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

REPLY BRIEF FOR PETITIONER

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September 25, 2024

117017

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TABLE OF CONTENTS

Table of Contents

TABLE OF AUTHORITIES

Page

Cases

Statutes

Table of Authorities

Page

Federal Register Notices

Other Authorities

INTRODUCTION

The Environmental Protection Agency defends imposing the Generic Prohibitions by reimagining both the Clean Water Act and the agency's relationship with Congress. EPA acknowledges that the Generic Prohibitions are *not* effluent limitations and concedes that the only plausible basis for imposing them is section 301(b)(1)(C) of the Act, 33 U.S.C. § 1311(b)(1)(C). The only question, then, is whether section 301(b)(1)(C) authorizes EPA to impose the Generic Prohibitions.

EPA says it does, claiming expansive power to impose limitations "of whatever kind" for any purpose, providing no limiting principle. Resp. Br. 22. Indeed, the agency claims plenary authority to impose sweeping prohibitions unless Congress has expressly "*preclude[d]*" EPA from doing so. *Id.* at 17, 28 (emphasis added). EPA misstates the scope of its authority. *See*, *e.g.*, *FEC* v. *Cruz*, 596 U.S. 289, 301 (2022) ("An agency . . . has no power to act . . . unless and until Congress authorizes it do so by statute." (cleaned up)). EPA must identify some statutory authorization for the Generic Prohibitions, and section 301(b)(1)(C) provides none.

Rather, section 301(b)(1)(C) grants the agency authority to impose only limitations that are "more stringent" than technology-based effluent limitations when "necessary to meet" or "required to implement" water quality standards. The text, structure, and purpose of section 301(b)(1)(C) resist a reading that would empower EPA to impose limitations "of whatever kind," including the Generic Prohibitions. Instead, as even EPA's own regulation and guidance recognize, section 301(b)(1)(C) requires EPA to set water quality-based effluent limitations.

EPA responds that it is too difficult to set water quality-based effluent limitations as the Act and its regulation require. EPA argues that, when "a clear picture is lacking," permit writers may throw up their hands and leave permitholders to figure it out themselves. Resp. Br. 41. In similar fashion, the State of California extols the desirability of leaving permitholders to "make their own informed decisions" about how to achieve California's broadly-worded water quality standards. California Br. 8-11, 14. EPA and California thus tout abdication of their regulatory duties as a *feature* and lament a ruling in San Francisco's favor—which will lead to clear permit requirements—as a *bug*. *Id.*; States Br. 27. This is exactly backwards.

San Francisco welcomes precisely what section 301(b)(1)(C) requires: for *EPA* and States to impose more stringent effluent limitations when necessary to achieve water quality standards. What they cannot do, however, is punt that question by imposing receiving water prohibitions that leave permitholders in the dark about their obligations and subject them to liability based on "hopelessly indeterminate" standards. *Sackett* v. *EPA*, 598 U.S. 651, 681 (2023) (cleaned up).

Permit terms like the Generic Prohibitions also fail to protect the environment, because they "add nothing" to instruct permitholders how to *prevent* pollution, instead only imposing liability *after* water quality violations have occurred. *Nat. Res. Def. Council* v. *EPA*, 808 F.3d 556, 578 (2d Cir. 2015). Because the Ninth Circuit erroneously excused EPA's failure to protect the environment as Congress directed, San Francisco asks the Court to reverse.

ARGUMENT

Section 301(b)(1)(C) does not authorize EPA to impose receiving water prohibitions—like the Generic Prohibitions—that condition a permitholder's compliance on whether receiving waters satisfy water quality standards. Only *effluent* limitations—which EPA concedes the Generic Prohibitions are not—are consistent with section 301(b)(1)(C)'s text and Congress' purpose for enacting the provision, as EPA's implementing regulation and guidance confirm. By imposing receiving water prohibitions rather than effluent limitations, EPA undermines the Act's goal of preventing water pollution and exposes permitholders to substantial penalties without fair notice.

I. EPA lacks authority to impose the Generic Prohibitions.

As explained in the opening brief, EPA's assertion that section 301(b)(1)(C) allows the agency to impose the Generic Prohibitions cannot be reconciled with the section's text. *See* Pet. Br. 24-34.[1] Even if EPA were correct that it may impose permit terms other than effluent limitations, section 301(b)(1)(C)'s use of the word "any" does not have such "an expansive meaning" as to empower the agency to impose limitations "of whatever kind." Resp. Br. 22. Instead, the meaning of "any," as the Court has recognized, "depends on the statutory context." *Nat'l Ass'n of Mfrs.* v. *Dep't of Def. (NAM)*, 583 U.S. 109, 123 (2018).

