No. 23-753

In the Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The U.S. Environmental Protection Agency issued petitioner a National Pollutant Discharge Elimination System permit that imposes various limitations on petitioner's discharges into the Pacific Ocean. Petitioner challenged two of those limitations, which are expressed as narrative prohibitions on discharges that cause or contribute to specified adverse effects on water quality. The question presented is as follows:

Whether the challenged limitations violate the Clean Water Act, 33 U.S.C. 1251 *et seq.*, by failing to identify specific limits to which petitioner's discharges must conform.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-76) is reported at 75 F.4th 1074. The order of the Environmental Appeals Board (Pet. App. 402-486) is reported at 18 E.A.D. 322.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2023. A petition for rehearing was denied on October 10, 2023 (Pet. App. 487). The petition for a writ of certiorari was filed on January 8, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1972, Congress enacted the Clean Water Act, 33 U.S.C. 1251 *et seq.*, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a) (Supp. II 1972); see

Decker v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 602 (2013). To achieve that objective, the Clean Water Act generally prohibits "the discharge of any pollutant by any person." 33 U.S.C. 1311(a). The Act defines the term "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source," as well as "any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. 1362(12)(A) and (B).

The Clean Water Act "contains important exceptions to the prohibition on discharge of pollutants." *National Ass'n of Mfrs.* v. *Department of Def.*, 583 U.S. 109, 115 (2018). One of those exceptions is found in 33 U.S.C. 1342, which establishes the National Pollutant Discharge Elimination System (NPDES) program. Under that program, the U.S. Environmental Protection Agency (EPA) may "issue a permit" for the discharge of any pollutant other than dredged or fill material "upon condition that such discharge will meet * * * all applicable requirements under [33 U.S.C.] 1311, 1312, 1316, 1317, 1318, and 1343." 33 U.S.C. 1342(a)(1); see 33 U.S.C. 1342(a)(2) (authorizing EPA to "prescribe conditions for such permits to assure compliance with the requirements of [Section 1342(a)(1)] and such other requirements as [EPA] deems appropriate").[1]

Section 1311, in turn, requires the achievement of "effluent limitations" and "any more stringent limitation, including those necessary to meet water quality standards." 33 U.S.C. 1311(b)(1). The term "effluent limitation" is broadly defined in the Act to refer to "any restriction" on the "quantities, rates and concentrations"

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[1] A separate Clean Water Act program authorizes permits for the discharge of dredged or fill material. See 33 U.S.C. 1344.

of pollutants discharged from point sources. 33 U.S.C. 1362(11). Water quality standards "establish the desired condition" of the waters receiving the discharge. *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992); see 33 U.S.C. 1313(c)(2)(A) (providing that whenever a State "revises or adopts a new" water quality standard, such standard "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses").

EPA may authorize a State that meets certain statutory criteria to administer its own NPDES program. 33 U.S.C. 1342(b). When EPA grants such authorization, the State assumes responsibility for issuing NPDES permits "for discharges into navigable waters within its jurisdiction," while EPA retains responsibility for issuing NPDES permits for discharges beyond the State's territorial waters, more than three miles from shore. *Ibid.*; see 33 U.S.C. 1342(c)(1), 1362(8).

2. "Combined sewer systems" are "wastewater collection systems designed to carry sanitary sewage (consisting of domestic, commercial, and industrial wastewater) and storm water (surface drainage from rainfall or snowmelt) in a single pipe to a treatment facility." C.A. E.R. 1489. In periods of wet weather, total flows can exceed the capacity of such a system, and the resulting overflow can result in discharges of sewage into nearby waters. *Ibid.* Those discharges are known as "combined sewer overflows," *ibid.*, which are subject to NPDES permit requirements, 59 Fed. Reg. 18,688, 18,689 (Apr. 19, 1994).

