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 FOR PETITIONER

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QUESTION PRESENTED

Whether the Clean Water Act allows EPA (or an authorized State) to impose generic prohibitions in NPDES permits that subject permitholders to enforcement for exceedances of water quality standards without identifying specific limits to which their discharges must conform.

PARTIES TO THE PROCEEDING

The names of all parties appear in the case caption on the cover page.

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OPINIONS BELOW

The Ninth Circuit's July 31, 2023, opinion is reported at 75 F.4th 1074 and is reproduced in the Petition Appendix starting at Pet. App. 1. The Environmental Appeals Board's December 1, 2020, opinion denying review of the Environmental Protection Agency's permitting decision is reported at 18 E.A.D. 322 and is reproduced starting at Pet. App. 402.

JURISDICTION

The Ninth Circuit issued its decision on July 31, 2023, and entered an order denying a timely petition for rehearing *en banc* on October 10, 2023, Pet. App. 487. The City timely filed a petition for a writ of certiorari on January 8, 2024, which the Court granted on May 28, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant statutory and regulatory provisions are included in the Appendix.

INTRODUCTION

Congress' passage of the Clean Water Act in 1972 was a landmark achievement, and "[f]ive decades later, our Nation's waters are dramatically cleaner." A Proclamation on the 50th Anniversary of the Clean Water Act, 87 Fed. Reg. 63,661 (Oct. 17, 2022). The Act's success stems in no small part from its structure: the statute draws a clear distinction between water quality standards, which set goals for the condition of navigable waters, and effluent limitations, which restrict discharges from point sources into those waters. *EPA* v. *California ex rel. State Water Resources Control Bd. (California)*, 426 U.S. 200, 203–04 (1976).

Prior to the CWA, federal law used water quality standards to regulate individual dischargers. *Id.* at 202. Rather than restrict specific pollutant levels that any person could discharge, that law simply imposed liability on anyone whose discharge was "causing or contributing" to the "reduct[ion of] the quality of such waters below the water quality standards." 33 U.S.C. § 1160(c)(5) (1970). The pre-CWA scheme "proved ineffective." *California*, 426 U.S. at 202. The law's focus on the overall quality of receiving waters made "it very difficult to develop and enforce standards to govern the conduct of individual polluters." *Id.* at 202–03. Such an approach provided no clear standards to guide conduct *ex ante*, allowing for enforcement only *after* a waterbody became "overpolluted." *See id.* at 203–04. When Congress passed the CWA in 1972, it did so precisely "because it recognized this national effort to abate and control water pollution ha[d] been inadequate in every vital aspect." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 319 (1982) (cleaned up).

Just as a chef will be more successful preparing a soup recipe that specifies the qualities and quantities

of ingredients that go into the pot rather than by telling the line cooks collectively to avoid making the soup "too salty,"[1] the CWA restricts the pollutants individual dischargers may add to navigable waters instead of making them responsible for the overall quality of those waters. The Act implements this approach by requiring dischargers to obtain National Pollutant Discharge Elimination System (NPDES) permits that set "effluent limitations" established under section 301 of the Act, 33 U.S.C. § 1311. Effluent limitations impose "direct restrictions on discharges" by specifying limits to which a permitholder's discharges must conform. *California*, 426 U.S. at 204. To return to the analogy, effluent limitations restrict the specific ingredients each line cook may add to the soup, not the quality of the soup itself.

But as the City and County of San Francisco (San Francisco or the City) can attest, the Environmental Protection Agency (EPA) has gone off-recipe, telling dischargers that they are once again responsible for the quality of the soup, rather than their individual additions to it. When EPA most recently renewed the NPDES permit authorizing San Francisco's wastewater treatment system to discharge treated effluent into the Pacific Ocean (the Oceanside Permit), EPA imposed conditions that require the City to avoid any discharge that causes or contributes to a violation of

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[1] For the sake of simplicity, the City adopts this Court's "apt" analogy of receiving water additions under the CWA to additions to a pot of soup. *See S. Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 110 (2004) ("[I]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot."); *Los Angeles Cnty. Flood Control Dist.* v. *Nat. Res. Def. Council, Inc.*, 568 U.S. 78, 83 (2013) (same).

water quality standards. These conditions effectively resurrect the ineffective statutory scheme Congress supplanted with the CWA. Indeed, one of the prohibitions in the City's Oceanside Permit mirrors that rejected statutory approach nearly word for word. *Compare* 33 U.S.C. § 1160(c)(5) (1970) (prohibiting discharges "causing or contributing" to "reduct[ion of] the quality of such waters below the water quality standards"), *with* Pet. App. 97 (San Francisco's discharges may "not cause or contribute to a violation of any applicable water quality standard").

San Francisco petitioned the Ninth Circuit for review of this and a similar permit condition (together, the Generic Prohibitions), objecting that these Generic Prohibitions impermissibly measure the City's compliance based on whether the *receiving waters* meet water quality standards, instead of whether the City's *discharges* meet effluent limitations. The Generic Prohibitions make compliance with the CWA elusive, because a waterbody's ability to meet water quality standards at any time depends on pollutants that all sources—not just San Francisco—contribute. The City consequently lacks advanced notice of how much it must control its discharges to comply with the Generic Prohibitions.

Below, a split Ninth Circuit panel erroneously upheld the Generic Prohibitions, largely by misconstruing the City's petition as an objection to narrative limitations. *See* Pet. App. 30–36. San Francisco has no objection to *narrative effluent limitations*, descriptive requirements that function to restrict a permitholder's discharges. Instead, the City contests only the lawfulness of limitations that make permitholders responsible for the overall quality of receiving waters. The panel majority glossed over the text, structure, and context of

the Act to hold that EPA may impose prohibitions based on receiving water quality—notwithstanding that doing so is contrary to the CWA's text, revives the regulatory scheme Congress abandoned, and hinders permitholders' ability to assess what they must do to comply with their permits. Pet. App. 32–33.

In dissent, Judge Collins found the Generic Prohibitions "inconsistent with the text of the CWA" by "making the ultimate, overall 'water quality standards' themselves the applicable 'limitation' for an individual discharger." Pet. App. 62–63 (Collins, J., dissenting). The Act requires EPA "to translate the *overall* water quality standards" into effluent limitations that notify permitholders how much they need to control their discharges, he argued, and "the agency's erasure of this crucial distinction is fundamentally inconsistent with the CWA's regulatory approach." *Id.* at 53, 63 (emphasis in original). As Judge Collins recognized, the Act clearly instructs EPA to impose requirements that restrict permitholders' discharges at their point sources—the very definition of an "effluent limitation." *See* 33 U.S.C. § 1362(11).

The Ninth Circuit further erred by blessing the Generic Prohibitions as a "backstop" to a permit's effluent limitations. Pet. App. 36. Experience shows these provisions are wielded by EPA (and many private plaintiffs) as a sword rather than a shield. While this case has been pending, EPA filed a lawsuit alleging violations of a provision in another of the City's NPDES permits that—like the Generic Prohibitions—prohibits San Francisco from causing violations of water quality standards in its receiving waters. EPA alleges that the City's discharges have caused violations of receiving water conditions *since 2013*, but nowhere specifies how, if at all, the nature or contents of the

City's discharges did so. Based on threadbare allegations, EPA seeks hundreds of millions of dollars in civil penalties and even more in injunctive relief, all without affording San Francisco notice of precisely how the City could have reasonably avoided the alleged violations, let alone correct them now.

The approach EPA has taken in permits like San Francisco's is unfair, unworkable, and, as Congress recognized, not an effective way to protect the waters of the United States. It also directly conflicts with the text, structure, and historical context of the CWA. The Ninth Circuit's decision should be reversed, and EPA should be required to protect water quality in the manner Congress directed.

STATEMENT OF THE CASE

I. The Clean Water Act

A. Congress passed the CWA because the Nation needed an effective approach to controlling water pollution.

Congress enacted the Clean Water Act, Pub. L. 92-500, 86 Stat. 816, 33 U.S.C. § 1251 *et seq.*, in 1972 to accomplish a "total restructuring" and "complete rewriting" of the federal laws regulating water pollution. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317 (1981). Before 1972, federal law "employed ambient water quality standards specifying the acceptable levels of pollution in a State's interstate navigable waters as the primary mechanism in its program for the control of water pollution." *California*, 426 U.S. at 202. That law authorized enforcement against anyone whose "discharge of matter into interstate waters" was "causing or contributing" to the "reduc[tion of] the quality of such waters below the water quality standards." 33 U.S.C. § 1160(c)(5) (1970).

This regulatory approach, in which "water quality standards . . . serve[d] both to guide performance by polluters and to trigger legal action to abate pollution, proved ineffective." *California*, 426 U.S. at 202. The water quality standards were difficult to enforce against individual dischargers for the same reason a chef cannot easily identify which particular line cook made the soup too salty. Because federal law focused on navigable waters' aggregate levels of pollution, rather than on the "preventable causes of water pollution" discharged into them, ascertaining if dischargers were out of compliance required "work[ing] backward from an overpolluted body of water to determine which point sources [we]re responsible." *Id.* at 202,

204. This retrospective approach made "it very difficult to develop and enforce standards to govern the conduct of individual polluters." *Id.* at 202–03. Worst, it also failed to protect water quality because dischargers lacked clear standards to guide their conduct *ex ante*; they only learned of their failure to control their discharges adequately *after* water quality standards were exceeded. *See id.* at 203.

B. The CWA established NPDES permits, which set effluent limitations to regulate permitholders' discharges.

Faced with this failure, Congress enacted the CWA to reboot water quality regulation. It "introduced two major changes in the methods" used to control water pollution: (1) the NPDES permit system, which establishes an individual discharger's compliance obligations; and (2) effluent limitations, the specific restrictions that permits impose on the nature and contents of a permitholder's discharges. *California*, 426 U.S. at 204–05.

1. NPDES Permits

Section 402 of the Act, 33 U.S.C. § 1342, establishes the NPDES permitting scheme.[2] Congress established the NPDES program to regulate dischargers individually, by making it "unlawful for any person to discharge a pollutant without obtaining

[2] The Act imposes a variety of other mandates on regulators, including a requirement for states to issue certifications for federally permitted activities "which may result in any discharge into the navigable waters." 33 U.S.C. § 1341(a)(1). That certification scheme is not at issue in this case.

a permit and complying with its terms." *California,* 426 U.S. at 205; *see* 33 U.S.C. § 1311(a).[3]

Each NPDES permit "defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations" under the CWA. *California*, 426 U.S. at 205. The specific requirements contained in an NPDES permit are subject to "direct administrative and judicial enforcement." *Id.* With a handful of exceptions, an NPDES permitholder who complies with the conditions of their permit is "deemed to be in compliance" with the CWA's anti-pollution mandate and not subject to enforcement. *Id.*; *see also* 33 U.S.C. § 1342(k) (known as the "permit shield"). This is true even where discharges that comply with an NPDES permit "reach waters already in violation of existing water quality standards." *Arkansas* v. *Oklahoma*, 503 U.S. 91, 107 (1992).

2. Effluent Limitations

The Act's second major innovation was its establishment of effluent limitations: "direct restrictions on discharges [that] facilitate enforcement by making it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible." *California*, 426 U.S. at 204. Section 301 of the Act, 33 U.S.C. § 1311 ("Effluent limitations"), sets forth the Act's requirements for setting effluent

[3] The Act's requirement to obtain an NPDES permit applies only to "point sources"—"discernible, confined and discrete conveyance[s] . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Nonpoint source pollution, which "arises from many dispersed activities over large areas, and is not traceable to any single discrete source," does not require a permit. *League of Wilderness Defs.* v. *Forsgren*, 309 F.3d 1181, 1183–84 (9th Cir. 2002).

limitations—restrictions "on quantities, rates, and concentrations of . . . constituents . . . discharged from point sources." 33 U.S.C. § 1362(11) (definition of "effluent limitation").

Section 301(b)(1) of the Act instructs EPA to establish "effluent limitations for point sources," including "publicly owned treatment works." 33 U.S.C. § 1311(b)(1)(A)-(B). In the first instance, EPA sets effluent limitations based on the application of specified control technologies. *See id*. EPA calls these "technology-based effluent limitations." *See* EPA, NPDES Permit Limits-TBELs and WQBELs (Oct. 5, 2023), https://perma.cc/A5X7-WJMX.

