams v. Taylor*, 529 U.S. 362, 404 (2000); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). It would be impermissible to treat the addition of the word "effluent" to the CWA subsections empowering the EPA and the States to issue TBELs as mere surplusage, and the subtraction of the word "effluent" in the CWA subsection empowering the EPA and the States to set WQBLs as having no significance. *See, e.g.*, *Babbitt*, 515 U.S. at 687. Congress must be presumed to have meant different things when

establishing what approach the EPA and the States could take to setting TBELs versus the approach they could take in setting WQBLs.

That Congress chose to limit TBELs to "effluent" limitations, but omitted this modifier when empowering the EPA to set "limitations" designed to attain WQS, telegraphs that Congress intended permit restrictions on the level of pollutants that could be discharged if permittees employed specified technologies to be restrictions on the level of pollutants in *effluent*, *i.e.*, in the wastewater discharged by a permittee. By contrast, in omitting the term "effluent" in the limitations that the EPA and the States could set in NPDES permits that are designed to attain WQS, Congress must be construed to have not so restricted the EPA and the States. Congress must be deemed to have intended the EPA and the States to have more flexibility to set any sort of permit "limitation" "necessary" to attaining WQS, including allowing such limitations to not be limited to the level of pollutants in discharged effluent.

The answer to the true question presented, of whether the term "limitation" is broad enough to encompass permit conditions prohibiting dischargers from adverse impacts in receiving waters, is that it can—provided those limitations are properly framed. They must be clear enough: (1) that a discharger is provided with notice of its obligations and whether it is violating them, and (2) that compliance can be readily determined based on the required monitoring.

For example, an NPDES permit limitation making it unlawful to cause or contribute to an exceedance of a WQS for fecal coliform in receiving waters could well be valid if accompanied with appropriate monitoring requirements. To begin, such a focused permit limitation would not repeat the flaw of the Vessel General Permit challenged in *Natural Resources Defense Council* of being a vague and overinclusive prohibition on causing or contributing to the exceedances of *any* undefined WQS. The specific limitation of such a permit to one WQS, that for fecal coliform, would go a long way towards making it possible for the discharger and the regulators alike to determine compliance with the limitation. Such a limitation could then be further bolstered with specific monitoring regime requirements set forth in the permit that would require the permittee to study and gather the data needed to determine compliance. This would include, for example, data on the fate and transport of fecal coliform bacteria in its effluent, and corresponding levels of fecal coliform bacteria detected in the receiving waters that the permittee discharges. To be robust, the permittee would be required to perform this study under a variety of receiving water conditions (different seasons, different weather patterns, and so forth). With such data in hand, the permittee would then be able to create a model allowing it to forecast whether its discharge would likely cause or contribute to exceedances of the fecal coliform WQS. Further, regulatory agencies and concerned citizen groups could use this data and modeling to reach reasonable conclusions concerning whether a permittee's

discharges have caused or contributed to exceedances of fecal coliform WQS.

The above example is particularly germane and illustrative for the present case given that San Francisco's permit, shaped as it has been by the CSO Policy, effectively requires San Francisco to do this sort of study and analysis—and thus to have educated itself concerning whether particular CSO discharges from San Francisco's sewage system cause or contribute to exceedances of WQS at Ocean Beach and surrounding ocean waters.

III. THE CHALLENGED SAN FRANCISCO PERMIT'S NARRATIVE LIMITATION IS BOTH SUFFICIENTLY SPECIFIC AND CONTAINS SUFFICIENT MONITORING TO DETERMINE COMPLIANCE WITH THE LIMITATION.

While for all the reasons specified above, vague NPDES permit limitations that merely require not causing or contributing to exceedances of WQS can be problematic and should be held invalid, the narrative limitation in San Francisco's NPDES permit that San Francisco challenges meets the test identified herein and should be upheld. Unlike many NPDES permits, such as the Draft Regional MS4 Permit described above, the San Francisco Permit has the requisite specificity as a result of the EPA's issuance and reliance upon its CSO Policy. Notably, CWA Section 402(q)(1), 33 U.S.C § 1342(q)(1), creates a special carveout rule authorizing narrative

limitations that prohibit causing or contributing to an exceedance of WQS for CSOs.

A. The CSO Policy requires robust permit provisions that, in context, are sufficiently specific to give the relevant parties notice of the obligations required for compliance.

In 2000, Congress amended the CWA to incorporate the EPA's 1994 CSO Policy. 33 U.S.C. § 1342(q)(1). The Policy states that each permit from a municipal combined storm and sanitary sewer "shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994." *Id*. Accordingly, the EPA and the Regional Board have incorporated the EPA's CSO Policy into San Francisco's challenged NPDES permit.[8] Incorporation of the CSO Policy and its corresponding requirements has made San Francisco's challenged narrative permit limitation sufficiently specific when a similar limitation, unaccompanied by the monitoring and analysis requirements of this permit, may be problematic and justifiably invalidated.