In 1994, EPA published the "Combined Sewer Overflow (CSO) Control Policy"—a set of "provisions for developing appropriate, site-specific NPDES permit requirements" for combined sewer overflows. 59 Fed. Reg.

at 18,688. The CSO Control Policy states, among other things, that permits initially "should at least require" compliance "with applicable [water quality standards], expressed in the form of a narrative limitation"—*i.e.*, a limitation stated in qualitative, rather than quantitative, terms. *Id.* at 18,696. In 2000, Congress amended the Clean Water Act to require each NPDES permit for discharges from a municipal combined sewer system to "conform to the [CSO] Control Policy." 33 U.S.C. 1342(q)(1); see Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, sec. 1(a)(4) [Div. B, Tit. I, § 112(a)], 114 Stat. 2763A-224.

3. The Oceanside system is a combined sewer system that petitioner operates. Pet. App. 15. The Oceanside system collects wastewater from approximately 250,000 residents in western San Francisco. *Id.* at 252. During heavy rain, the Oceanside system can overflow, discharging wastewater directly into the Pacific Ocean at eight discharge points, known as "outfalls." *Id.* at 16; see *id.* at 255, 257-258. Seven of the outfalls discharge sewage near the shore, including public beaches, while the eighth, the Southwest Ocean Outfall, discharges sewage more than three miles offshore. *Id.* at 16, 18, 258.

The Oceanside system is subject to the water quality standards in the Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan), which was adopted by the California Regional Water Quality Control Board for the San Francisco Bay Region (Regional Water Board). See Pet. App. 264-268; C.A. E.R. 404, 416 & n.13. The Basin Plan identifies the "beneficial uses" of the region's waters, including shellfish harvesting, marine habitat, and recreation. Pet. App. 265. The Basin Plan further identifies "water quality objectives," as well

as "implementation programs and policies to achieve those objectives." *Ibid.*

The Oceanside system is also subject to the water quality standards in the Water Quality Control Plan for Ocean Waters of California (Ocean Plan), which was adopted by the California State Water Resources Control Board (State Water Board). C.A. E.R. 503-619; see Pet. App. 268-269. Chapter II of the Ocean Plan "sets forth limits or levels of water quality characteristics for ocean waters to ensure the reasonable protection of beneficial uses and the prevention of nuisance." C.A. E.R. 514 (footnote omitted). Those limits establish bacterial, physical, chemical, biological, and other standards. *Id.* at 514-518. One of the physical standards, for example, requires that "[f]loating particulates and grease and oil shall not be visible." *Id.* at 517. Chapter III of the Ocean Plan sets forth a program of implementation, including requirements for the management of discharged waste and prohibitions on certain types of discharge. *Id.* at 523-524, 541-542.[2]

In 1979, the State Water Board issued Order No. WQ 79-16. C.A. E.R. 1654-1674; see Pet. App. 270-274. Known as the "1979 Ocean Plan Exception," that order exempts the Oceanside system from the Ocean Plan's bacterial standards and allows the system to experience an average of eight combined sewer overflows per year. Pet. App. 18; see C.A. E.R. 1670-1671. The order provides, however, that with the exception of the bacterial stand-

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[2] The Ocean Plan provides that, "[i]f a discharge outside the territorial waters of the State could affect the quality of the waters of the State, the discharge may be regulated to assure no violation of the Ocean Plan will occur" in the State's territorial waters. C.A. E.R. 577; see Pet. App. 441 (noting that the Ocean Plan applies to "discharges both within and outside of the territorial waters of the state").

ards, petitioner "shall," "to the greatest extent practical," "design, construct and operate facilities" that "will conform to the remaining standards set forth in Chapter II of the Ocean Plan" and that "will comply with the conditions controlled by the requirements provided by Chapter III, Sections A and B of the Ocean Plan." C.A. E.R. 1670.

4. EPA has authorized California to administer its own NPDES program. Pet. App. 412. Accordingly, California has assumed jurisdiction over petitioner's nearshore discharges, while EPA continues to regulate discharges at the Southwest Ocean Outfall. *Ibid.* Because the Oceanside system requires both federal and state NPDES permits, EPA and California agreed to consolidate the permitting process. *Id.* at 425; see 40 C.F.R. 124.4(c)(2).