In many instances, technology-based effluent limitations provide sufficient control of point sources' discharges such that navigable waters will meet applicable water quality standards. *See id*. However, conditions in some waterbodies are such that "implementing technology-based controls is inadequate to achieve water quality standards." *Id.* In these circumstances, section 301(b)(1)(C) requires that EPA impose "any more stringent limitation, including those necessary to meet water quality standards . . . or required to implement any applicable water quality standard." 33 U.S.C. § 1311(b)(1)(C).

EPA has long understood section 301(b)(1)(C) to mandate that the agency set "*effluent limitations* necessary to meet all applicable water quality standards," and has crafted a set of regulations for setting these discharge restrictions. 54 Fed. Reg. 23,868, 23,875 (June 2, 1989) (emphasis added); *Arkansas*, 503 U.S. at 96 ("EPA's Chief Judicial Officer . . . ruled that § 301(b)(1)(C) . . . 'requires an NPDES permit to impose any *effluent limitations* necessary to comply with applicable state water quality standards.'"

(emphasis added) (citation omitted)). The regulations prescribe a methodology for identifying the need for "water quality-based effluent limits" based on an assessment of whether specific "pollutants or pollutant parameters" in a point source's discharge have a "reasonable potential" to cause a waterbody to violate water quality standards. 40 C.F.R. § 122.44(d)(1)(i), (vii).

If EPA concludes that any pollutant in a discharge has such a reasonable potential, EPA must impose "effluent limit[ation]s for that pollutant." 40 C.F.R. § 122.44(d)(1)(iii); *Arkansas*, 503 U.S. at 105 (affirming EPA's obligation to set appropriate effluent limitations under § 122.44(d)(1) to "ensure compliance with the applicable water quality requirements"). These effluent limitations may be stated numerically (*e.g.,* a restriction on a particular concentration of a chemical in discharged effluent), or narratively (*e.g.*, a requirement to minimize solid or floatable matter discharged from a point source).

The water quality standards that are the basis for these effluent limitations are set under section 303 of the Act, 33 U.S.C. § 1313, which requires States to develop water quality standards that describe a waterbody's "desired condition," subject to EPA's review and approval. *Arkansas*, 503 U.S. at 101; *see* 33 U.S.C. § 1313(c)(2)(A). These state-developed standards consist of two primary components: (1) a water's designated use, such as "recreation[ ]" or "water suppl[y]"; and (2) water quality criteria, appropriate benchmarks to protect each designated use. 33 U.S.C. § 1313(c)(2)(A).[4]

[4] In California, a designated use is called a "beneficial use," and water quality criteria are referred to as "water quality objectives." *See* JA.32.

A State may express water quality criteria numerically (*e.g.*, a maximum concentration of a chemical in the receiving water) or narratively (*e.g.*, narrative criteria that set out broad goals for a water body).[5] *See* 40 C.F.R. § 131.11(b); EPA, Water Quality Standards Handbook Ch. 3 at 6 (Dec. 2023).

Thus, while the Act retained water quality standards, it does not replicate its predecessor's mistake of requiring dischargers to avoid "causing or contributing" to conditions that fail to meet water quality standards. 33 U.S.C. § 1160(c)(5) (1970). Instead, the CWA recasts water quality standards in a new role: serving as the "basis for effluent limitations." *California*, 426 U.S. at 205 n.12. Under the Act, it is not the permitholder that must comply with water quality standards, but EPA, which has the duty to set effluent limitations for permitholders that will ensure that water quality standards are met.

II. San Francisco's Combined Sewage and Stormwater Treatment Facilities

Despite that carefully designed regulatory scheme, San Francisco now finds itself subject to the very obligation the CWA was designed to eliminate: a requirement not "to cause or contribute" to violations of water quality standards. Like most cities in the United States, *see* Pet. App. 7, San Francisco owns and operates facilities that collect, convey, and treat combined sewage and stormwater. This case concerns the City's Oceanside Facilities, which provide combined sewage and stormwater treatment for more than 250,000

[5] For instance, California's water quality criteria require that "[m]arine communities . . . not be degraded," and prohibit "objectionable aquatic growths" or chemical conditions that "degrade indigenous biota." JA.38-39.

people living in the western portion of San Francisco and include: (a) the Oceanside Water Pollution Control Plant; and (b) over 250 miles of combined sewers. Pet. App. 252–57. The City also operates a second combined sewer and wastewater treatment system, called the Bayside Facilities, which serve the eastern portion of San Francisco. The Bayside Facilities operate under a separate NPDES permit, which is the subject of EPA's recently-filed enforcement action.[6]

As an operator of a combined sewer system, San Francisco is one of hundreds of older cities that experience combined sewer overflows (CSOs)—discharges from the combined sewer before reaching the treatment plant that occur when large storms cause flows to exceed the sewer's capacity. *Id.* at 258. The City has made major investments in upgrading the Oceanside Facilities to minimize CSOs and their impacts on water quality. Among other infrastructure improvements, the Oceanside Facilities include three enormous transport and storage structures that can store approximately 71 million gallons of combined wastewater and stormwater. Pet. App. 254. These and other improvements—part of a multibillion-dollar citywide investment in CSO controls—reduced the average annual frequency of CSOs from

[6] EPA sued San Francisco for allegedly violating a provision of its Bayside permit that is substantively identical to the Generic Prohibitions challenged in this case. *See* Complaint ¶ 100, *United States* v. *City & Cnty. of San Francisco*, No. 3:24-cv-02594 (N.D. Cal. May 1, 2024) (ECF No. 1) (EPA Complaint) (citing S.F. Bay Reg'l Water Quality Control Bd., Waste Discharge Requirements for the Southeast Water Pollution Control Plant et al., Order No. R2-2013-0029, NPDES No. CA0037664, at § V.C (Aug. 19, 2013)), *available at* https://perma.cc/HT8M-SS35.

approximately 114 per year to fewer than eight. *See* JA.6; 9th Cir. ER 964; 9th Cir. Supp. ER 914.

III. Case History

A. EPA's Issuance of the Oceanside Facilities' 2019 NPDES Permit

EPA and the State of California, through the San Francisco Bay Regional Water Quality Control Board (Regional Board), jointly developed and issued the Oceanside Facilities' latest NPDES permit (the Oceanside Permit) in 2019.[7] Pet. App. 80. The CWA charges EPA with issuing permits in the first instance, but most States—including California—are authorized to issue permits for discharges into waters within their jurisdiction. *See* 33 U.S.C. § 1342(b); 40 C.F.R. § 123.1(d)(1).[8] Only EPA, however, may issue permits for ocean discharges occurring more than three miles from shore. *Pac. Legal Found.* v. *Costle*, 586 F.2d 650, 655 (9th Cir. 1978), *rev'd on other grounds, Costle* v. *Pac. Legal Found.*, 445 U.S. 198 (1980). Because the Oceanside Facilities discharge both

[7] The CWA classifies NPDES permits for combined sewer systems in phases. Permitholders that have yet to develop a long-term plan to control their CSOs and select control projects are in "Phase I," and those that have completed their plans and selected control projects fall into "Phase II." *See* EPA, Combined Sewer Overflow Control Policy, 59 Fed. Reg. 18,688, 18,696 (Apr. 19, 1994). Because San Francisco has already selected (and completed building) its CSO control projects, EPA has placed San Francisco's permit in Phase II. *See* Br. for EPA 18, 23, 29, *City & Cnty. of San Francisco* v. *EPA*, No. 21-70282 (9th Cir. Nov. 24, 2021) (ECF No. 33-1).

[8] For the reader's convenience, this brief throughout refers only to EPA, but this Court's interpretation of the Act will govern NPDES permits that may be issued under the Act by either EPA or an authorized State. *See* 33 U.S.C. § 1342(a), (b).

close to and more than three miles from the shore, San Francisco must obtain an NPDES permit from both EPA and the Regional Board.[9]

The Oceanside Permit comprises over 100 pages of detailed requirements for San Francisco's discharges and includes both technology- and water quality-based effluent limitations. The latter include two distinct sets of water quality-based effluent limitations: (1) a numeric effluent limitation that applies during dry weather; and (2) narrative limitations that set comprehensive management requirements for the operation of the Oceanside Facilities during wet weather. Pet. App. 95–97, 128–31.

Despite the wide-ranging scope of those effluent limitations, EPA also included the two challenged Generic Prohibitions in the final Oceanside Permit over San Francisco's objections. 9th Cir. ER 921–29. Resurrecting the regulatory scheme that Congress expressly abandoned in 1972, EPA inserted into Section V—entitled "Receiving Water Limitations"—a condition that a discharge may "not cause or contribute to a violation of any applicable water quality standard." Pet. App. 97. EPA included a similar condition in Attachment G, § I.I.1 that no "discharge of pollutants shall create pollution, contamination, or nuisance as defined by California Water Code section 13050." *Id.* at 339. California defines "pollution" by reference to whether a surface water meets the beneficial use

[9] Because the Regional Board's approval of the Permit is a distinct agency action, San Francisco separately challenged the Regional Board's decision in a state court proceeding. *City & Cnty. of San Francisco* v. *San Francisco Bay Reg'l Water Quality Control Bd.*, No. RG19042575 (Alameda Cnty. Super. Ct.). This state court litigation is stayed pending resolution of proceedings in this Court.

component of the state's water quality standards. *See* Cal. Water Code § 13050(l)(1)(A) (defining "pollution" to include "alteration of the quality of the waters of the state . . . which unreasonably affects . . . [t]he waters for beneficial uses").

Thus, both Section V and Attachment G, § I.I.1—the Generic Prohibitions—condition San Francisco's compliance on the overall quality of receiving waters. Because water quality varies over time in response to additional sources of pollutants and other factors, San Francisco's compliance with those permit conditions will not be knowable at the time of discharge.[10] Instead, it often can only be determined by "work[ing] backward" when the Pacific Ocean fails to meet water quality standards, *California*, 426 U.S. at 204, to determine if San Francisco's discharges "create[d]," "contribute[d] to" or "cause[d]" that deficiency. Pet. App. 97, 339. In other words, San Francisco is subject to the exact regulatory approach that the CWA was supposed to supplant.

[10] Nor can San Francisco control all nonpoint sources of pollution into the Pacific Ocean, even though "nonpoint source pollution is the leading remaining cause of water quality problems." EPA, Basic Information about Nonpoint Source (NPS) Pollution (Dec. 4, 2023), https://perma.cc/YP8J-8PQ4.

B. Administrative and Judicial Review of EPA's Permitting Decision

San Francisco petitioned for review with EPA's Environmental Appeals Board (EAB) to challenge the Generic Prohibitions and two other provisions. *See* 40 C.F.R. § 124.19(a). As relevant here, the City objected that neither section 301(b)(1)(C) nor any other provision of the Act authorized the agency to impose the Generic Prohibitions. The EAB issued an order on December 1, 2020, denying San Francisco's petition and concluding, among other things, that section 301(b)(1)(C) empowered the agency to impose the Generic Prohibitions. *See* Pet. App. 433. EPA issued its Notice of Final Permit Decision—marking final agency action—on December 22, 2022. Pet. App. 77–79.

The City then timely petitioned for review in the Ninth Circuit to challenge both the Generic Prohibitions and another provision of the Oceanside Permit. *See* 33 U.S.C. § 1369(b)(1)(F). A divided Ninth Circuit panel denied San Francisco's petition and concluded, as relevant here, that the Generic Prohibitions are "consistent with the CWA and its implementing regulations." Pet. App. 34. The panel majority held that section 301(b)(1)(C) of the Act allows EPA to condition compliance on the overall quality of receiving waters, rather than on the nature or contents of the permitholder's discharges, whenever EPA determines doing so is "necessary."[11] Pet. App. 32–33.

Judge Collins dissented, finding the Generic Prohibitions "invalid" because they are "inconsistent

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[11] The panel majority also pointed to similar language in 40 C.F.R. § 122.44(d) as a basis for EPA's authority to impose generic prohibitions against violating water quality standards. Pet. App. 32–33.

with the text of the CWA." Pet. App. 50, 62. Analyzing section 301(b)(1)(C), Judge Collins concluded that the CWA "draws an explicit distinction between the 'limitations' that the agency must . . . impose on a particular permittee[ ] and the overall 'water quality standards'" applicable to the relevant receiving water. Pet. App. at 62. He wrote that the Generic Prohibitions "ignore this critical distinction by making the ultimate, overall 'water quality standards' themselves the applicable limitation for" San Francisco. *Id.* at 63. By conditioning San Francisco's ability to comply with its permit on *receiving water* quality, Judge Collins concluded, EPA "ha[d] fundamentally abdicated the regulatory task assigned to it under the CWA": prescribing effluent limitations that restrict the pollutants in the City's *discharges* at a level that would meet or implement water quality standards. *Id.* at 64.