[1] That San Francisco made this and similar arguments in its opening brief, Pet. Br. 28-31, 34-37, gives lie to EPA's contention that the City somehow "waived" the argument that the Generic Prohibitions are not "limitations" that satisfy section 301(b)(1)(C)'s requirements. Resp. Br. 47-48.

Here, the text demands that limitations be both (a) "more stringent" than technology-based effluent limitations and (b) "necessary to meet" or "required to implement" water quality standards. 33 U.S.C. § 1311(b)(1)(C). The Generic Prohibitions and similar terms satisfy neither requirement.

A. The Generic Prohibitions are not "more stringent" than technology-based effluent limitations.

By their nature, "limitations" that simply prohibit causing or contributing to violations of water quality standards are not "more stringent" than technology-based effluent limitations imposed under section 301(b)(1)(A) and (B). 33 U.S.C. § 1311(b)(1)(C). Such prohibitions will vary with receiving water conditions and can allow discharges in amounts *greater* than technology-based effluent limitations allow when waters are relatively pristine, resulting in a *less stringent* requirement. Pet. Br. 28.

EPA responds that such restrictions *would* be more stringent *if* they "require[ ] the permittee to use additional control measures." Resp. Br. 27. But permit terms like the Generic Prohibitions "add nothing" to a permitholder's control obligations. *NRDC*, 808 F.3d at 578. Indeed, EPA acknowledges that it imposes such prohibitions when there is a "lack of necessary information" to require additional controls. Resp. Br. 41. California likewise admits that it does not know what controls, if any, these permit terms require. *See* California Br. 3 (receiving water prohibitions leave permitholders to make "reasonable judgments about how to conduct their activities"). Where even

the expert agencies cannot determine what (or even *if*) additional controls are needed, it beggars belief to suggest that permitholders will adopt unspecified additional pollution controls beyond those demanded by their permits' effluent limitations. *See NRDC*, 808 F.3d at 577-78 (receiving water prohibition failed to provide "specific guidance" as to the "practices" or "procedures" required); Hayden Area Reg'l Sewer Bd. (HARSB) Br. 14-15 (receiving water prohibitions "leave HARSB in the dark" about its obligations).

B. The Generic Prohibitions are neither "necessary to meet" nor "required to implement" water quality standards.

EPA's use of receiving water prohibitions like the Generic Prohibitions as a multi-purpose "backstop" also fails to satisfy section 301(b)(1)(C)'s condition that limitations be "necessary" or "required" for a specific purpose: "meet[ing]" or "implement[ing]" water quality standards. 33 U.S.C. § 1311(b)(1)(C). EPA claims it imposes conditions like the Generic Prohibitions for a litany of reasons: "when information necessary to develop additional 'effluent limitations' is unavailable"; to "reduce administrative burden"; when "particular discharges may not be known at the time" of permit issuance; when EPA lacks "a clear picture of the level of CSO controls necessary"; and to avoid "delay." Resp. Br. 41. But in practice, some permitting authorities have reflexively put them in every permit they issue. *See*, *e.g.*, *In re City of Lowell*, 18 E.A.D. 115, 176 (EAB 2020) (all National Pollutant Discharge Elimination System (NPDES) permits issued in Massachusetts contain receiving water prohibitions); Pet App. 519 ("nearly all individual NPDES permits" in the San

Francisco Bay region have included receiving water prohibitions). Imposing permit restrictions as a just-in-case prophylactic when EPA is uncertain—or in every permit—is the opposite of imposing conditions only when "necessary" or "required."

Receiving water prohibitions like the Generic Prohibitions also fail to satisfy section 301(b)(1)(C)'s requirement that limitations "meet" or "implement" water quality standards. Contrary to EPA's claim that section 301(b)(1)(C) does not require it to write permit requirements "at any particular level of specificity," Resp. Br. 29, Congress' choice of verbs does exactly that. EPA must impose limitations that "satisfy" water quality standards, particularly with "exactitude and precision," or that "ensure" their "actual fulfillment by concrete measures." Pet Br. 29 (quoting dictionaries). At a minimum, this directive requires EPA to impose *some* specific obligations distinct from water quality standards. *See* Pet. Br. 28-31; *cf. Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 496 (1987) (CWA's purpose was to establish "'clear and identifiable' discharge standards"). Permit terms that simply forbid causing or contributing to a violation of water quality standards cannot be "naturally described as a way to 'meet' or 'implement' [water quality] standards," Resp. Br. 28, because their requirements are indistinguishable from the standards themselves. *See NRDC*, 808 F.3d at 578-79.