In 2019, EPA and California published, and solicited comments on, a draft consolidated Oceanside NPDES permit. C.A. E.R. 620-765, 936. The draft permit set forth discharge prohibitions, effluent limitations, and receiving-water limitations. *Id.* at 624-627. The draft permit also required petitioner to implement nine minimum controls, update its long-term control plan, and engage in monitoring and reporting. *Id.* at 627, 633-640. The draft permit included various attachments. *Id.* at 642-765. Attachment F, for example, was a "Fact Sheet" that explained "the legal requirements and technical rationale that serve as the basis for the [permit's] requirements." *Id.* at 694; see *id.* at 692-727. Attachment G was a set of regional standard provisions regarding permit compliance and other matters. *Id.* at 728-748.

Petitioner submitted comments on the draft permit. C.A. E.R. 888-932. In those comments, petitioner objected to two "narrative" limitations in the draft permit.

Id. at 921. The first—which appeared in Section V, entitled "Receiving Water Limitations"—stated: "Discharge shall not cause or contribute to a violation of any applicable water quality standard (with the exception set forth in State Water Board Order No. WQ 79-16) for receiving waters adopted by the Regional Water Board, State Water Resources Control Board (State Water Board), or U.S. EPA." *Id.* at 626-627 (emphasis omitted; capitalization altered). The second—which appeared among the "Regional Standard Provisions" in Attachment G—stated: "Neither the treatment nor the discharge of pollutants shall create pollution, contamination, or nuisance as defined by California Water Code section 13050." *Id.* at 731-732 (emphasis omitted; capitalization altered). Petitioner argued that those two "narrative" limitations were "contrary to law," were "unsupported by the available facts," and would "introduce unnecessary uncertainty regarding ongoing compliance with the permit." *Id.* at 921 (emphasis omitted).

In response to petitioner's comments, EPA and California explained that the two narrative limitations were "supported by applicable law and available facts." Pet. App. 513. EPA and California also rejected petitioner's assertion that the two limitations would create uncertainty. *Id.* at 514-521, 535-538. With respect to the limitation in Section V, EPA and California explained that "Fact Sheet sections III.C.1 and III.C.2" identified "the applicable water quality standards" as "the California Ocean Plan (Ocean Plan), the Water Quality Control Plan for San Francisco Bay Basin (Basin Plan), and State Water Board Order No. WQ 79-16." *Id.* at 516. Those standards, EPA and California emphasized, represented no change in the "overarching regulatory context in which [petitioner] operates." *Id.* at 535-536.

With respect to the limitation in Attachment G, EPA and California explained that "Water Code section 13050 defines 'pollution,' 'contamination,' and 'nuisance.'" Pet. App. 518-519. They also emphasized that California has included the same "'region-specific'" limitation "in nearly all individual NPDES permits since at least 1993." *Id.* at 519. Accordingly, EPA and California each issued a final NPDES permit that included the two narrative limitations. *Id.* at 83-84, 97, 339; see *id.* at 80-401; C.A. Supp. E.R. 2-5.

5. Petitioner filed a petition for review of EPA's issuance of the NPDES permit with the agency's Environmental Appeals Board. C.A. E.R. 442-501.[3] The Board denied the petition for review. Pet. App. 402-486. The Board rejected petitioner's contention that the two narrative limitations were contrary to law and were based on clearly erroneous factual findings. *Id.* at 429-450. The Board also rejected petitioner's contention that the two limitations were "so 'vague' and 'unclear' that [they] fail[ed] to provide 'fair notice' to [petitioner] of its legal obligations." *Id.* at 450 (citation omitted); see *id.* at 450-452.