SUMMARY OF THE ARGUMENT

The text, structure, and pre- and post-enactment context of the CWA all make clear the Act does not authorize EPA to impose NPDES permit requirements that condition permitholders' compliance on whether receiving waters meet applicable water quality standards. EPA has argued, and the Ninth Circuit erroneously concluded, that section 301(b)(1)(C) of the Act empowers the agency to impose prohibitions of this kind. That section gives EPA no such authority. Accordingly, EPA's imposition of the Generic Prohibitions is "not in accordance with law." 5 U.S.C. § 706(2)(A).

I. The Act's text and structure do not authorize EPA to condition a permitholder's compliance on the quality of receiving waters. Section 301(b)(1)(C) commands EPA to use a specific regulatory tool to protect water quality: effluent limitations, which Congress defined to be restrictions on the nature or contents of a permitholder's discharges from their point sources.

A.1. Section 301(b)(1)(C) grants EPA the authority to use only one mechanism to control permitholders' discharges: effluent limitations. The sequencing of terms both in subsection (b)(1) and throughout section 301 makes clear that subsection (b)(1)(C) is a narrow directive to set more stringent "effluent limitations"—not a grant of unfettered authority to impose the Generic Prohibitions. Reading section 301(b)(1)(C) to empower EPA to impose such prohibitions would render the provision illogical and short-circuit its requirement that "limitations" set under this provision be more stringent than other effluent limitations set pursuant to section 301(b)(1).

2. Congress' instruction to EPA to set effluent *limitations* precludes the agency from imposing permit requirements that condition compliance on receiving water quality. The Act's definition of the term makes clear that effluent limitations must restrict a permitholder's discharges at the point source, prior to their addition to navigable waters.

B. The Act's structure confirms EPA may not make permitholders responsible for exceedances of water quality standards. Numerous provisions identify which of the CWA's requirements bind individual permitholders, and *none* contemplates that a permitholder is directly liable for violations of section 303, the Act's water quality standards provision. It flies in the face of logic—and Congress' carefully drafted regulatory regime—to interpret section 301(b)(1)(C) to enable EPA to do what Congress declined to do throughout the CWA. This Court should resist EPA's invitation to insert a requirement Congress expressly declined to add. *See Whitfield* v. *United States*, 543 U.S. 209, 216–17 (2005).

II. The CWA's pre-enactment context and early post-enactment agency interpretations confirm what the Act's text makes clear: EPA may not impose permit terms such as the Generic Prohibitions that condition a permitholder's compliance on receiving water conditions.

A. The City's interpretation ensures EPA cannot revive aspects of the ineffective pollution control system the CWA replaced, which regulated dischargers based on whether they were causing or contributing to exceedances of water quality standards. Congress designed section 301(b)(1)(C) to depart from this failed approach by requiring EPA to impose effluent limitations that make permitholders respon-

sible for what they can and must control—the nature and content of their own discharges.

B. EPA's longstanding agency interpretations of section 301(b)(1)(C) confirm that this provision is not a license to condition permitholders' compliance on receiving water quality. Based on its understanding that section 301(b)(1)(C) requires it to set effluent limitations, EPA has developed an entire regulatory regime that demonstrates the agency possesses the tools necessary to protect water quality without resorting to unlawful permit terms like the Generic Prohibitions.

III. The Act's permit shield and enforcement provisions confirm the soundness of the City's interpretation of section 301(b)(1)(C) and the Act.

A. The City's interpretation ensures permitholders face the "crushing consequences" of the CWA's enforcement machinery only when they violate pollution control obligations clearly defined in their permits. *Sackett* v. *EPA*, 598 U.S. 651, 660 (2023) (cleaned up). EPA's interpretation, by contrast, unsettles Congress' careful pairing of potentially severe enforcement penalties with the Act's guarantee of finality codified in the statute's permit shield, which deems conformity to a permit's specific requirements to be compliance with the Act. *See* 33 U.S.C. § 1342(k).

B. Recent litigation, including a lawsuit brought by EPA against San Francisco, shows how requirements like the Generic Prohibitions harm permitholders. In lawsuits seeking to enforce such conditions, courts must decide after the fact how much permitholders should have controlled their discharges, making permit obligations "hopelessly indeterminate" and impeding permitholders' ability to assess their compliance *ex ante*. *Sackett*, 598 U.S. at 681 (cleaned up). San Francisco

now faces such a lawsuit, brought by EPA, that seeks to enforce a condition in the City's Bayside permit that—like the Generic Prohibitions—defines compliance by reference to receiving water quality. Even after being sued, San Francisco still does not know *what* EPA contends San Francisco has done to violate that permit condition, nor what, if anything, the City can do to avoid future enforcement actions, short of stopping wastewater treatment operations altogether. Interpreting section 301(b)(1)(C) consistent with its text, structure, and context ensures no permitholder will face such a predicament.

ARGUMENT

The CWA does not allow EPA (or an authorized State)[12] to impose permit conditions that—like the Generic Prohibitions—condition a permitholder's compliance on the quality of receiving waters. EPA has argued, and the Ninth Circuit incorrectly held, that section 301(b)(1)(C) of the Act, 33 U.S.C. § 1311(b)(1)(C), authorizes the imposition of any receiving water prohibition that EPA deems "necessary to meet water quality standards." *See* Pet. App. 32–33; Br. in Opp. to Pet. for Writ of Cert. 2 (EPA BIO); *see also* Br. for EPA, *supra* note 7, at 52. Section 301(b)(1)(C), however, gives EPA no such discretion.

The Act's text and structure instead establish one mechanism for ensuring water quality standards are met by permitholders: effluent limitations, which regulate the nature and contents of a permitholder's *discharges at the point source.* Nothing in the Act's text or structure authorizes EPA to condition a permitholder's compliance on the quality of receiving waters. That understanding of the Act comports with this Court's longstanding expectation that EPA will "translate[] Congress' broad goal of eliminating the discharge of pollutants into the navigable waters into specific requirements that must be met by individual point sources." *EPA* v. *Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 69 (1980) (cleaned up). That reading also ensures the Act's onerous enforcement consequences only befall those permitholders who violate clear, *ex ante* requirements in their permits.

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[12] As noted above, both EPA and authorized States may issue NPDES permits, *see supra* at 14–15 & note 8, but for the reader's convenience, this brief throughout refers only to EPA.

The Generic Prohibitions thus exceed EPA's authority under section 301(b)(1)(C) because they do not restrict the City's discharges at its point sources. Because the Generic Prohibitions are not effluent limitations that section 301(b)(1)(C) authorizes the agency to impose, they should be set aside as "not in accordance with law," 5 U.S.C. § 706(2)(A), and the Court should reverse the Ninth Circuit's contrary holding.

I. The CWA does not authorize EPA to impose permit conditions that hold permitholders directly liable for the quality of receiving waters.

Section 301(b)(1)(C)'s text and the Act's structure make clear EPA must use effluent limitations in NPDES permits to ensure discharges are sufficiently regulated to meet water quality standards. The statutory definition of effluent limitations does not allow EPA to condition a permitholder's compliance on receiving water quality. Moreover, reading section 301(b)(1)(C) as authorizing EPA to do so would flout the text of other parts of section 301(b) and do violence to related provisions of the Act.

A. EPA may only set effluent limitations that restrict the nature or contents of discharges from permitholders' point sources.

1. The CWA requires EPA to use effluent limitations—not any other type of permit condition—to meet water quality standards.

Section 301(b)(1)(C) does not give the agency broad discretion to impose permit conditions that simply direct permitholders to avoid violating water quality

standards. Rather, Congress directed EPA to use *effluent limitations*—the specific regulatory tool that Congress determined would effectively control pollution by establishing "direct restrictions on discharges." *California*, 426 U.S. at 204.

"[S]tatutory interpretation must begin with, and ultimately heed, what a statute actually says." *Groff* v. *DeJoy*, 600 U.S. 447, 469 (2023) (cleaned up). Here, section 301(b) provides in relevant part:

> In order to carry out the objective of this chapter there shall be achieved –
>
> (A) . . . *effluent limitations* for point sources, . . . which shall require the application of the *best practicable control technology* currently available as defined by the Administrator pursuant to section 1314(b) of this title . . . ;
>
> (B) for publicly owned treatment works . . . , *effluent limitations* based upon secondary treatment as defined by the Administrator pursuant to section 1314(d) . . . ; or,
>
> (C) . . . *any more stringent limitation*, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations . . . or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

33 U.S.C. § 1311(b)(1) (emphases added).

Although section 301(b)(1)(C) uses only the word "limitation," its use within the broader context of section 301 makes clear that Congress deployed it as a shorthand for the defined term "effluent limitation." *See United States* v. *Taylor*, 596 U.S. 845, 856 (2022) ("a law's terms are best understood by the company [they] kee[p]" (cleaned up)). To begin, the two (and only) uses of "limitations" preceding (C) both require the achievement of "effluent limitations" based on specified technologies, 33 U.S.C. § 1311(b)(1)(A), (B). *Cf. New Prime Inc.* v. *Oliveira*, 586 U.S. 105, 110, 111 (2019) ("statute's terms and sequencing" show "antecedent statutory provisions limit the scope of" the provision in question)); *Harrington* v. *Purdue Pharma L. P.*, 144 S. Ct. 2071, 2084 (2024) ("When resolving a dispute about a statute's meaning, we sometimes look for guidance not just in its immediate terms but in related provisions as well.")

EPA itself has long recognized—since shortly after Congress passed the Act—that "the position of § 301(b)(1)(C) following two other subparagraphs which clearly establish effluent limitations favors a construction of subparagraph (C) by which it also 'establishes' *effluent limitations*."[13] This interpretation, coming shortly after the passage of the Act, is especially telling. *See Loper Bright Enters.* v.

[13] EPA, Decisions of the Administrator & Decisions of the General Counsel – National Pollutant Discharge Elimination System Adjudicatory Hearing Proceedings Vol. 2 at 116 (Jan. 1976 – Dec. 1976) (Jan. 22, 1976 decision of EPA's General Counsel) (emphasis added); *see also* EPA, The National Water Permit Program 12 (June 1, 1973) ("*more stringent effluent limitations* are to be imposed" when technology-based controls are insufficient to attain water quality standards (emphasis added)).

Raimondo, 144 S. Ct. 2244, 2258 (2024) ("[An] Executive Branch interpretation [that] was issued roughly contemporaneously with enactment of the statute . . . can inform [a court's] determination of what the law is." (cleaned up)).

That interpretation also ensures that "limitation" has a consistent meaning—as a shorthand for "effluent limitation"—throughout section 301. *See Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) (invoking the consistent-usage canon to find a term used in related provisions enacted at the same time had the same meaning). For instance, section 301(i)(1) refers to "limitations under subsection (b)(1)(B)," 33 U.S.C. § 1311(i)(1), a subsection that addresses only "effluent limitations." *Id.* § 1311(b)(1)(B). Other provisions of section 301 also describe "effluent limitations" before referring to them again simply as "limitations." *See id.* § 1311(b)(2)(C)–(D), (F), (3)(A)–(B), (m)(1)–(2), (n)(7). Indeed, Congress removed any doubt that section 301(b)(1)(C)'s "limitation" should have the same meaning as it does elsewhere by providing section 301 an unambiguous title: "Effluent limitations," 86 Stat. 844, Pub. L. No. 92-500, § 301. *See INS* v. *Nat'l Ctr. for Immigrants' Rts., Inc.*, 502 U.S. 183, 189 (1991) ("the title of a statute or section can aid in resolving an ambiguity in the legislation's text").

Two additional aspects of section 301(b)(1)(C) confirm that this provision authorizes EPA to impose only effluent limitations. *First*, section 301(b)(1)(C)'s use of a comparative adjective—"more stringent"—requires a comparison to some other limitation preceding it. The only "limitations" preceding subsection (b)(1)(C) are the "effluent limitations" in subsections (b)(1)(A) & (B). Thus, the comparison of stringency that

the statute requires is only possible if the "limitation" required by section 301(b)(1)(C) is the same kind as those in the preceding subsections (A) and (B): "effluent limitations." *Id.* § 1311(b)(1)(A) –(B).