EPA's failure to meet or implement water quality standards is not merely some issue of vagueness that EPA believes the City has "disclaimed." Resp. Br. 29. Rather, the Generic Prohibitions are invalid because they do not translate water quality standards into

restrictions on the City's discharges. *NRDC*, 808 F.3d at 578-79; Pet App. 53 (Collins, J., dissenting). For instance, San Francisco understands that the Generic Prohibitions forbid causing or contributing to a violation of California's water quality standards, including their requirement that "[m]arine communities . . . shall not be degraded." JA. 39. San Francisco is not told, however, *how* it must limit its discharges to avoid causing or contributing to such degradation. *Cf. Am. Paper Inst., Inc.* v. *EPA*, 996 F.2d 346, 350 (D.C. Cir. 1993) ("water quality standards by themselves have no effect on pollution; the rubber hits the road when the . . . standards are used as the basis for specific *effluent limitations*." (emphasis added)).

Section 301(b)(1)(C) assigns to EPA—not permitholders—the obligation to determine specific discharge limitations that will meet or implement water quality standards. *EPA v. California ex rel. State Water Res. Bd. (California)*, 426 U.S. 200, 204–05 (1976). By failing to do so, EPA has abdicated the regulatory task that Congress assigned it. Pet. App. 64; *NRDC*, 808 F.3d at 578.

II. Only effluent limitations satisfy section 301(b)(1)(C)'s requirements.

Unsurprisingly, receiving water prohibitions like the Generic Prohibitions run afoul of section 301(b)(1)(C)'s requirements because, as EPA concedes, they are not effluent limitations. Resp. Br. 18. Effluent limitations satisfy section 301(b)(1)(C)'s requirements and fulfill Congress' evident purpose, as EPA itself has recognized in relevant regulations and guidance.

A. Section 301(b)(1)(C)'s text requires EPA to set effluent limitations.

Only effluent limitations—restrictions on a permitholder's discharges at its point sources—satisfy section 301(b)(1)(C)'s demand that the requirements EPA imposes be more stringent than technology-based effluent limitations and "meet" and "implement" water quality standards. Pet. Br. 27-31.[2]

EPA contends that section 301(b)(1)(C) does not require "effluent limitations" because it does not "use[ ] the term [Congress] had defined"—"effluent limitations." Resp. Br. 25. Congress, however, repeatedly used "limitations" as a shorthand for "effluent limitations" *throughout* section 301. Pet. Br. 27-28. That Congress did not modify "limitation" with the word "such" does not compel EPA's conclusion that Congress intended to refer to something other than effluent limitations. *See* Resp. Br. 25. "Such" is but one way Congress could signal that it was using the word "limitation" in the same manner it used that term throughout section 301: to refer to an "*effluent* limitation." Another is Congress' choice to modify the word "limitation" in subsection (b)(1)(C) with the phrase "more stringent." 33 U.S.C. § 1311(b)(1)(C). As the only prior references to limitations *anywhere* in section 301(b)(1) are to "effluent limitations," it follows that a "more stringent"

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[2] The City does not contend "that NPDES permits may impose only 'effluent limitations,'" Resp. Br. 28, but rather that under section 301(b)(1)(C), EPA may only impose more stringent effluent limitations to meet or implement water quality standards. NPDES permits can, of course, contain other terms, such as monitoring and reporting requirements. *See* 33 U.S.C. § 1342(a)(2).

limitation would be of the same kind as the ones preceding it. Further, using "such" would not make sense in this context because section 301(b) refers to two different types of effluent limitations: technology-based effluent limitations required by subsections (b)(1)(A)-(B), and "more stringent" water quality-based effluent limitations required by subsection (b)(1)(C).

EPA's assertion that "more stringent limitation" means a "limitation[ ] 'of whatever kind'," Resp. Br. 22, would also make subsection (b)(1)(C) the exception that swallows the rest of the CWA's rules. The CWA's overarching purpose is achieving water quality standards. *Cf.* 33 U.S.C. § 1251(a)(2). If EPA could fulfill that goal simply by requiring permitholders to avoid causing or contributing to violations of water quality standards, EPA would not need to establish effluent limitations at all. Thus, EPA's reading of one subsection of section 301(b) would make superfluous the rest of section 301, as well as sections 302 and 304(b). 33 U.S.C. §§ 1311, 1312, 1314(b).

But "Congress does not hide elephants in mouseholes by alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Sackett*, 598 U.S. at 677 (cleaned up). Subsection (b)(1)(C) applies in specific and narrower circumstances than subsections (b)(1)(A) and (B), so "it would be odd indeed if Congress had tucked an important expansion to the reach of the CWA into convoluted language in a relatively obscure provision." *Id.* Although even EPA's *amici* agree that EPA cannot simply "include generic conditions and nothing else," States Br. 19, neither EPA nor its *amici* furnishes any limiting principle that would prevent EPA from doing exactly that.