The Board did not find the "language" of the narrative limitations to be "unclear." Pet. App. 451; see *id.* at 430 n.15. The Board likewise did not find it "unclear which water quality standards apply under the permit." *Id.* at 451. And the Board noted that petitioner had "not identified" any "language in any particular water qual-

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[3] Petitioner separately sought review of California's issuance of the NPDES permit in California state court. See *City & County of San Francisco* v. *San Francisco Bay Reg'l Water Quality Control Bd.*, No. RG19042575 (Alameda County Super. Ct.); Pet. App. 427 n.11. Those proceedings have been stayed pending the resolution of the current federal-court proceedings.

ity standard" that petitioner believed to be "vague or insufficiently clear." *Ibid.* Following the Board's order, EPA's issuance of the permit became final. *Id.* at 77-78.

6. The court of appeals denied petitioner's petition for review of EPA's NPDES permit. Pet. App. 1-76. Like the Environmental Appeals Board, the court held that the Clean Water Act authorized EPA to include the narrative limitations in Section V and Attachment G of the permit. *Id.* at 5; see *id.* at 32-36. Rejecting petitioner's assertion that the limitations were "too vague to ensure [petitioner's] control measures will protect water quality," *id.* at 32, the court explained that the limitations "simply require[d] that [petitioner's] discharges comply with applicable state [water quality standards]," *id.* at 34. The court also found that the evidence supported EPA's decision to include the narrative limitations "as a 'backstop' to ensure compliance with [water quality standards] not addressed by specific effluent limitations elsewhere in the permit." *Id.* at 40.

Judge Collins dissented. Pet. App. 50-76. In his view, the narrative limitations violated the Clean Water Act "by failing to articulate any 'specific guidance' as to the 'practices" or 'procedures' that dischargers should undertake" to ensure compliance with the applicable water quality standards. *Id.* at 63 (citation omitted).

7. The court of appeals denied rehearing en banc. Pet. App. 487.

ARGUMENT

EPA issued petitioner an NPDES permit that imposes various limitations on petitioner's discharges into the Pacific Ocean. Petitioner contends (Pet. i) that two of those limitations, expressed as narrative prohibitions on discharges that have specified adverse effects on water quality, violate the Clean Water Act by not "identi-

fying specific limits to which [petitioner's] discharges must conform." The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly rejected petitioner's contention that the two narrative limitations—one in Section V of the permit, and the other in Attachment G—are not specific enough to satisfy the Clean Water Act. Pet. App. 32-36.

a. Contrary to petitioner's contention (Pet. i), the two narrative limitations at issue adequately specify the limits to which petitioner's discharges must conform. The narrative limitation in Section V of the permit states: "Discharge shall not cause or contribute to a violation of any applicable water quality standard (with the exception set forth in State Water Board Order No. WQ 79-16) for receiving waters adopted by the Regional Water Board, State Water Resources Control Board (State Water Board), or U.S. EPA." Pet. App. 97. The permit itself makes clear what those applicable water quality standards are. See *id.* at 451 (finding it clear "which water quality standards apply under the permit"); *id.* at 516 (explaining that the "Fact Sheet" identifies "the applicable water quality standards" under the permit). Attachment F to the permit—which sets forth the "legal" basis for the permit's "requirements," *id.* at 248—specifically identifies the Basin Plan, the Ocean Plan, and State Water Board Order No. 79-16 as the "applicable" state water quality standards, *id.* at 264-274 (capitalization and emphasis omitted); see *id.* at 308 (reiterating that the permit's "receiving water limitations are based on Ocean Plan chapters II.C, II.D, and II.E, and State Water Board Order No. WQ 79-16").

Those standards, in turn, establish specific limits to which petitioner's discharges must conform. Chapter II of the Ocean Plan, for instance, "sets forth limits or levels of water quality characteristics," C.A. E.R. 514—requiring, among other things, that "[f]loating particulates and grease and oil shall not be visible" and that "[t]he pH shall not be changed at any time more than 0.2 units from that which occurs naturally," *id.* at 517. Contrary to petitioner's assertion (Pet. 21), those requirements adequately "defin[e] [petitioner's] obligations to protect water quality." Indeed, petitioner has "not identified" any "language in any particular water quality standard" that petitioner believes to be "vague or insufficiently clear." Pet. App. 451.