The converse interpretation hinders the comparison the text demands. A "limitation" that conditions compliance on receiving water quality will necessarily vary in its stringency depending on circumstances in the receiving water that can include "*other* sources of pollutants into the applicable waters," Pet. App. 64 (Collins, J., dissenting) (emphasis in original), as well as variations in flow or other conditions.[14] The relative stringency of a permit condition like the Generic Prohibitions will thus vary from season to season, and day to day. When a receiving water's conditions are comparatively pristine, for example, such a prohibition would allow a permitholder to discharge *in greater amounts* than permitted by their technology-based effluent limitations set under subsections (b)(1)(A) – (B). In those circumstances, the permit's receiving water prohibition would be invalid under section 301(b)(1)(C) because it would be *less* stringent than the permit's technology-based effluent limitations.

Second, reading section 301(b)(1)(C) to require EPA to set only effluent limitations ensures the remainder of the provision functions coherently. *See Food & Drug Admin.* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[a] court must . . . interpret the statute as a symmetrical and coherent regulatory scheme . . . . and fit, if possible, all parts into

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[14] *See* Jeffrey M. Gaba, Generally Illegal: NPDES General Permits Under the Clean Water Act, 31 Harv. Envtl. L. Rev. 409, 441 (2007).

a harmonious whole" (cleaned up)). Section 301(b)(1)(C) requires that the more stringent limitations will "*meet* water quality standards" or "*implement* any applicable water quality standard." 33 U.S.C. § 1311(b)(1)(C) (emphasis added). Both terms resist an interpretation that would allow EPA to impose a "limitation" that demands a permitholder avoid receiving water conditions inconsistent with water quality standards. "T*o meet*" generally means "to conform" or "to satisfy,"[15] particularly with "exactitude and precision."[16] Similarly, "*to implement*" means "to give practical effect to and ensure of actual fulfillment by concrete measures"[17]—an interpretation the EPA Administrator long ago adopted with respect to this provision.[18] These verbs connote the need for a "limitation" to impose precise, concrete restrictions on a permitholder's discharges.

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[15] "Meet," The Random House Dictionary of the English Language 831 (1968).

[16] "Meet," Webster's Ninth New Collegiate Dictionary 738 (1986).

[17] "Implement," Webster's Third New Int'l Dictionary 1134 (1961); "Implement," The Random House Dictionary of the English Language 667 (1968) ("to put into effect according to or by means of a definite plan or procedure").

[18] "The word 'implement,' as used in the statute, is a transitive verb which I interpret as meaning to carry something into effect over a period of time, *as opposed to the actual realization or fulfilment of an objective*." EPA, Decisions of the EPA Administrator & Decisions of the General Counsel – National Pollutant Discharge Elimination System Adjudicatory Hearing Proceedings Vol. 1 at 121 (Sep. 1974 – Dec. 1975) (Decision of the Administrator, Oct. 10, 1975) (emphasis added) (hereinafter Decisions of the EPA Administrator & Decisions of the General Counsel Vol. 1).

An *effluent* limitation provides the precision and specificity demanded by Congress' choice of verbs. The Act requires an effluent limitation to restrict "quantities, rates, and concentrations of" pollutants in a permitholder's discharge. 33 U.S.C. § 1362(11). For this reason, EPA's guidance devotes a whole chapter to explaining how permit writers should develop specific effluent limitations that will meet and implement water quality standards. *See* EPA, NPDES Permit Writers' Manual (NPDES Manual) p. 6-32 (Sep. 2010) (instructing permit writer to "translate [a receiving water's loading capacity] into effluent limitations" because "[t]he requirements of a [receiving water's loading capacity] generally must be interpreted in some way to be expressed as an effluent limitation").

By contrast, permit terms like the Generic Prohibitions—which simply tell a permitholder not to "create pollution," Pet. App. 339, or not to "cause or contribute to a violation of any applicable water quality standard," *id.* at 97—lack concrete or specific restrictions. In effect, reading section 301(b)(1)(C) to allow EPA to impose the Generic Prohibitions would enable the agency simply to *impose* water quality standards "*to meet* water quality standards" or "*implement* any applicable water quality standard." Such an interpretation is illogical and, worse yet, effectively reads out of the statute Congress' directive that EPA set "limitations" that are distinct from—but that *meet* and *implement*—water quality standards.[19] The Court

[19] *See* Pet. App. 67 (Collins, J., dissenting) (Interpreting the Act to allow EPA to impose the Generic Prohibitions enables "the agency's wholesale erasure of the distinction between the 'limitations' to be crafted by the agency and the ultimate water

should not countenance a reading of EPA's authority that would nullify these critical terms in section 301(b)(1)(C). *See Corley* v. *United States*, 556 U.S. 303, 314 (2009) (It is "one of the most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (cleaned up)); *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (The Court is "especially unwilling to [adopt an interpretation that nullifies a word in a statute] when the term occupies so pivotal a place in the statutory scheme.").

2. EPA must set effluent limitations that restrict permitholders' discharges at their point sources.

By requiring EPA to impose effluent limitations under section 301(b)(1)(C), Congress directed EPA to impose permit conditions that restrict the nature of permitholders' *discharges* at their point sources. The Act defines an "effluent limitation" as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents *which are discharged from point sources*," 33 U.S.C. § 1362(11) (emphasis added). Six months after the Act's passage, EPA had already begun interpreting this definition to demand that the agency restrict the contents of a discharge at the point source, rather than restrict the receiving water conditions these discharges can cause. *See* EPA, The National Water Permit Program, *supra* note 12, at 7 (explaining how effluent limitations regulate "the *amount of pollutants in discharged wastewater* or on

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quality standards those limitations are supposed to help to achieve.").

the volume of wastewater discharged") (emphasis added); *see also infra* at 41–42.

EPA's "contemporaneous[]" and "consistent" interpretation is "especially useful in determining the statute's meaning," *Loper Bright*, 144 S. Ct. at 2262, and is confirmed by two components of the definition of "effluent limitation." *First,* the Act specifies that an effluent limitation must restrict pollutants "which are discharged," indicating that the restriction must restrain the release or emission of discharges *prior* to leaving the point source and *before* their addition to a navigable water. Although the Act does not define the verb "discharge," the term ordinarily refers to a fluid being "emit[ted].[20] The CWA itself also defines a "discharge of pollutant"—which an effluent limitation regulates—as an "*addition* of any pollutant to navigable waters." 33 U.S.C. § 1362(12)(A) (emphasis added); *see also Cnty. of Maui* v. *Hawaii Wildlife Fund*, 590 U.S. 165, 189 (2020) (Thomas, J., dissenting) (word "addition" in statutory definition of "discharge" "denote[s] an augmentation or increase" such that the meaning of "discharge" is "the augmentation of navigable waters"). Congress' word choice thus directs EPA to restrict the discharge of pollutants, rather than prohibit the effects those (and other) pollutants collectively can have once they have already entered navigable waters.

Second, Congress' instruction that EPA restrict discharges "*from* point sources" reinforces that effluent limitations must condition compliance at the discharge's point of origin, rather than in the receiving

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[20] "Discharge," Webster's Seventh New Collegiate Dictionary 237 (1971); "Discharge," The Random House Dictionary of the English Language 377 (1968).

water. As used in the definition, "from" functions to "indicate a starting point" or the location "where an actual physical movement . . . has its beginning."[21] Moreover, the Act's coupling of this preposition with a source—a "point source"—"connote[s] an origin." *Cnty. of Maui*, 590 U.S. at 179. The definition thus directs EPA to set restrictions that apply at their origin—the point source—rather than in the receiving water.[22]

This reading also comports with how the statute elsewhere characterizes effluent limitations as restrictions on *discharges* rather than restrictions on receiving water effects. In Section 304(b) of the Act, Congress required EPA to establish "guidelines" for "adopting or revising effluent limitations" and specified that these guidelines "identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, *the degree of effluent reduction* attainable" by point sources. 33 U.S.C. § 1314(b)(1)(A), (2)(A), (4)(A) (emphasis added). This instruction confirms that effluent limitations should restrict the contents of a permitholder's discharge, not

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[21] "From," Webster's Third New Int'l Dictionary 913; "From," The Random House Dictionary of the English Language 570 (1968) ("used to specify a starting point").

[22] EPA is of course free to impose narrative (*i.e.*, non-numeric) effluent limitations so long as they restrict the nature of a point source's discharges. *See Citizens Coal Council* v. *EPA*, 447 F.3d 879, 865 (6th Cir. 2006) (EPA may impose narrative requirements because "effluent limitations are not limited to numeric discharge[ ] restrictions"); *Waterkeeper All., Inc.* v. *EPA*, 399 F.3d 486, 502 (2d Cir. 2005) (numeric effluent limitations in the form of required management practices meet the CWA's definition of "effluent limitations"). Narrative requirements that restrict the nature of a point source's discharges—rather than receiving water quality conditions—satisfy the Act's definition.

its effect (in combination with other sources of pollution) once in the receiving water.

B. The CWA's structure reinforces that EPA may not impose permit terms that measure compliance based on exceedances of water quality standards.

Numerous critical provisions in the Act reinforce that section 301(b)(1)(C) cannot authorize EPA to impose receiving-water-based restrictions like the Generic Prohibitions. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *West Virginia* v. *EPA*, 597 U.S. 697, 721 (2022) (cleaned up). Reading section 301(b)(1)(C) to require EPA to restrict the contents of permitholders' discharges—as opposed to the receiving water conditions caused by them—honors Congress' choice *not* to measure permitholders' compliance based on whether waterbodies meet applicable standards.

Four sets of provisions identify which of the Act's requirements bind individual permitholders, and *none* contemplates that a permitholder's compliance can be conditioned on the quality of the receiving waters. *First*, section 301(a) makes it unlawful for any person to discharge a pollutant without complying with effluent limitations set under section 301 and six other sections of the Act, but Congress chose not to condition compliance on section 303, 33 U.S.C. § 1313, the Act's water quality standards provision.[23] *Second*,

[23] *See* 33 U.S.C. § 1311(a) ("Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.").

section 402(a)(1) of the Act requires permitted discharges to meet the requirements of six other sections of the Act, including section 301, but section 303 is notably not among them.[24] *Third*, section 309, the Act's enforcement provision, identifies several different ways permitholders may be held liable for violations of particular sections of the CWA, but section 303 is not included as a basis for liability in those lists.[25] *Last*, the Act's citizen suit provision—section 505—identifies sections of the CWA that impose requirements that can form the basis for a private enforcement (citizen suit) action, and Congress again omitted section 303.[26] Congress' omission of section 303 from

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[24] *See id.* § 1342(a)(1) (A discharge may only be permitted "upon condition that such discharge will meet . . . all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343.").

[25] *See, e.g.*, *id.* § 1319(c)(2)(A) (holding criminally liable any person who "knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1322(p), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a[n NPDES] permit"); *id.* § 1319(d) (imposing civil penalties on anyone "who violates section 1311, 1312, 1316, 1317, 1318, 1322(p), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in [an NPDES] permit").

[26] *See id.* § 1365(f) (identifying "(1) . . . an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) a standard of performance or requirement under section 1322(p) of this title; (6) a certification under section 1341 of this title; (7) a permit or condition of a permit issued under section 1342 of this title . . . ; or (8) a regulation under section 1345(d) of this title").

these provisions was no mistake.[27] Moreover, section 402 elsewhere references section 303, but does so in a manner that instructs *the agency* on how to set effluent limitations, rather than to make water quality standards themselves enforceable against dischargers.[28]

Construing the Act to allow EPA to impose permit terms that condition compliance on the quality of receiving waters effectively rewrites sections 301(a), 402(a)(1), 309, and 505 to insert compliance obligations under section 303 where Congress expressly omitted them. By making permitholders directly responsible for meeting water quality standards—as opposed to effluent limitations—those prohibitions would add section 303 to the list of sections that the Act demands "compliance with" in order to discharge lawfully. 33 U.S.C. § 1311(a). And it would likewise function to add section 303 to Section 402(a)(1)'s list of sections "that [a] discharge will meet," despite Congress' express declination to impose any such requirement. *Id.* § 1342(a)(1). Further, dischargers would be subject to civil liability (in an action brought by EPA or a private citizen) as well as

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[27] A single subsection of 309 contemplates knowing endangerment liability stemming from section 303's requirements, *see* 33 U.S.C. § 1319(c)(3)(A), which "clearly demonstrate[s] that [Congress] knows how to impose such a requirement when it wishes to do so." *Whitfield*, 543 U.S. at 216.