Further confirmation that Congress meant for section 301(b)(1)(C) to authorize only effluent limitations comes from section 301(e)'s instruction that "*[e]ffluent limitations* established pursuant to this section . . . shall be applied to *all point sources of discharge of pollutants*." 33 U.S.C. § 1311(e) (emphasis added). If section 301(b)(1)(C) allowed non-effluent limitations, it would be odd that section 301(e) neither mentions them nor instructs they must also be applied.

As a last resort, EPA takes statements in *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992), and *PUD No. 1 of Jefferson County* v. *Washington Department of Ecology* (*PUD No. 1)*, 511 U.S. 700, 704 (1994), out of context to suggest section 301(b)(1)(C) authorizes non-effluent limitations like the Generic Prohibitions. Resp. Br. 20-21, 27. All *Arkansas* and *PUD No. 1* did was quote footnote 12 in *California*, 426 U.S. at 205 n.12, which explained that Congress retained water quality standards as a "supplementary basis" for setting "effluent limitations" when technology-based effluent limitations are insufficient to achieve water quality standards.[3] *Id. Arkansas, PUD No. 1*, and *California* nowhere suggest that section 301(b)(1)(C) authorizes anything other than water quality-based effluent limitations.

[3] The CWA's legislative history echoes this point: "Water quality standards will be utilized for the purpose of setting effluent limitations" when technology-based effluent limitations "are inadequate to meet those water quality standards." H.R. Rep. No. 92-911, at 105 (1972).

B. Congress intended EPA to impose effluent limitations to achieve water quality standards.

Congress enacted the CWA, including section 301(b)(1)(C), to replace a failed regulatory regime that provided for enforcement against dischargers who were "causing or contributing" to a violation of "water quality standards." 33 U.S.C. § 1160(c)(5) (1970). EPA nonetheless claims that a one-word difference between the House and Senate versions of section 301(b)(1)(C) supports its decision to impose restrictions that recreate the scheme Congress rejected *nearly word-for-word*. Resp. Br. 32-35; Pet. App. 97. EPA is mistaken.

It is true that the House and Senate took different approaches to water quality standards, with the Senate proposing to phase out federal water quality standards and the House—through section 303 (now 33 U.S.C. § 1313)—retaining them. *See* 1 Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. at 969 (1973) (Legislative History). But both chambers agreed that section 301(b)(1)(C) would require effluent limitations. As the House Committee that drafted section 301(b)(1)(C) explained:

> Even though 301(b)(1)(A) and (B) requires the setting of effluent limitations . . . , the Committee intends that if the sum of the discharges from point sources meeting such effluent limitations would preclude the meeting of water quality standards . . . , *new and more stringent effluent limitations* would have to be established consistent with such water quality standards.

H.R. Rep. No. 92-911, at 101-02 (emphasis added). The House thus retained water quality standards "for the purpose of setting effluent limitations"—not to allow EPA to recreate the pre-CWA regulatory scheme. *Id.* at 105.

Recognizing that both the House and Senate bills required effluent limitations, the Conference Report explained that both versions of section 301(b)(1)(C) were the "same," except for compliance dates and the House's use of additional sources of law for water quality standards. S. Rep. No. 92-1236, at 20 (1972). Congressman Harsha, the House Floor Manager for the bill, sought to dispel any doubt during debate over the Conference Report, explaining that "the managers clearly intend that each point source shall be required to meet *effluent limitations* which would be consistent with the applicable water quality standard" if technology-based effluent limitations are "inadequate to meet the water quality standards." 1 Legislative History 246 (emphasis added). Members of Congress thus would have understood the reconciled legislation to require *effluent* limitations just as in the Senate bill.

The handful of statements EPA plucks from the legislative history are not to the contrary. *See* Resp. Br. 33-36. Each concerns debate over whether the Act should include *section 303*. *See* 1 Legislative History 150, 238, 353, 524; 2 Legislative History 1183. None suggests disagreement about whether section 301(b)(1)(C) requires effluent limitations. Indeed, Administrator Ruckelshaus's testimony that "the new law must build on existing foundations of water quality standards" further explained that the statute must "employ *effluent limitations* as a tool for the achievement of

those standards." 2 Legislative History 1182 (emphasis added). Thus, EPA is mistaken when it claims that "Congress viewed limitations like the ones at issue here" to be an "important part of the statutory design." Resp. Br. 40.