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[8] Cal. Reg'l. Water Quality Control Bd., San Francisco Region, Waste Discharge Requirements and National Pollutant Discharge Elimination System Permit for City and County of San Francisco Oceanside Water Pollution Control Plant, Wastewater Collection System, and Westside Recycled Water Project, at Section III(A) and (C), Attachment F (2019) https://www.epa.gov/sites/default/files/2020-04/documents/order-r2-2019-0028_npdes-ca0037681-city-county-san-francisco-2019-12-10.pdf.

i. Background on the CSO Policy

The CSO Policy provides a national framework for controlling discharges from combined sewer systems during wet weather events. 59 Fed. Reg. 18688, 18689-90 (Apr. 19, 1994). The Policy creates a two-phase permitting process for municipalities with combined sewer systems. Phase I NPDES permits require the municipality to develop and implement nine minimum controls and to develop a Long-Term Control Plan ("LTCP"). *Id.* at 18696. Phase II permits apply to the implementation of approved CSO controls, LTCPs, and post-construction monitoring. *Id.* The Policy encourages an integrated planning process that considers cost-effectiveness, financial capabilities, and the potential for phased implementation, while ensuring that WQS are met. The Policy puts unique requirements on the permittee to analyze its own effluent, the contribution of pollution to the receiving waters from other sources, and the quality of the receiving waters.

Permittees are required to adjust their practices and update their LTCP, in consideration of all those other factors, to ensure that WQS are met. The success or failure of the LTCP is determined through the requirement to monitor the receiving waters, and until WQS are met in the receiving waters during both dry and wet weather, the LTCP must be updated and improved.

ii. The CSO Policy contains the specificity and monitoring required by the Second Circuit in *Natural Resources Defense Council*.

The CSO Policy adequately addresses the defects set forth by the Second Circuit in *Natural Resources Defense Council*. In that case, the challenged Vessel General Permit required vessel operators to control ballast water discharges "as necessary to meet applicable water quality standards in the receiving water body or another water body." 808 F.3d at 578. The Second Circuit concluded that the challenged term was insufficient because it "added nothing" to the permit's technology-based limitation, did not qualify as a BMP either in practice or procedure, and failed to require monitoring that would ensure compliance with the permit's water quality-based limitations. *Id*. at 578-83. The monitoring requirements in that case only required a vessel to report the *expected* discharges of ballast water, but contained no requirement to report actual volumes, locations, or composition of ballast water. *Id*. at 583. Not only did the lack of meaningful monitoring render the monitoring requirements invalid, but the Court reasoned that the vague water quality limitation was "all the more problematic" because the vessel operator would not know it had a violation based on the expected discharges, instead of measurements of actual ballast water discharge. *Id*. at 580. The CSO Policy, which is incorporated into San Francisco's permit, does not contain similar defects.

First, the CSO Policy requires permittees to understand their own effluent by utilizing monitoring and modeling to characterize the number, frequency, location, volume, and concentration of mass pollutants for a range of storm events to understand "the impacts of the CSOs *on the receiving waters and their designated uses*." 59 Fed. Reg. at 18691 (emphasis added). Second, it requires the permittee to understand other sources of pollution by analyzing "information on the contribution and importance of other pollution sources in order to develop a final plan designed to *meet water quality standards*." *Id*. (emphasis added). Third, it requires permittees to analyze natural events by reviewing rainfall records to evaluate "flow variations in the receiving water body to correlate between CSOs and receiving water conditions." *Id*. Fourth, the Policy requires permittees to monitor "CSO effluent and ambient in-stream monitoring and, where appropriate, other monitoring protocols such as biological assessment[s]." *Id*. at 18692. Fifth, Phase II CSO permits require implementation of a post-construction water quality monitoring assessment program, "including requirements to monitor and collect sufficient information to demonstrate *compliance* with WQS and protection of designated uses as well as to determine the effectiveness of CSO controls." *Id*. at 18696 (emphasis added). Accordingly, unlike the permit struck down by the Second Circuit in *Natural Resources Defense*

Council, the CSO Policy requires CSO permits to contain a myriad of monitoring and analysis such that municipal permittees can readily determine violations of WQS. Petitioner's permit does just that.

The CSO Policy specifies that these monitoring requirements are used to determine the effectiveness of the LTCP and whether the permittee is meeting WQS. *Id*. at 18691. Unlike the Vessel General Permit at issue in *Natural Resources Defense Council*, CSO permittees are required to monitor their actual effluent, conduct ambient water quality monitoring, and assess other sources of pollution, such that both the permittee and enforcement authorities can determine whether the permittee is obtaining compliance with any CSO Permit's narrative limitation on not causing or contributing to an exceedance of WQS.[9]

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[9] The Second Circuit found the Vessel General Permit invalid because it had a monitoring provision that was illogically related to determining compliance. 808 F.3d at 583. Any compliance determination would turn on gathering information about the actual ballast discharge, but the monitoring provision only required information on the expected discharge that could not be used to determine compliance. *Id*. San Francisco's permit contains monitoring provisions for its actual discharge and monitoring of receiving water conditions as they are actually impacted by the discharge, and therefore does not have the same infirmity that the Second Circuit reasonably found to be a basis for invalidating the Vessel General Permit. (*See* NPDES Permit for City and County of San Francisco, Attachment E, Sections IV and VI.)