[28] *See* 33 U.S.C. § 1342(o)(1) (instructing EPA not to issue a permit with "effluent limitations which are less stringent than the comparable effluent limitations in the previous permit [when] in compliance with section 1313(d)(4)"); *id.* §1342(o)(3) (same, as to a permit with "a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313").

criminal liability for violating Section 303 or permit terms implementing that section, even though the statute's text provides otherwise. *See, e.g.*, *id.* § 1319(c)(2)(A), (d); *id.* § 1365(a)(1)(A), (f). In effect, EPA asks this Court to insert a requirement Congress expressly declined to add. *See Whitfield*, 543 U.S. at 217 (where Congress has demonstrated it knows how to impose a requirement but "has chosen *not* to do so" in a statute, "we will not override that choice" (emphasis in original)); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 94 (2012) (an "absent provision cannot be supplied by the courts").

The City's reading of section 301(b)(1)(C) does no such violence to the statute. Under the City's interpretation, permitholders simply must comply with the effluent limitations EPA is to impose to meet or implement the water quality standards. Such a requirement is consistent with how the Act expects permitholders to comply with applicable provisions of section 301. *See* 33 U.S.C. §§ 1311(a), 1342(a)(1), 1319, 1365(f); *cf. United States* v. *Atl. Rsch. Corp.*, 551 U.S. 128, 136 (2007) (rejecting interpretation that would "destroy the symmetry" and "render [the statute] internally confusing").

II. Pre- and post-enactment context confirms that NPDES permits cannot condition compliance on receiving water quality.

The CWA's pre- and post-enactment context confirms what the Act's text makes clear: EPA may not impose permit terms such as the Generic Prohibitions that condition a permitholder's compliance on receiving water conditions. EPA seeks to revive—nearly word for word—the prior regulatory scheme Congress expressly chose to abandon when enacting the CWA.

And as EPA itself has recognized in its regulations, section 301(b)(1)(C) allows the agency to impose only effluent limitations, *not* restrictions based on the quality of receiving waters.

A. Receiving water prohibitions resuscitate the ineffective approach to environmental protection Congress rejected in passing the CWA.

Interpreting section 301(b)(1)(C) as allowing EPA to impose only effluent limitations—not receiving water prohibitions—ensures that the agency cannot revive the regulatory approach that Congress discarded in 1972 precisely because it "proved ineffective." *California*, 426 U.S. at 202. Were its text and structure not already conclusive, the Act's legislative history removes any doubt that Congress never expected NPDES permits to measure permitholders' compliance based on the overall quality of receiving waters. Instead, members of Congress drafted section 301(b)(1)(C) specifically so "that each point source shall be required to meet *effluent limitations*."[29]

Congress understood that the effluent limitations required by section 301(b)(1)(C) would require EPA to restrict the content of permitholders' discharges, not make permitholders directly responsible for receiving

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[29] S. Comm. on Public Works, 93d Cong., 1 Legislative History of the Water Pollution Control Act Amendments of 1972 (1 Legis. History), Serial No. 93-1, at 246 (1973) (statement of floor manager Rep. Harsha concerning section 301(b)(1)(C) during House consideration of the Conference Report) (emphasis added); *see also id.* at 209 (CWA would require permitholders to meet "*effluent* limitations sufficiently stringent" to meet water quality standards (statement of Sen. Tunney during consideration of the Conference Report) (emphasis added)).

water quality. The House Committee on Public Works explained section 301(b)(1)(C) as follows in its Report:

> [A]ll point sources could be required to meet a more stringent *effluent* limitation consistent with water quality standards of the receiving waters if the effluent limitations set pursuant to subsection (b)(1)(A) and subsection (b)(1)(B) of section 301 are inadequate to meet those water quality standards. In this case a more stringent *effluent* limitation will be imposed.

H. Rep. No. 92-911 (Mar. 3, 1972), at 105 (emphases added). Such an effluent limitation, the Report continued, "will be set on the basis of that *reduction in the quantity and quality of the discharge of pollutants*" that is necessary to meet water quality standards. *Id.* at 105–06 (emphasis added).[30] The provision's drafters understood section 301(b)(1)(C) precisely as an ordinary reader of English does: to require EPA to set restrictions on the content of point sources' discharges rather than the condition of the receiving waters.

Congress imposed such a duty on EPA to restrict pollutants *at the point source* to *"prevent* water quality from falling below acceptable levels." *California*, 426 U.S. at 205 n. 12 (emphasis added); *see also Nat. Res. Def. Council* v. *EPA*, 808 F.3d 556, 579 (2d Cir. 2015) ("The point of a permit is to prevent discharges that

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[30] The Committee's Senate counterparts similarly understood that effluent limitations would set "specific requirements . . . as to the quantities, rates, and concentration of . . . constituents *discharged from point sources*"—without reference to the receiving water conditions. S. Rep. No. 92-414 (Oct. 28, 1971), at 77 (emphasis added).

violate water quality standards *before* they happen." (emphasis in original)). When it properly implements the Act, EPA need not wait for water quality to be harmed—as under the CWA's predecessor—before it can bring an enforcement action against a discharger. *See* NPDES Manual at p. 6-11 (effluent limitations "allow[] for controlling individual parameters [in a permitholder's discharge] . . . *before a water quality impact has occurred*" (emphasis added)).

By contrast, reading the Act to authorize EPA to impose the Generic Prohibitions would give the agency license to recreate almost word-for-word the "causing or contributing" regime that Congress discarded in 1972. 33 U.S.C. § 1160(c)(5) (1970). By allowing enforcement only after adverse effects occur, receiving water prohibitions like the Generic Prohibitions inherently fail to keep pollution *out* of navigable waters by again requiring regulators to "work backward" from an *already*-impaired waterbody to bring enforcement actions. *California*, 426 U.S. at 204. Section 301(b)(1)(C) cannot be interpreted to resuscitate this ineffective method of regulation that Congress cast off. *See Stone* v. *INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

B. EPA developed a regulatory regime premised on an interpretation of section 301(b)(1)(C) that aligns with San Francisco's.

EPA's own regulations and guidance provide further confirmation that section 301(b)(1)(C) allows EPA to impose only effluent limitations, *not* restrictions that condition permitholders' compliance on the quality of receiving waters. *See Loper Bright*, 144 S. Ct. at 2257–58 ("due respect" for agency interpretations is "especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time"). Although EPA permit writers have imposed the Generic Prohibitions and other receiving water prohibitions in specific NPDES permits, the agency's formal policies memorialized in guidance and rulemakings have long interpreted section 301(b)(1)(C) in the same way the City does: to require EPA to set effluent limitations restricting the content of permitholders' discharges. Moreover, EPA's development of rules implementing section 301(b)(1)(C) illustrate that the agency has all the necessary regulatory tools at its disposal to protect water quality and need not resort to the Generic Prohibitions or similar provisions that impose liability for causing or contributing to adverse receiving water conditions.[31]

Outside of this litigation,[32] EPA has long read section 301(b)(1)(C) to require the agency to ensure water quality standards are met by imposing "effluent

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[31] Indeed, in the City's Oceanside Permit, EPA also imposed a variety of specific narrative and numeric effluent limitations. *See supra* at 15.

limitations" on discharges from point sources. In 1973, EPA issued a guide on the NPDES program explaining how, in circumstances where technology-based controls are insufficient to protect water quality, "more stringent *effluent limitations* are to be imposed." EPA, The National Water Permit Program at 12 (emphasis added).[33] Such effluent limitations, EPA explained, "are placed on the amount of pollutants *in discharged wastewater* or on the volume of wastewater discharged." *Id.* at 7 (emphasis added). EPA thus understood within months of the Act's passage that section 301(b)(1)(C) required the agency to restrict the content of discharges *at the point source.* This interpretation, "issued contemporaneously with the statute at issue," is "especially useful in determining" the limits of EPA's authority. *Loper Bright*, 144 S. Ct. at 2262.

EPA developed a comprehensive regulatory regime designed to execute on this long-held understanding that "Section 301(b)(1)(C) . . . requires that water quality standards be achieved through *effluent limitations*." 54 Fed. Reg. at 23,872 (emphasis added); *id.* at 23,875 ("section 301(b)(1)(C) requires NPDES

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[32] In opposing certiorari, EPA argued that the term "limitation" in section 301(b)(1)(C) referred to something other than an effluent limitation. *See* EPA BIO 12.

[33] This document is representative of multiple instances in which EPA, shortly after the Act was passed, interpreted section 301(b)(1)(C) to require the agency to set effluent limitations. *See also supra* note 13 and accompanying text; Decisions of the EPA Administrator & Decisions of the General Counsel Vol. 1 at 373–74 (concluding that section 301(b)(1)(C) required EPA "to establish effluent limitations to meet the more stringent state water quality standards" (Oct. 14, 1975 decision of EPA's General Counsel)).

permits to contain any *effluent limitations* necessary to meet all applicable water quality standards" (emphasis added)). The relevant regulation, codified at 40 C.F.R. § 122.44(d)(1), prescribes "procedures for . . . identify[ing] those permits that must have water quality-based effluent limits, and describe[s] several principles for developing [them]." 54 Fed. Reg. at 23,872. That regulation mandates the imposition of effluent limitations to "control all pollutants or pollutant parameters" that "are or may be discharged at a level which 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).

EPA's regulation does not allow permit writers simply to require that permitholders not "cause or contribute" to water pollution. The rule instead requires permit writers to set effluent limitations "*on point sources*" that must be "derived from" the relevant water quality standards. 40 C.F.R. § 122.44(d)(1)(vii)(A) (emphasis added).[34] Even by its own rule, EPA must translate the relevant water quality standard into a restriction on the contents of a permitholder's discharges that applies at the point source.

EPA's guidance likewise anticipates that an NPDES permit restricts, at the point source, a permitholder's discharges to protect water quality. In the agency's

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[34] Although these effluent limitations restrict discharges at the point source, EPA's regulations appropriately do not require that they must always set *numeric* restrictions on pollutant levels discharged. Permits may require best management practices when "[n]umeric effluent limitations are infeasible." 40 C.F.R. § 122.44(k)(3).

manual for drafting NPDES permits, EPA notes that "CWA section 301(b)(1)(C) requires that permits include any *effluent limitations* necessary to meet water quality standards." NPDES Manual at p. 6-1 (emphasis added). That manual instructs permit writers how to "model effluent and receiving water interactions," *id.* at p. 6-16, "determine[ ] whether WQBELs [water quality-based effluent limitations] are needed," *id.* at p. 6-22, and "develop WQBELs for [relevant] pollutant parameter[s]," *id.* at p. 6-31. The effluent limitations that the manual instructs EPA to impose must specify a particular "concentration of the pollutant [at issue] in the effluent" that a permitholder must achieve. *Id.* at p. 6-32; *see also* EPA, Technical Support Document for Water Quality-Based Toxics Control 95 (Mar. 1991) (effluent limitations must prescribe a specific level of "acceptable effluent quality").

The agency's regulations and guidance at no point suggest that NPDES permits can or should include prohibitions that condition a permitholder's compliance on the quality of receiving waters. Instead, the imposition of receiving water prohibitions like the Generic Prohibitions has been an off-menu practice that conflicts with EPA's proper interpretations of the statute. Reversing the Ninth Circuit's decision will do nothing more than require EPA to use the specific tools that it has already developed—and the CWA requires—to ensure navigable waters meet water quality standards.

III. The City's straightforward interpretation of the CWA allows the Act's enforcement scheme to function fairly and as designed.

Reading section 301(b)(1)(C) consistent with EPA's longstanding interpretations and regulations ensures that permitholders face the Act's onerous enforcement

machinery only when their discharges exceed benchmarks defined in their permits. The Act's "permit shield" and enforcement provisions work as Congress intended only when the pollutant control requirements that permitholders must meet are defined *ex ante* through effluent limitations at their point sources. By contrast, permit conditions that tie permitholders' obligations to the receiving water conditions they must avoid inherently deprive them of advance notice of their obligations, as evidenced by a lawsuit EPA recently brought against the City.