C. Other provisions of the Act do not rescue EPA's erroneous interpretation of section 301(b)(1)(C).

Finding little support in the text or legislative history of section 301(b)(1)(C), EPA asks the Court to infer that the subsection nevertheless authorizes non-effluent limitations because "[m]any [other] CWA provisions refer to effluent 'or other' limitations, often with an explicit cross-reference to Section 1311." Resp. Br. 23. This argument assumes that Congress' frequent use of the catch-all "other limitations" refers to section 301(b)(1)(C).[4] But Congress more plausibly used that phrase to refer to the *numerous* instances in which the CWA allows effluent limitations to be modified and other limitations imposed where compliance with effluent limitations is not feasible. *See*, *e.g.*, 33 U.S.C. §§ 1311(c), (g), (h), (i), (m), (n), (p); 1312(b). For instance, section 301(c) allows EPA to modify effluent limitations issued under section 301(b)(2)(A) based on the "economic capability of the owner." 33 U.S.C. § 1311(c). Section 301(i) allows EPA to impose "other terms and conditions" on publicly-owned treatment works that require additional construction "to achieve

[4] EPA similarly infers from the House bill's inclusion of the phrase "other limitations" that the House intended section 301(b)(1)(C) to authorize non-effluent limitations. Resp. Br. 33. But EPA cites nothing in the legislative history even hinting that "other limitations" refers to section 301(b)(1)(C).

limitations under subsection (b)(1)(B) or (b)(1)(C)." 33 U.S.C. § 1311(i)(1). And section 302(b)(2)(A) allows EPA to issue permits modifying effluent limitations otherwise required under that section where the relationship between the costs and benefits to be obtained is not reasonable. 33 U.S.C. § 1312(b)(2)(A). These sections authorize "other limitations," as opposed to the otherwise applicable effluent limitations.[5]

EPA likewise fails to find support in Congress' codification of the CSO Control Policy, 33 U.S.C. § 1342(q)(1). Resp. Br. 24, 34-37. EPA does not claim that the CSO Control Policy is controlling here, and with good reason: the Policy sheds no light on the interpretation of section 301(b)(1)(C). In any event, the Policy supports San Francisco, by making clear that Phase II permits—like the City's—must contain "[w]ater quality-based effluent limits" to implement water quality standards. *See* Combined Sewer Overflow (CSO) Control Policy, 59 Fed. Reg. 18,688, 18,696 (Apr. 19, 1994); Resp. Br. 10. EPA emphasizes that *Phase I* permits must contain "narrative limitation[s]," Resp. Br. 24, but EPA's guidance states that "narrative limitations" in Phase I permits must be "narrative water quality-based effluent limitations." 9th Cir. ER 1577.

[5] Likewise, Section 401(a)(1)'s use of the phrase "effluent limitation or other limitation under sections 1311(b) and 1312," 33 U.S.C. § 1341(a)(1), is properly understood to refer to the "other limitations" that 33 U.S.C. § 1312(b)(2)(A) authorizes EPA to impose.

D. EPA's regulations and guidance demand that it impose effluent limitations to "meet" and "implement" water quality standards.

Perhaps most bizarrely, EPA tries to sidestep that its implementing regulation, 40 C.F.R. § 122.44(d), recognizes that permit writers must impose effluent limitations under section 301(b)(1)(C). Resp. Br. 39-40. The regulation's preamble repeatedly states that section 301(b)(1)(C) "*requires* that water quality standards be achieved through *effluent* limitations." 54 Fed. Reg. 23,868, 23,872 (June 2, 1989) (emphasis added); *id.* at 23,875 (similar); *id.* at 23,876 (similar). Indeed, EPA explained that "[a] permit would be inconsistent with section 301(b)(1)(C) if it did not contain effluent limit[ation]s necessary to attain and maintain [water quality standards]." *Id.* at 23,875.

Section 122.44(d)'s implementation of section 301(b)(1)(C) is thus consistent with both the City's interpretation and this Court's determination that section 301 is to be implemented primarily through regulations, rather than on an *ad hoc* basis by permit writers. *See E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 129 (1977) (concluding that "§ 301 limitations are to be adopted by the Administrator, that they are to be based primarily on classes and categories, and that they are to take the form of regulations."). Far from giving permit writers the expansive authority EPA claims, section 301(b) requires permit terms be set in accordance with the regulations promulgated by the Administrator.

As explained in the opening brief, 40 C.F.R. § 122.44(d) prescribes thorough "procedures for developing water quality-based effluent limit[ation]s" that "section 301(b)(1)(C) . . . require[s]." 54 Fed. Reg. at 23,871, 23,873; *see* Pet. Br. 42-43. Permit writers first "must" assess whether, notwithstanding application of technology-based effluent limitations, any pollutants "will cause, have the *reasonable potential to cause, or contribute* to an excursion above any State water quality standard." 40 C.F.R. § 122.44(d)(1)(i) (emphasis added); *see also* EPA, NPDES Permit Writers' Manual (NPDES Manual) p. 6-23 (2010), https://perma.cc/R36E-EEWH. If "reasonable potential" exists, permit writers "must" calculate and impose "water quality-based effluent limitations" that are "derived from" both numeric and narrative water quality standards. *Id.* §§ 122.44(d)(1)(iii), (vi), (vii)(A). Far from authorizing permit writers to throw up their hands when they "lack . . . necessary information," Resp. Br. 41, the guidance provides procedures for "conducting a reasonable potential analysis without data" and imposing water quality-based effluent limitations in such circumstances. NPDES Manual pp. 6-30–6-31.