The other narrative limitation, which appears in Attachment G to the permit, states: "Neither the treatment nor the discharge of pollutants shall create pollution, contamination, or nuisance as defined by California Water Code section 13050." Pet. App. 339. Section 13050, in turn, defines "[p]ollution" as "an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects" the "waters for beneficial uses" or "[f]acilities which serve these beneficial uses." Cal. Water Code § 13050(*l*) (West 2009). It defines "[c]ontamination" as "an impairment of the quality of the waters of the state by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease." *Id.* § 13050(k). And it defines "[n]uisance" as anything that (1) "[i]s injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property"; (2) "[a]ffects at the same time an entire community or neighborhood, or any considerable number of persons"; and (3) "[o]ccurs during, or as a result of, the treatment or disposal of wastes."

Id. § 13050(m). Thus, in defining each of those terms, Section 13050 specifies the adverse water-quality effects that petitioner must avoid, and petitioner has "not identified" any "language" in Section 13050 that petitioner believes to be "vague or insufficiently clear." Pet. App. 451.

b. In support of its view that the narrative limitations at issue here are not specific enough, petitioner cites (Pet. 22, 29, 33) three Clean Water Act provisions. None of those statutory provisions, however, actually supports petitioner's position.

First, petitioner argues (Pet. 22, 25, 29) that the narrative limitations are too general to satisfy 33 U.S.C. 1311(b)(1)(C), which authorizes EPA to require the achievement of "any * * * limitation" that is "necessary to meet water quality standards." The narrative limitations at issue here, however, *are* "necessary to meet water quality standards." The court of appeals so held, see Pet. App. 40 (upholding the narrative limitations "as a 'backstop' to ensure compliance with [water quality standards]"), and petitioner does not challenge that holding here. To the extent that petitioner equates the term "limitation" in Section 1311(b)(1)(C) with the term "effluent limitation" as defined in 33 U.S.C. 1362(11), its argument reflects a misreading of the statute. See Pet. 10-11, 28-29. Unlike adjacent provisions of the Clean Water Act, see 33 U.S.C. 1311(b)(1)(A) and (B), Section 1311(b)(1)(C) does not use the term "effluent limitation." Whatever the scope of that term, Section 1311(b)(1)(C)'s expansive language is naturally read to authorize the type of "limitation" at issue here—a limitation that focuses on "the discharge's effect on the receiving water." Pet. App. 515.

Second, petitioner cites (Pet. 22) 33 U.S.C. 1342(a)(2), which directs EPA to "prescribe conditions for [NPDES] permits to assure compliance with the requirements of [Section 1342(a)(1)] and such other requirements as [EPA] deems appropriate." But Section 1342(a)(2) "vest[s] in [EPA] broad discretion to establish conditions for NPDES permits." *Arkansas* v. *Oklahoma*, 503 U.S. 91, 105 (1992). That discretion encompasses EPA's decision to impose the narrative limitations at issue here, which EPA determined were necessary to "ensure compliance with [water quality standards]." Pet. App. 40; see *id.* at 440-450.

Third, petitioner relies (Pet. 32-35) on 33 U.S.C. 1342(k), which provides that "[c]ompliance with a permit issued pursuant to [Section 1342] shall be deemed compliance" with various provisions of the Clean Water Act. Section 1342(k), however, says nothing about the level of specificity at which permit conditions must be expressed.

c. Petitioner's reliance (Pet. 24-27) on this Court's decision in *PUD No. 1 of Jefferson County* v. *Washington Department of Ecology*, 511 U.S. 700 (1994), is likewise misplaced. The Court in that case recognized that, in granting a certification under 33 U.S.C. 1341, a State may "impose limitations to ensure compliance with" Section 1311, which "incorporates * * * by reference" the statutory provision (33 U.S.C. 1313) that authorizes States to adopt water quality standards. *PUD No. 1*, 511 U.S. at 713. The Court thus held that, as part of the Section 1341 certification process, a State may require that "an applicant operate [a] project consistently with state water quality standards" as a valid "'limitation' to assure 'compl[iance].'" *Id.* at 715 (quoting 33 U.S.C. 1341(d)) (brackets in original). That decision supports

the court of appeals' holding in this case that, as part of the NPDES permitting process, EPA may likewise require observance of state water quality standards as a valid limitation to "assure compliance." 33 U.S.C. 1342(a)(2); see Pet. App. 33.