A. Receiving water prohibitions undermine the CWA's permit shield by depriving permitholders of regulatory certainty.

Reading section 301(b)(1)(C) to require that EPA restrict the content of permitholders' discharges at the point source ensures that the CWA's "permit shield," 33 U.S.C. 1342(k), "serves the purpose of giving permits finality." *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 138 n.28 (1977). Under the permit shield, "[c]ompliance with [an NPDES permit] shall be deemed compliance, for purposes of sections 1319 and 1365 of this title," with various substantive provisions of the Act. 33 U.S.C. § 1342(k). An NPDES permit "shield[s] its holder from CWA liability" so long as the permitholder complies with the permit's terms. *Piney Run Pres. Ass'n* v. *Cnty. Comm'rs of Carroll Cnty.*, 268 F.3d 255, 266 (4th Cir. 2001); *see also Nat. Res. Def. Council, Inc.* v. *Cnty. of Los Angeles*, 725 F.3d 1194, 1204 (9th Cir. 2013) ("Where a permittee discharges pollutants in compliance with the terms of its NPDES permit, the permit acts to 'shield' the permittee from liability under the CWA." (citation omitted)).

The permit shield thus assures permitholders that they will not face the Act's "crushing consequences"

unless they violate the requirements found within the four corners of their permits. *Sackett*, 598 U.S. at 660 (cleaned up). Even unintentional violations of the Act can lead to criminal punishments. *See* 33 U.S.C. § 1319(c)(1)(A). In civil enforcement actions, EPA can bring lawsuits seeking civil penalties of over $66,000 per day for each permit violation, as well as injunctive relief. *Id.* § 1319(b), (d); 40 C.F.R. § 19.4. For municipalities like San Francisco, the cost of injunctive relief in CWA enforcement cases can often run into the hundreds of millions or even billions of dollars.[35] Private plaintiffs may also bring lawsuits seeking the same civil penalties and injunctive relief. *See* 33 U.S.C. § 1365(a).

The Act's severe penalties are warranted only alongside "some measure of predictability,"[36] which is why "Congress intended to establish clear and identifiable discharge standards" in permits that "provide manageable and precise benchmarks for performance." *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 496 n.16 (1987) (cleaned up). Indeed, as EPA has acknowledged, the permit shield, when properly applied, allows a "facility [to] plan and operate with knowledge of what rules apply." 45 Fed. Reg. 33,290, 33,312 (May 19, 1980). Only when the Act's enforcement provisions are balanced alongside the Act's permit shield can San Francisco and other

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[35] *See* EPA, EPA National Enforcement Initiative: Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation's Waters – Status of Civil Judicial Consent Decrees Addressing Combined Sewer Systems (May 1, 2017), https://perma.cc/U7JU-477C (estimating municipalities' combined sewer compliance costs under CWA consent decrees).

[36] *U.S. Army Corps of Eng'rs* v. *Hawkes*, 578 U.S. 590, 602 (2016) (Kennedy, J., concurring).

permitholders "know what is required of them so they may act accordingly," as is consistent with basic notions of due process. *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

When EPA complies with its statutory obligation under section 301(b)(1)(C) to set effluent limitations that restrict the quantities, rates, and concentrations of discharges at the point source, permitholders can know from the face of their permits what they must do to comply. Permitholders need only look at the terms of their permits, their activities, and effluent quality to know whether they comply with their permits.

By contrast, when EPA conditions a permitholder's compliance on the quality of receiving waters, it is impossible to know precisely "what rules apply." 45 Fed. Reg. at 33,312. Contributions to a receiving water from multiple sources prevent an individual permitholder from knowing *ex ante* how much they need to control their discharges to prevent a violation. Such sources can include nonpoint source pollution like runoff "not traceable to any single discrete source." *League of Wilderness Defs.*, 309 F.3d at 1184. Tens of thousands of "water bodies nationwide are impaired [*i.e.*, do not meet water quality standards] primarily by such pollution," Gov't Accountability Office, Nonpoint Source Pollution 1 (May 2012), https://perma.cc/MQ6G-GLZB, and "[n]onpoint source pollution of this kind is the largest source of water pollution in the United States." *League of Wilderness Defs.*, 309 F.3d at 1184 (citing EPA guidance). Other factors, like seasonal variation in stream conditions,

can also affect whether a waterbody meets water quality standards.[37]

When restrictions on the quality of receiving waters are included in a permit, a permitholder will know only retrospectively whether their discharge—in combination with those variables—resulted in conditions that violate a water quality standard. Under such permit terms, permitholders can no longer ascertain from their permits how they must control their discharges to avoid facing the risk of enforcement actions. Permitholders can only be certain they are not violating their permits by ceasing to discharge altogether. *See* Pet. App. 65–66 (Collins, J., dissenting) ("[I]n the event of excessive pollution from another source, the immediate cessation of discharges involving the same pollutant from *all* other sources [would be required], without regard to the importance of those sources' operations." (emphasis in original)); *see also Arkansas*, 503 U.S. at 108 (CWA has never been construed to "mandate[ ] a complete ban on discharges into a waterway that is [already] in violation of [water quality] standards."). Of course, ceasing operations altogether is not an option for San Francisco and permitholders around the Nation who provide vital sanitary services, further illustrating the untenable nature of EPA's interpretation of the Act.

B. Enforcement actions demonstrate the unfairness of prohibiting permitholders from violating water quality standards.

Recent litigation confirms how permit terms like the Generic Prohibitions make the Act's enforcement provisions and permit shield malfunction, illustrating

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[37] Gaba, *supra* note 14, at 441.

why Congress directed EPA specifically to set effluent limitations. When NPDES permits include terms that condition compliance on the quality of receiving waters rather than permitholders' discharges, permits lack the finality the permit shield is supposed to provide, and permitholders effectively risk liability for discharging in excess of benchmarks not found in their permits.

Defendants alleged to have violated receiving water prohibitions like the Generic Prohibitions have found themselves unable to assert permit shield defenses based on their compliance with the specific terms in their permits.[38] Instead, defendants have had to proceed through judicial fact finding to determine after the fact whether—and to what extent—they should have further controlled their discharges to comply.

For example, in *MWRD*, the district court ruled that it would need to hold a trial to determine "how much phosphorus"—considering other sources'

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[38] *See Ohio Valley Env't Coal.* v. *Fola Coal Co. (Fola)*, 845 F.3d 133, 142–43 (4th Cir. 2017); *Nat. Res. Def. Council* v. *Metro. Water Reclamation Dist. of Greater Chicago (MWRD)*, 175 F. Supp. 3d 1041, 1049–54 (N.D. Ill. 2016); *Cnty. of Los Angeles*, 725 F.3d at 1204–06 (defendants lacked a Permit Shield defense based on alleged violations of a prohibition against "discharges . . . that cause or contribute to a violation of water quality standards"); *Nw. Env't Advocs.* v. *City of Medford*, No. 1:18-cv-00856-CL, 2021 WL 2673126, at *5 (D. Or. June 9, 2021) (allegation of violating a receiving water quality prohibition negated ability to rely on Oregon regulation substantially codifying the permit shield); *see also Swartz* v. *Beach*, 229 F. Supp. 2d 1239, 1271 (D. Wyo. 2002) (permitholders are not shielded from allegations of noncompliance with water quality standards "when [such] standards are incorporated into a[n] NPDES permit" by a receiving water prohibition).

contributions—the permitholder could have discharged without contributing to a violation of a water quality standard. 175 F. Supp. 3d at 1062. Similarly, the permitholder sued in *Fola* learned that the level of ions in its discharges was "materially contributing" to stream characteristics that violated water quality standards only after a bench trial that required "mountains of expert testimony, reports, and charts." 845 F.3d at 137–38; *see also* Petition for Writ of Certiorari 31 n.17 (collecting similar cases). In these cases, permitholders found that they could not look to their permits to know in advance whether they were discharging "too much" to comply. This critical issue was instead adjudicated *ex post*, confirming that conditioning permitholders' compliance on whether receiving waters meet water quality standards nullifies the permit shield.

San Francisco itself now faces an enforcement action that demonstrates how permit conditions like the Generic Prohibitions require *ex post* adjudication of permitholders' discharge control obligations and undermine the permit shield. On May 1, 2024, EPA filed a lawsuit alleging that combined sewer overflows from the City's Bayside Facilities violate a provision in those facilities' NPDES permit that—like the Generic Prohibitions—prohibits the City from "causing a violation of any applicable water quality standard for receiving waters." EPA Complaint ¶ 100. EPA's complaint alleges that San Francisco has been violating its permit since 2013 by causing receiving waters to exceed applicable water quality standards. Even after being sued, however, San Francisco does not know the quantities, rates, and concentrations of pollutants that are excessive in EPA's view, or what management practices EPA believes San Francisco

should have implemented to control its discharges and avert a lawsuit. *See id.* ¶¶ 110–13. The agency seeks daily civil penalties over the period of more than a decade, as well as injunctive relief, while leaving San Francisco in the dark about what it allegedly did wrong. *Id.* ¶¶ 119–20, Prayer for Relief ¶¶ a–c.

And it is not just EPA that has sought to enforce this receiving water quality prohibition in the Bayside Facilities' permit. Shortly after EPA filed suit, San Francisco Baykeeper intervened, alleging that the Bayside Facilities violate this same permit provision by discharging unspecified but "elevated levels of bacteria and other pollutants [that] adversely affect the beneficial uses" of San Francisco Bay.[39] Baykeeper claims that these violations occur "each time" San Francisco experiences a rain event severe enough to cause combined sewer overflows. Baykeeper Complaint ¶ 142. As with EPA's complaint, San Francisco remains unaware of the quantities, rates, and concentrations of pollutants that Baykeeper deems excessive.

Like the permit terms they seek to enforce, Baykeeper and EPA's allegations provide the City no guidance on what—short of shutting down a sewer system serving a major American city—it must do to avoid the risk of liability. Consequently, the City could spend billions more than it has already invested in its combined sewer and stormwater system and still not know whether it will face enforcement actions for allegedly "violating" unspecified, unknown, and unknowable "requirements" based on receiving water

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[39] Complaint in Intervention ¶ 140, *United States* v. *City & Cnty. of San Francisco*, No. 3:24-cv-02594 (N.D. Cal. May 31, 2024) (ECF No. 24) (Baykeeper Complaint), *available at* https://perma.cc/L9LC-EM2S.

conditions that San Francisco cannot solely control. *See supra* at 13–14.

Particularly for municipalities that build large infrastructure projects like the Oceanside Facilities, it is critical that they have clear notice of what their permits require to ensure public expenditures are appropriately invested. The permit shield is designed to ensure that permitholders can look within the four corners of their permits to ascertain the pollution control benchmarks they must meet, so that they can design and build infrastructure projects with confidence that these capital investments will result in compliance. By imposing the Generic Prohibitions, EPA has left San Francisco in an impossible situation —the City has invested billions in capital improvements without knowing whether those improvements will satisfy EPA, given the agency seeks to impose obligations that depend on ever-changing conditions in the receiving water.

Neither San Francisco nor any other permitholders would face such a predicament if EPA obeyed section 301(b)(1)(C)'s command to set effluent limitations instead of imposing prohibitions on causing or contributing to undesirable receiving water quality. Only that interpretation effectuates the permit shield's guarantee that an NPDES permit provides the final word on a permitholder's compliance obligations. Effluent limitations define permitholders' duties at the point of discharge and clearly specify what permitholders must do *ex ante* to control their discharges. Setting effluent limitations—rather than receiving water prohibitions—also best protects the environment by ensuring that EPA need not wait until a waterbody has become "overpolluted" to bring an enforcement action. *California*, 426 U.S. at 204.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted.

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Statutory and Regulatory Appendix

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33 U.S.C. § 1311

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable

pretreatment requirements and any other requirement under section 1317 of this title;

(B) Repealed. Pub. L. 97–117, §21(b), Dec. 29, 1981, 95 Stat. 1632.

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95–30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314 (b) of this title, and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of

the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3)(A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314 (b) of this title, and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 1342(a)(1) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

(c) Modification of timetable

The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Review and revision of effluent limitations

Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

(f) Illegality of discharge of radiological, chemical, or biological warfare agents, high-level radioactive waste, or medical waste

Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.

(g) Modifications for certain nonconventional pollutants

(1) General authority

The Administrator, with the concurrence of the State, may modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge from any point source of ammonia, chlorine, color, iron, and total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by subsection (b)(2)(F)) and any other pollutant which the Administrator lists under paragraph (4) of this subsection.

(2) Requirements for granting modifications

A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that—

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on

the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(3) Limitation on authority to apply for subsection (c) modification

If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.