EPA thus rewrites history and ignores its own regulation by claiming to have "consistently understood section 1311(b)(1)(C) to authorize permit conditions" other than effluent limitations to meet water quality standards. Resp. Br. 36. Nothing EPA cites suggests the agency ever interpreted section 301(b)(1)(C) to authorize non-effluent limitations. *See* Resp. Br. 37 (citing briefs and an EPA letter in the Act's legislative history). Rather, the agency's early interpretations consistently read section 301(b)(1)(C) to mandate more stringent

effluent limitations when technology-based effluent limitations are insufficient to meet water quality standards, *see* Pet. Br. 26-27, 31-32, 41-43, precisely as its regulation requires. Moreover, EPA's assertion that permit writers have "frequently" imposed terms like the Generic Prohibitions does not establish that section 301(b)(1)(C) authorizes them. Resp. Br. 16.

III. The Court has not resolved the question presented.

Lacking support in section 301(b)(1)(C) for its broad claim of authority, EPA wrongly contends that *NAM* resolved the question presented in its favor. Resp. Br. 19-20. In *NAM*, the Court considered whether 33 U.S.C. § 1369 allowed challenges to the Waters of the United States (WOTUS) Rule to be filed directly in the courts of appeals. EPA sought to bypass district court review by contending the WOTUS Rule was an "EPA action[ ] 'in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345'" under 33 U.S.C. § 1369(b)(1)(E). 583 U.S. at 114. This Court unanimously rejected EPA's assertion, holding that the WOTUS Rule was not a limitation promulgated under section 1311. *Id.* at 124. *NAM* neither reached nor decided the question presented here.

PUD No. 1 also does not "foreclose" the City's argument, as EPA claims. Resp. Br. 19-21. *PUD No. 1* held that Washington State could impose a minimum stream flow requirement for a dam bypass under section 401(d)'s State certification process, which allows States to impose "other limitations, and monitoring requirements" as a condition of certification. 33 U.S.C.

§ 1341(d). San Francisco's challenge to the Generic Prohibitions in its EPA-issued NPDES permit has nothing to do with State certifications issued under section 401(d). To the extent *PUD No. 1* addressed sections 301 and 303, the decision simply confirmed the unremarkable proposition that States may consider their water quality standards when imposing conditions in the State certification process. 511 U.S. at 712-13. The Court did not decide what type of "more stringent limitation" section 301(b)(1)(C) allows.

In any event, *NAM* and *PUD No. 1* support San Francisco. *NAM's* brief discussion of section 301(b)(1)(C) confirmed the narrow circumstances when the provision applies, rejecting EPA's portrayal of the provision as an open-ended grant of authority to impose limitations of any kind, for any reason. *See* 583 U.S. at 122-23 ("Section [301](b)(1)(C) allows the EPA to issue 'any more stringent limitation[s]' *if* technology-based effluent limitations *cannot* 'meet water quality standards'" (emphasis added)). EPA recognizes that section 301(b)(1)(C) limitations must restrict discharges under *NAM*, Resp. Br. 48, but the Generic Prohibitions do not. They tell San Francisco "nothing" about how to control its discharges and instead simply impose liability based on receiving water conditions. *NRDC*, 808 F.3d at 578. But, as this Court recognized in *PUD No. 1*, the CWA requires *EPA* to "translate[ ]" "open-ended" water quality criteria into "specific limitations" that guide permitholders' conduct. 511 U.S. at 716. Because they fail to translate water quality standards into discharge restrictions, the Generic Prohibitions are inconsistent with both *NAM* and *PUD No. 1.*

IV. EPA's reading of the Act undermines regulatory certainty.

A. EPA's interpretation of section 301(b)(1)(C) allows the agency to deprive permitholders of fair notice.

Permit terms like the Generic Prohibitions undermine the finality the permit shield guarantees by exposing permitholders to enforcement actions without fair notice. Pet. Br. 44-52 (citing 33 U.S.C. § 1342(k)). EPA dismisses those harms as not "relevant," Resp. Br. 46-47, but cannot dispute that the challenged conditions subject San Francisco and the many public and private sector *amici* to "crushing consequences" for discharging in excess of amounts that are not specified in their permits. *Sackett*, 598 U.S. at 680 (cleaned up); *see generally* Nat'l Mining Ass'n *et al.* (NMA) Br. 17-22; Public Wastewater & Stormwater Agencies & Municipalities (Municipalities) Br. 27-32; HARSB Br. 14-16; Nat'l Ass'n of Home Builders (NAHB) Br. 24-25. Even EPA's *amici* admit that conditions like the Generic Prohibitions impose liability where "[t]he permittee lacks fair notice of how to comply." Orange Cnty. Coastkeeper Br. 15.