B. Even if the narrative limitation challenged would otherwise fail the Second Circuit's test, the CSO Policy mandates the challenged limitation.

Even if the Court determined that the challenged terms of Petitioner's permit did violate the test established by the Court in *Natural Resources Defense Council*, and advocated for by Coastkeeper here, the statutory analysis must continue with inquiry as to whether the terms are allowable pursuant to CWA section 402(q)(1), 33 U.S.C. § 1342(q)(1). Section 402(q)(1) requires all CSO Permits issued after 2000 to conform to the CSO Policy.

The most relevant requirement is that permits should *"at least* require permittees to: … Comply with applicable WQS, no later than the date allowed under the State's WQS, expressed in the form of a *narrative limitation*." CSO Control Policy, 59 Fed. Reg. at 18696 (emphasis added). The Policy specifies that the limitation be narrative and must at least require compliance with WQS. Thus, where a similar narrative limitation may fail the two-pronged test, these narrative limitations are not only permitted, but a minimum requirement for CSO permits.

IV. SAN FRANCISCO IS NOT VIOLATING THE CHALLENGED LIMITATION PURSUANT TO AN ISSUED EXEMPTION.

San Francisco's contention that unless its permit's limitation prohibiting it from discharges that cause or contribute to and exceedance of WQS, it will face dire and unfair enforcement consequences under this permit, including potentially hundreds of millions of dollars in civil penalties, is simply false. San Francisco fails to acknowledge that it has been effectively immunized from violating this permit limitation and facing any enforcement consequences related to that limitation. San Francisco hides that in 1979, California State Water Board Order No. 79-16 ("1979 Ocean Plan Exception") issued an exception to the applicable WQS set forth in California's Ocean Plan for San Francisco's CSOs. Recognizing that CSOs would violate the Ocean Plan's water quality objectives, the 1979 Ocean Plan Exception exempts San Francisco from compliance with the Ocean Plan during wet weather, allowing an average of eight CSO discharges per year. For many years, San Francisco has averaged less than eight CSOs per outfall per year via the Oceanside system that its NPDES permit at issue concerns, and it presently appears as a virtual certainty that San Francisco is unlikely to have eight or more CSOs from the Oceanside system at any time in the foreseeable future. So long as San Francisco continues to have fewer than eight CSOs from the Oceanside system, it will continue to *per se* comply with the narrative permit limitation that it challenges. For these reasons, San Francisco is shielded from liability for violating WQS pursuant to its Oceanside permit.

CONCLUSION

The text of the CWA does not restrict NPDES permitting authorities to issuing only "*effluent* limitations" to meet WQS, but instead broadly allows EPA and the States to issue "any limitations" to this end. 33 U.S.C. § 1311(b)(1)(C). In determining the scope of such authority, this Court should adopt the rule articulated by the Second Circuit in *Natural Resources Defense Council v. U.S. E.P.A.*, that a limitation in an NPDES permit violates the CWA if it is too vague such that the discharger has no notice of its obligations to comply. Furthermore, the limitation must be supported by sufficient monitoring provisions to ensure that compliance can be effectively measured. This rule is essential for upholding the CWA's goal of clear, enforceable standards that protect water quality.

San Francisco's NPDES permit meets this test. The permit's narrative limitation, which prohibits causing or contributing to an exceedance of WQS, is accompanied by extensive monitoring and compliance requirements mandated by the EPA's CSO Policy. These provisions ensure that the limitation is not only specific enough to be enforceable, but also provides the necessary tools for both the permittee and the enforcement authorities to monitor and determine compliance effectively.

However, even if this Court were to find that the narrative limitation in San Francisco's permit somehow lacks the required specificity or monitoring provisions articulated by the Second Circuit, CWA

section 402(q) allows for such narrative limitations in CSO permits. Congress explicitly incorporated the CSO Policy into the CWA, recognizing the unique challenges posed by combined sewer systems and mandating that permits for these systems include narrative limitations that require compliance with WQS. Thus, under CWA section 402(q), the challenged limitation is not only permissible but is a statutory requirement.

Finally, to the extent the San Francisco is fearful of enforcement, it is and has been deemed in compliance with WQS pursuant to the 1979 Ocean Plan Exception.

Coastkeeper respectfully request that the Court adopt the holding of the Second Circuit in *Natural Resources Defense Council v. U.S. E.P.A.*, and uphold the challenged provisions of San Francisco's CSO Permit for the reasons argued herein.

Respectfully submitted,

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