(4) Procedures for listing additional pollutants

(A) General authority

Upon petition of any person, the Administrator may add any pollutant to the list of pollutants for which modification under this section is authorized (except for pollutants identified pursuant to section 1314(a)(4) of this title, toxic pollutants subject to section 1317(a) of this title, and the thermal component of discharges) in accordance with the provisions of this paragraph.

(B) Requirements for listing

(i) Sufficient information

The person petitioning for listing of an additional pollutant under this subsection shall submit to the Administrator sufficient information to make the determinations required by this subparagraph.

(ii) Toxic criteria determination

The Administrator shall determine whether or not the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title.

(iii) Listing as toxic pollutant

If the Administrator determines that the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title, the Administrator shall list the pollutant as a toxic pollutant under section 1317(a) of this title.

(iv) Nonconventional criteria determination

If the Administrator determines that the pollutant does not meet the criteria for listing as a toxic pollutant under such section and determines that adequate test methods and sufficient data are available to make the determinations required by paragraph (2) of this subsection with respect to the pollutant, the Administrator shall add the pollutant to the list of pollutants specified in paragraph

(1) of this subsection for which modifications are authorized under this subsection.

(C) Requirements for filing of petitions

A petition for listing of a pollutant under this paragraph—

(i) must be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title;

(ii) may be filed before promulgation of such guideline; and

(iii) may be filed with an application for a modification under paragraph (1) with respect to the discharge of such pollutant.

(D) Deadline for approval of petition

A decision to add a pollutant to the list of pollutants for which modifications under this subsection are authorized must be made within 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title.

(E) Burden of proof

The burden of proof for making the determinations under subparagraph (B) shall be on the petitioner.

(5) Removal of pollutants

The Administrator may remove any pollutant from the list of pollutants for which modifications are authorized under this subsection if the Administrator

determines that adequate test methods and sufficient data are no longer available for determining whether or not modifications may be granted with respect to such pollutant under paragraph (2) of this subsection.

(h) Modification of secondary treatment requirements

The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that—

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 1314(a)(6) of this title;

(2) the discharge of pollutants in accordance with such modified requirements will not interfere, alone or in combination with pollutants from other sources, with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable, and the scope of such monitoring is limited to include only those scientific investi-

gations which are necessary to study the effects of the proposed discharge;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) in the case of any treatment works serving a population of 50,000 or more, with respect to any toxic pollutant introduced into such works by an industrial discharger for which pollutant there is no applicable pretreatment requirement in effect, sources introducing waste into such works are in compliance with all applicable pretreatment requirements, the applicant will enforce such requirements, and the applicant has in effect a pretreatment program which, in combination with the treatment of discharges from such works, removes the same amount of such pollutant as would be removed if such works were to apply secondary treatment to discharges and if such works had no pretreatment program with respect to such pollutant;

(7) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(8) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

> (9) the applicant at the time such modification becomes effective will be discharging effluent which has received at least primary or equivalent treatment and which meets the criteria established under section 1314(a)(1) of this title after initial mixing in the waters surrounding or adjacent to the point at which such effluent is discharged.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 1251(a)(2) of this title. For the purposes of paragraph (9), "primary or equivalent treatment" means treatment by screening, sedimentation, and skimming adequate to remove at least 30 percent of the biological oxygen demanding material and of the suspended solids in the treatment works influent, and disinfection, where appropriate. A municipality which applies secondary treatment shall be eligible to receive a permit pursuant to this subsection which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters. No permit issued under this subsection shall authorize the discharge of sewage sludge into marine waters. In order for a permit to be issued under this subsection for the discharge of a pollutant into marine waters, such marine waters must exhibit characteristics assuring that

water providing dilution does not contain significant amounts of previously discharged effluent from such treatment works. No permit issued under this subsection shall authorize the discharge of any pollutant into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or which exhibit ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses. The prohibition contained in the preceding sentence shall apply without regard to the presence or absence of a causal relationship between such characteristics and the applicant's current or proposed discharge. Notwithstanding any other provisions of this subsection, no permit may be issued under this subsection for discharge of a pollutant into the New York Bight Apex consisting of the ocean waters of the Atlantic Ocean westward of 73 degrees 30 minutes west longitude and northward of 40 degrees 10 minutes north latitude.

(i) Municipal time extensions

(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this chapter available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropri-

ate the State) to issue a permit pursuant to section 1342 of this title or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after February 4, 1987. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1988, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 1281 of this title, section 1317 of this title, and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this chapter.

(2)(A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and—

(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii) if either an application made before July 1, 1977, for a construction grant under this chapter

> for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 1342 of this title to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after December 27, 1977, or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this chapter.

(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to para-

graph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1988; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1988, and will meet the requirements of subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 1284 of this title, and the publicly owned treatment works to accept the discharge from the point source; and (iii) the permit for such point source requires that point source to meet all requirements under section 1317(a) and (b) of this title during the period of such time modification.

(j) Modification procedures

(1) Any application filed under this section for a modification of the provisions of—

(A) subsection (b)(1)(B) under subsection (h) of this section shall be filed not later that[1] the 365th day which begins after December 29, 1981, except that a publicly owned treatment works which prior to December 31, 1982, had a contractual arrangement to use a portion of the capacity of an

[1] So in original. Probably should be "than".

ocean outfall operated by another publicly owned treatment works which has applied for or received modification under subsection (h), may apply for a modification of subsection (h) in its own right not later than 30 days after February 4, 1987, and except as provided in paragraph (5);

(B) subsection (b)(2)(A) as it applies to pollutants identified in subsection (b)(2)(F) shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title or not later than 270 days after December 27, 1977, whichever is later.

(2) Subject to paragraph (3) of this section, any application for a modification filed under subsection (g) of this section shall not operate to stay any requirement under this chapter, unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

(3) COMPLIANCE REQUIREMENTS UNDER SUBSECTION (g).—

(A) EFFECT OF FILING.—An application for a modification under subsection (g) and a petition for listing of a pollutant as a pollutant for which modifications are authorized under such subsection shall not stay the requirement that the person seeking such modification or listing comply with effluent limitations under this chapter for all pollutants not the subject of such application or petition.

(B) EFFECT OF DISAPPROVAL.—Disapproval of an application for a modification under subsection (g) shall not stay the requirement that the person seeking such modification comply with all applicable effluent limitations under this chapter.

(4) DEADLINE FOR SUBSECTION (g) DECISION.—An application for a modification with respect to a pollutant filed under subsection (g) must be approved or disapproved not later than 365 days after the date of such filing; except that in any case in which a petition for listing such pollutant as a pollutant for which modifications are authorized under such subsection is approved, such application must be approved or disapproved not later than 365 days after the date of approval of such petition.

(5) EXTENSION OF APPLICATION DEADLINE.

(A) IN GENERAL.—In the 180-day period beginning on October 31, 1994, the city of San Diego, California, may apply for a modification pursuant to subsection (h) of the requirements of subsection (b)(1)(B) with respect to biological oxygen demand and total suspended solids in the effluent discharged into marine waters.

(B) APPLICATION.—An application under this paragraph shall include a commitment by the applicant to implement a waste water reclamation program that, at a minimum, will¬

(i) achieve a system capacity of 45,000,000 gallons of reclaimed waste water per day by January 1, 2010; and

(ii) result in a reduction in the quantity of suspended solids discharged by the applicant into the marine environment during the period of the modification.

(C) ADDITIONAL CONDITIONS.—The Administrator may not grant a modification pursuant to an application submitted under this paragraph unless the Administrator determines that such modification will result in removal of not less than 58 percent of the biological oxygen demand (on an annual average) and not less than 80 percent of total suspended solids (on a monthly average) in the discharge to which the application applies.

(D) PRELIMINARY DECISION DEADLINE.—The Administrator shall announce a preliminary decision on an application submitted under this paragraph not later than 1 year after the date the application is submitted.

(k) Innovative technology

In the case of any facility subject to a permit under section 1342 of this title which proposes to comply with the requirements of subsection (b)(2)(A) or (b)(2)(E) of this section by replacing existing production capacity with an innovative production

process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for significantly lower costs than the systems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 1342 of this title, in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) or (b)(2)(E) of this section no later than two years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection, if it is also determined that such innovative system has the potential for industrywide application.

(l) Toxic pollutants

Other than as provided in subsection (n) of this section, the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 1317(a)(1) of this title.

(m) Modification of effluent limitation requirements for point sources

(1) The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsections (b)(1)(A) and (b)(2)(E) of this section, and of section 1343 of this title, with respect to effluent limitations to the extent such limitations relate to biochemical oxygen demand and pH from discharges by an industrial discharger in such State into deep waters of the territorial seas, if the applicant demonstrates and the Administrator finds that—

(A) the facility for which modification is sought is covered at the time of the enactment of this subsection by National Pollutant Discharge Elimination System permit number CA0005894 or CA0005282;

(B) the energy and environmental costs of meeting such requirements of subsections (b)(1)(A) and (b)(2)(E) and section 1343 of this title exceed by an unreasonable amount the benefits to be obtained, including the objectives of this chapter;

(C) the applicant has established a system for monitoring the impact of such discharges on a representative sample of aquatic biota;

(D) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(E) there will be no new or substantially increased discharges from the point source of the

pollutant to which the modification applies above that volume of discharge specified in the permit;

(F) the discharge is into waters where there is strong tidal movement and other hydrological and geological characteristics which are necessary to allow compliance with this subsection and section 1251(a)(2) of this title;

(G) the applicant accepts as a condition to the permit a contractural[2] obligation to use funds in the amount required (but not less than $250,000 per year for ten years) for research and development of water pollution control technology, including but not limited to closed cycle technology;

(H) the facts and circumstances present a unique situation which, if relief is granted, will not establish a precedent or the relaxation of the requirements of this chapter applicable to similarly situated discharges; and

(I) no owner or operator of a facility comparable to that of the applicant situated in the United States has demonstrated that it would be put at a competitive disadvantage to the applicant (or the parent company or any subsidiary thereof) as a result of the issuance of a permit under this subsection.

(2) The effluent limitations established under a permit issued under paragraph (1) shall be sufficient to implement the applicable State water quality standards, to assure the protection of public water supplies and protection and propagation of a balanced, indigenous

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[2] So in original. Probably should be "contractual".

population of shellfish, fish, fauna, wildlife, and other aquatic organisms, and to allow recreational activities in and on the water. In setting such limitations, the Administrator shall take into account any seasonal variations and the need for an adequate margin of safety, considering the lack of essential knowledge concerning the relationship between effluent limitations and water quality and the lack of essential knowledge of the effects of discharges on beneficial uses of the receiving waters.

(3) A permit under this subsection may be issued for a period not to exceed five years, and such a permit may be renewed for one additional period not to exceed five years upon a demonstration by the applicant and a finding by the Administrator at the time of application for any such renewal that the provisions of this subsection are met.

(4) The Administrator may terminate a permit issued under this subsection if the Administrator determines that there has been a decline in ambient water quality of the receiving waters during the period of the permit even if a direct cause and effect relationship cannot be shown: *Provided*, That if the effluent from a source with a permit issued under this subsection is contributing to a decline in ambient water quality of the receiving waters, the Administrator shall terminate such permit.

(n) Fundamentally different factors

(1) General rule

The Administrator, with the concurrence of the State, may establish an alternative requirement under subsection (b)(2) or section 1317(b) of

this title for a facility that modifies the requirements of national effluent limitation guidelines or categorical pretreatment standards that would otherwise be applicable to such facility, if the owner or operator of such facility demonstrates to the satisfaction of the Administrator that

(A) the facility is fundamentally different with respect to the factors (other than cost) specified in section 1314(b) or 1314(g) of this title and considered by the Administrator in establishing such national effluent limitation guidelines or categorical pretreatment standards;

(B) the application—

(i) is based solely on information and supporting data submitted to the Administrator during the rulemaking for establishment of the applicable national effluent limitation guidelines or categorical pretreatment standard specifically raising the factors that are fundamentally different for such facility; or

(ii) is based on information and supporting data referred to in clause (i) and information and supporting data the applicant did not have a reasonable opportunity to submit during such rulemaking;

(C) the alternative requirement is no less stringent than justified by the fundamental difference; and

(D) the alternative requirement will not result in a non-water quality environmental impact which is markedly more adverse than the impact considered by the Administrator in establishing

such national effluent limitation guideline or categorical pretreatment standard.

(2) Time limit for applications

An application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection must be submitted to the Administrator within 180 days after the date on which such limitation or standard is established or revised, as the case may be.

(3) Time limit for decision

The Administrator shall approve or deny by final agency action an application submitted under this subsection within 180 days after the date such application is filed with the Administrator.