EPA makes several arguments that receiving water prohibitions like the Generic Prohibitions do not undermine regulatory certainty, but none has merit:

First, EPA denies that the Generic Prohibitions mean what they say. By their plain terms, they expose San Francisco to liability for discharging even a *de minimis* quantity of any substance that "contributes" to an existing violation of water quality standards. Pet. App. 97; *see also id.* at 65; NAHB Br. 22-23; Local

Gov't Legal Ctr. *et al.* (LGLC) Br. 4, 21. EPA attempts to resist this natural reading by invoking *Arkansas*, Resp. Br. 46 n.10, but nothing in that case addresses the meaning of the word "contribute" in any permit. *See* 503 U.S. at 107, 109, 111. Further, *Arkansas rejected* an interpretation of the CWA that would prohibit discharging into a waterbody already exceeding water quality standards, *id.* at 107—yet that is precisely what the Generic Prohibitions do.

Likewise, EPA's *amici* wrongly claim the Generic Prohibitions provide "flexibility" and require only "reasonable" efforts to achieve compliance, when they do no such thing. California Br. 14-15, 18; States Br. 26-27. The Generic Prohibitions expose San Francisco to crushing penalties if a court determines that water quality standards were exceeded, regardless of the reasonableness of the City's efforts or its compliance with its permit's effluent limitations. *Cf.* NMA Br. 18-20.

Second, EPA suggests that water quality standards and monitoring data provide all the information a permitholder needs to avoid "causing or contributing" to a violation of water quality standards. Resp Br. 43-44. At the same time, EPA asserts that it needs to impose terms like the Generic Prohibitions when EPA does not know whether additional discharge restrictions are necessary. *Id.* at 41-42. EPA cannot have it both ways. If the agency cannot tell what level of pollution control is required, it is unreasonable to subject permitholders to liability for failing to do the same. As EPA admits, monitoring data *at most* tell permitholders whether their discharges adversely affected receiving waters *after the fact*, when it is too late to adjust their operations to avoid liability. Resp. Br. 43 (data tell

permitholders "if a discharge has *had* the effect of impairing receiving water quality" (emphasis added)).

Third, EPA dismisses as "hypothetical" San Francisco's concerns about being held responsible for pollutant contributions from other sources. Resp. Br. 45-46. But numerous *amici* share San Francisco's genuine concerns, *see* HARSB Br. 9-11, 14; LGLC Br. 13-19, and EPA's own guidance specifies that "other sources of pollutants" will affect whether a permitholder's discharges have the potential to cause or contribute to an exceedance of water quality standards. NPDES Manual p. 6-23.

Fourth, EPA's notions that enforcers bear the burden of proof and that penalties *might* be mitigated cannot offset the very real costs that lack of notice imposes on permitholders. *See* Resp. Br. 44-45. The burden of proof and penalty mitigation are beside the point when a permitholder lacks "know[ledge of] what is required of them so they may act accordingly," *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012), and would matter, if at all, only after burdensome litigation, as San Francisco's experience demonstrates. Pet. Br. 50-51.

Finally, EPA claims that effluent limitations are no better at providing notice to permitholders than conditions like the Generic Prohibitions. Resp. Br. 45. EPA is mistaken. Effluent limitations provide superior notice because they inform permitholders of their discharge limitations at their point sources, allowing them to plan and invest in controls with knowledge of what they must do to comply. *See* Pet. Br. 46-47; NMA Br. 12, 14. EPA strains to rebut this conclusion by

making a hypothetical comparison between receiving water prohibitions and a restriction on discharging "excessive" amounts of dye. This comparison fails because it does not contrast a receiving water prohibition with an effluent limitation. In EPA's hypothetical, "excessive" has no point of reference and so does not restrict, either narratively or numerically, discharged "quantities, rates, and concentrations of chemical, physical, biological, and other constituents." 33 U.S.C. § 1362(11); *see also* S. Rep. No. 92-414, at 77 (1971) (explaining effluent limitations provide "specificity"). To be an effluent limitation, the prohibition would need to define "excess[ ]" in relation to some metric or reference, such as a measurable industry guideline. And doing that *would* furnish an objective discharge control criterion and provide a clearer directive than simply prohibiting surface water "discoloration."