Petitioner reads this Court's decision in *PUD No. 1* as requiring that water quality standards "be translated into specific limitations for individual projects." Pet. 25-26 (quoting *PUD No. 1*, 511 U.S. at 716) (emphasis omitted). But the Court in *PUD No. 1* recognized that the Clean Water Act "permits enforcement of broad, narrative criteria based on, for example, 'aesthetics.'" 511 U.S. at 716. And the Court did not suggest that the application of such criteria to particular circumstances must be spelled out in the certification (or permit) itself. In any event, as explained above, the applicable water quality standards in this case already establish "specific limitations." *Ibid.*; see pp. 10-12, *supra*.

2. Contrary to petitioner's assertion (Pet. 21-24), the decision below does not conflict with the Second Circuit's decision in *NRDC* v. *United States EPA*, 808 F.3d 556 (2015). That case concerned discharges of ballast water from ships. *Id.* at 561-562. EPA had issued a "general" NPDES permit to "an entire class" of vessels. *Id.* at 563. And one of the limitations in the permit required all vessels to control discharges "as necessary to meet applicable water quality standards in the receiving water body or another water body impacted by the discharges." *Id.* at 568 (citation and brackets omitted). Environmental groups challenged that "narrative" limitation, arguing that it was "too imprecise to guarantee compliance with water quality standards." *Id.* at 570. The Second Circuit agreed, finding the limitation "insufficient to give a shipowner guidance as to what is expected or to allow

any permitting authority to determine whether a shipowner is violating water quality standards." *Id.* at 578.

That reason for invalidating a narrative limitation does not apply here. Unlike in *NRDC*, the narrative limitations in this case do not state without further elaboration that discharges must "meet applicable water quality standards." *NRDC*, 808 F.3d at 568 (citation omitted). Instead, unlike the general permit in *NRDC*, the permit in this case specifically identifies the water quality standards that apply under the limitation in Section V. See pp. 10-11, *supra*. And the limitation in Attachment G, unlike the limitation in *NRDC*, specifically incorporates the definitions of "pollution," "contamination," and "nuisance" that appear in a particular provision of state law. Pet. App. 339; see pp. 11-12, *supra*. Furthermore, unlike the general permit in *NRDC*, the permit in this case includes several "numeric" and "narrative" requirements, in addition to the challenged limitations, that "provide [petitioner] with substantial guidance as to how to satisfy the applicable [water quality standards]." Pet. App. 36; cf. *NRDC*, 808 F.3d at 577-578 (noting that the general permit did not include any "numeric" water-quality-based effluent limitations). *NRDC* therefore provides no sound basis for thinking that the Second Circuit would disapprove the inclusion in petitioner's NPDES permit of the particular limitations at issue in this case.

The Second Circuit's decision in *NRDC* also arose in a different context than the decision below. Whereas *NRDC* involved a suit brought by environmental groups seeking to prevent the relevant permitting authority from "avoid[ing] responsibility for regulating discharges," 808 F.3d at 578, this case involves a suit brought by a discharger seeking to protect the interests

of permittees, see Pet. App. 35 (describing this case as "the converse of *NRDC*"). And the fact that NPDES permits for combined sewer systems have long included limitations similar to those at issue here undermines any assertion that greater specificity is necessary to protect a permittee's interests. See *id.* at 27, 34. For that reason as well, there is no sound basis for thinking that the Second Circuit would reach a different conclusion than the court below in the particular context of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2024