One *amicus* brief objects that the City's interpretation of the Act is "not easily administrable," questioning how it would apply to receiving water prohibitions that incorporate nearly verbatim several narrative criteria in Ohio's water quality standards. *See* Env't & Cmty. Orgs. Br. 13-14; Ohio Admin. Code 3745-1-04. But EPA does not suggest any administrability problem with the City's reading, and there is none. Each of the examples impermissibly hold permitholders responsible for receiving water conditions, rather than the content of their discharges. Pet. Br. 31. But each of Ohio's narrative criteria could easily be translated into effluent limitations. *Cf. PUD No. 1*, 511 U.S at 716 ("open-ended [water quality] criteria . . . must be translated into specific limitations"). Instead of prohibiting the discharge of substances in "amounts

that will settle to form . . . objectionable[ ] sludge deposits" or that will cause "growth of aquatic weeds or algae . . . inimical to more desirable forms of aquatic life," Env't & Cmty. Orgs. Br. 14, EPA can assess what amounts of substances would cause such deposits or growths and set effluent limitations prohibiting discharges exceeding those amounts.[6]

B. The Generic Prohibitions are not necessary to address informational gaps or unforeseen circumstances.

EPA and its *amici* also insist that the challenged prohibitions are necessary as a "backstop"—an insurance policy against unanticipated circumstances. *See* Resp. Br. 41-42; California Br. 16-17; States Br. 7, 23. Their contentions ignore that the Act already provides multiple tools to address such concerns.

Prior to issuing a permit, the agency has broad authority to request additional information during the application process. *See* 33 U.S.C. § 1318(a); 40 C.F.R. § 122.21(g)(13), (j)(4)(v)-(vi). And after issuance, the agency may modify a permit in response to unanticipated water quality impacts. *See* 33 U.S.C. § 1342(b)(1)(C); 40 C.F.R. § 122.62(a)(2). EPA's guidance recommends including a "reopener" provision in permits for precisely this purpose. *See* NPDES Manual p. 6-31.

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[6] Effluent limitations can and do vary by season or based on other conditional factors, providing the flexibility *amici* seek. States Br. 27; *see*, *e.g.*, 15A N.C. Admin. Code 02B.0404(b), (c) (authorizing seasonal effluent limitations for "oxygen consuming wastes"); N.J. Admin. Code § 7:14A-14.9 (similar).

EPA has similar tools to address uncertainties when issuing general permits. *See* Resp. Br. 41. General permits, like individual permits, are required to include water quality-based effluent limitations if technology-based restrictions are insufficient to meet water quality standards. *See* 40 C.F.R. § 122.28(a)(3) (dischargers under general permits "shall be subject to the same water quality-based effluent limitations" "imposed pursuant to § 122.44"). And they routinely include water quality-based effluent limitations tailored to specific waterbodies. NAHB Br. 11-14.[7] To protect water quality, EPA can also conduct a "reasonable potential" analysis to determine whether an applicant may operate under a general permit or must obtain an individual permit;[8] impose more stringent restrictions in response to identified or potential exceedances;[9] or revoke a discharger's coverage under the general permit.[10] These mechanisms—not receiving water prohibitions—allow the agency to manage any uncertainty associated with general permits.

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[7] *See*, *e.g.*, Wash. Dep't of Ecology, Industrial Stormwater General Permit at Condition S6.C (2020), https://perma.cc/HNG9-TGYL.

[8] *See*, *e.g.*, Tex. Dep't of Envtl. Quality, Multi-Sector General Permit, TPDES General Permit No. TX050000, at Part II.B.6 (2021), https://perma.cc/2LQ3-9CV2.

[9] *See*, *e.g.*, Ark. Dep't of Envtl. Quality, General Permit – Stormwater Discharges Associated with Construction Activity, Permit No. ARR150000, at Part II.G.2. (2021), https://perma.cc/F2V9-2V5K.

[10] *See*, *e.g.*, Pa. Dep't of Envtl. Protection, General Permit for Discharges of Stormwater Associated with Industrial Activity, PAG-03, at 4-5 (2022), https://perma.cc/YY4K-XHXE.

Finally, *amici* incorrectly claim that EPA needs terms like the Generic Prohibitions to bring enforcement actions and abate pressing or unanticipated water quality issues. *See* States Br. 23-25; California Br. 22-23. *Amici*'s own enforcement data demonstrate no such need: where EPA brings lawsuits to enforce such prohibitions, it nearly always alleges violations of *other* permit terms as well. *See* Env't & Cmty. Orgs. Br. 16-17. Moreover, EPA already possesses authority to abate water quality emergencies and "stop the discharge of pollutants" by any source that "present[s] an imminent and substantial endangerment to the health . . . or to the welfare of persons." 33 U.S.C. § 1364(a). This provision, not section 301(b)(1)(C) or terms like the Generic Prohibitions, is the mechanism Congress intended to be a "backstop."

CONCLUSION

Section 301(b)(1)(C) does not authorize EPA to impose the Generic Prohibitions. The challenged permit terms flout the CWA's text and structure, Congress' objectives, and EPA's own regulations. Worse, they do not protect the environment as Congress directed.

The Court should reverse the judgment below.

Respectfully submitted,

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September 25, 2024