(4) Submission of information

The Administrator may allow an applicant under this subsection to submit information and supporting data until the earlier of the date the application is approved or denied or the last day that the Administrator has to approve or deny such application.

(5) Treatment of pending applications

For the purposes of this subsection, an application for an alternative requirement based on fundamentally different factors which is pending on February 4, 1987, shall be treated as having been submitted to the Administrator on the 180th day following February 4, 1987. The applicant

may amend the application to take into account the provisions of this subsection.

(6) Effect of submission of application

An application for an alternative requirement under this subsection shall not stay the applicant's obligation to comply with the effluent limitation guideline or categorical pretreatment standard which is the subject of the application.

(7) Effect of denial

If an application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection is denied by the Administrator, the applicant must comply with such limitation or standard as established or revised, as the case may be.

(8) Reports

By January 1, 1997, and January 1 of every odd-numbered year thereafter, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report on the status of applications for alternative requirements which modify the requirements of effluent limitations under section 1311 or 1314 of this title or any national categorical pretreatment standard under section 1317(b) of this title filed before, on, or after February 4, 1987.

(o) Application fees

The Administrator shall prescribe and collect from each applicant fees reflecting the reasonable administrative costs incurred in reviewing and processing applications for modifications submitted to the Administrator pursuant to subsections (c), (g), (i), (k), (m), and (n) of this section, section 1314(d)(4) of this title, and section 1326(a) of this title. All amounts collected by the Administrator under this subsection shall be deposited into a special fund of the Treasury entitled "Water Permits and Related Services" which shall thereafter be available for appropriation to carry out activities of the Environmental Protection Agency for which such fees were collected.

(p) Modified permit for coal remining operations

(1) In general

Subject to paragraphs (2) through (4) of this subsection, the Administrator, or the State in any case which the State has an approved permit program under section 1342(b) of this title, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(2)(A) of this section with respect to the pH level of any pre-existing discharge, and with respect to pre-existing discharges of iron and manganese from the remined area of any coal remining operation or with respect to the pH level or level of iron or manganese in any pre-existing discharge affected by the remining operation. Such modified requirements shall apply the best available technology economically achievable on a case-by-case

basis, using best professional judgment, to set specific numerical effluent limitations in each permit.

(2) Limitations

The Administrator or the State may only issue a permit pursuant to paragraph (1) if the applicant demonstrates to the satisfaction of the Administrator or the State, as the case may be, that the coal remining operation will result in the potential for improved water quality from the remining operation but in no event shall such a permit allow the pH level of any discharge, and in no event shall such a permit allow the discharges of iron and manganese, to exceed the levels being discharged from the remined area before the coal remining operation begins. No discharge from, or affected by, the remining operation shall exceed State water quality standards established under section 1313 of this title.

(3) Definitions

For purposes of this subsection—

(A) Coal remining operation

The term "coal remining operation" means a coal mining operation which begins after February 4, 1987 at a site on which coal mining was conducted before August 3, 1977.

(B) Remined area

The term "remined area" means only that area of any coal remining operation on which

coal mining was conducted before August 3, 1977.

(C) Pre-existing discharge

The term "pre-existing discharge" means any discharge at the time of permit application under this subsection.

(4) Applicability of strip mining laws

Nothing in this subsection shall affect the application of the Surface Mining Control and Reclamation Act of 1977 [30 U.S.C. 1201 et seq.] to any coal remining operation, including the application of such Act to suspended solids.

33 U.S.C. § 1319

§ 1319. Enforcement

(a) State enforcement; compliance orders

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in

this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1322(p), 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer

with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person

is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties

(1) Negligent violations

Any person who—

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1322(p), 1328, or 1345 of

this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who—

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1322(p), 1328, or 1345 of

this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3),

1322(p), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(B) Additional provisions

For the purpose of subparagraph (A) of this paragraph—

(i) in determining whether a defendant who is an individual knew that his conduct placed another person in imminent danger of death or serious bodily injury—

(I) the person is responsible only for actual awareness or actual belief that he possessed; and

(II) knowledge possessed by a person other than the defendant but not by the

defendant himself may not be attributed to the defendant;

except that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information;

(ii) it is an affirmative defense to prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of—

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent;

and such defense may be established under this subparagraph by a preponderance of the evidence;

(iii) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons; and

(iv) the term "serious bodily injury" means bodily injury which involves a substantial

risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) False statements

Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

(5) Treatment of single operational upset

For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(6) Responsible corporate officer as "person"

For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

(7) Hazardous substance defined

For the purpose of this subsection, the term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of this title, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of title 42(C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of this title, and (E) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of title 15.

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1322(p), 1328[1], or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall

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[1] So in original.

consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(e) State liability for judgments and expenses

Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

(f) Wrongful introduction of pollutant into treatment works

Whenever, on the basis of any information available to him, the Administrator finds that an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 1317 of this title, the Administrator may notify the owner or operator of such treatment works and the State of such violation. If the owner or operator of the treatment works does not commence appropriate enforcement action within 30 days of the date of such

notification, the Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works. In any such civil action the Administrator shall join the owner or operator of such source as a party to the action. Such action shall be brought in the district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this chapter. Notice of commencement of any such action shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this chapter.

(g) Administrative penalties

(1) Violations

Whenever on the basis of any information available—

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1322(p), 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit

condition or limitation in a permit issued under section 1344 of this title by the Secretary,

the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

(2) Classes of penalties

(A) Class I

The amount of a class I civil penalty under paragraph (1) may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed $25,000. Before issuing an order assessing a civil penalty under this subparagraph, the Administrator or the Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator's or Secretary's proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order. Such hearing shall not be subject to section 554 or 556 of title 5, but shall provide a reasonable opportunity to be heard and to present evidence.

(B) Class II

The amount of a class II civil penalty under paragraph (1) may not exceed $10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed $125,000. Except as otherwise

provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of title 5. The Administrator and the Secretary may issue rules for discovery procedures for hearings under this subparagraph.

(3) Determining amount

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(4) Rights of interested persons

(A) Public notice

Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.

(B) Presentation of evidence

Any person who comments on a proposed assessment of a penalty under this subsection shall be given notice of any hearing held under this subsection and of the order assessing such penalty. In any hearing held under this subsection, such person shall have a reasonable opportunity to be heard and to present evidence.

(C) Rights of interested persons to a hearing

If no hearing is held under paragraph (2) before issuance of an order assessing a penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the Administrator or Secretary, as the case may be, to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator or Secretary shall immediately set aside such order and provide a hearing in accordance with paragraph (2)(A) in the case of a class I civil penalty and paragraph (2)(B) in the case of a class II civil penalty. If the Administrator or Secretary denies a hearing under this subparagraph, the Administrator or Secretary shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

(5) Finality of order

An order issued under this subsection shall become final 30 days after its issuance unless a petition for judicial review is filed under paragraph (8) or a hearing is requested under paragraph (4)(C). If such a hearing is denied, such order shall become final 30 days after such denial.

(6) Effect of order

(A) Limitation on actions under other sections

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation¬

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

(B) Applicability of limitation with respect to citizen suits

The limitations contained in subparagraph (A) on civil penalty actions under section 1365 of this title shall not apply with respect to any violation for which—

(i) a civil action under section 1365(a)(1) of this title has been filed prior to commencement of an action under this subsection, or

(ii) notice of an alleged violation of section 1365(a)(1) of this title has been given in accordance with section 1365(b)(1)(A) of this title prior to commencement of an action under this subsection and an action under section 1365(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

(7) Effect of action on compliance

No action by the Administrator or the Secretary under this subsection shall affect any person's obligation to comply with any section of this chapter or with the terms and conditions of any permit issued pursuant to section 1342 or 1344 of this title.

(8) Judicial review

Any person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty in accordance

with paragraph (4) may obtain review of such assessment—

(A) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

(B) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business,

by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or the Secretary, as the case may be, and the Attorney General. The Administrator or the Secretary shall promptly file in such court a certified copy of the record on which the order was issued. Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion and shall not impose additional civil penalties for the same violation unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

(9) Collection

If any person fails to pay an assessment of a civil penalty—

(A) after the order making the assessment has become final, or

(B) after a court in an action brought under paragraph (8) has entered a final judgment in favor of the Administrator or the Secretary, as the case may be,

the Administrator or the Secretary shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount assessed (plus interest at currently prevailing rates from the date of the final order or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty as described in the first sentence of this paragraph shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to 20 percent of the aggregate amount of such person's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

(10) Subpoenas

The Administrator or Secretary, as the case may be, may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, or documents in connection with hearings under this subsection. In case of contumacy or refusal to obey a subpoena issued pursuant to this paragraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person,

shall have jurisdiction to issue an order requiring such person to appear and give testimony before the administrative law judge or to appear and produce documents before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(11) Protection of existing procedures

Nothing in this subsection shall change the procedures existing on the day before February 4, 1987, under other subsections of this section for issuance and enforcement of orders by the Administrator.

(h) Implementation of integrated plans

(1) In general

In conjunction with an enforcement action under subsection (a) or (b) relating to municipal discharges, the Administrator shall inform a municipality of the opportunity to develop an integrated plan, as defined in section 1342(s) of this title.

(2) Modification

Any municipality under an administrative order under subsection (a) or settlement agreement (including a judicial consent decree) under subsection (b) that has developed an integrated plan consistent with section 1342(s) of this title may request a modification of the administrative order or settlement agreement based on that integrated plan.

33 U.S.C. § 1342(a), (k), (o)

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be

deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

* * *

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of

sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

* * *

(o) Anti-backsliding

(1) General prohibition

In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 1314(b) of this title subsequent to the original issuance of such permit, to contain effluent limita-

tions which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 1311(b)(1)(C) or section 1313(d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) of this title.

(2) Exceptions

A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if—

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B);

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 1311(c), 1311(g), 1311(h), 1311(i), 1311(k), 1311(n), or 1326(a) of this title; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this chapter or for reasons otherwise unrelated to water quality.

(3) Limitations

In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be

renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters.

33 U.S.C. § 1362(11), (12), (16)

§ 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

* * *

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) 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.

* * *

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

33 U.S.C. § 1365(a)(1), (f)

§ 1365. Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

* * *

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) a standard of performance or requirement under section 1322(p) of this title; (6) a certification under section 1341 of this title; (7) a permit or condition of a permit issued under section 1342 of this title that is in effect under this chapter (including a requirement applicable by reason of section 1323 of

this title); or (8) a regulation under section 1345(d) of this title.

40 C.F.R. § 122.44(d)(1)

40 C.F.R. § 122.44. Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25).

* * *

(d) *Water quality standards and State requirements*: any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of CWA necessary to:

(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.

(i) Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.

(ii) When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating

whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.

(iii) When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant.

(iv) When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the numeric criterion for whole effluent toxicity, the permit must contain effluent limits for whole effluent toxicity.

(v) Except as provided in this subparagraph, when the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, toxicity testing data, or other information, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative criterion within an applicable State water quality standard, the permit must contain effluent limits for whole effluent toxicity. Limits on whole effluent toxicity are not necessary where the permitting authority demonstrates in the fact sheet or statement of basis of the NPDES permit, using the procedures in paragraph (d)(1)(ii) of this section, that chemical-specific limits for the efflu-

ent are sufficient to attain and maintain applicable numeric and narrative State water quality standards.

(vi) Where a State has not established a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable State water quality standard, the permitting authority must establish effluent limits using one or more of the following options:

(A) Establish effluent limits using a calculated numeric water quality criterion for the pollutant which the permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use. Such a criterion may be derived using a proposed State criterion, or an explicit State policy or regulation interpreting its narrative water quality criterion, supplemented with other relevant information which may include: EPA's Water Quality Standards Handbook, October 1983, risk assessment data, exposure data, information about the pollutant from the Food and Drug Administration, and current EPA criteria documents; or

(B) Establish effluent limits on a case-by-case basis, using EPA's water quality criteria, published under section 304(a) of the CWA, supplemented where necessary by other relevant information; or

(C) Establish effluent limitations on an indicator parameter for the pollutant of concern, provided:

(1) The permit identifies which pollutants are intended to be controlled by the use of the effluent limitation;

(2) The fact sheet required by § 124.56 sets forth the basis for the limit, including a finding that compliance with the effluent limit on the indicator parameter will result in controls on the pollutant of concern which are sufficient to attain and maintain applicable water quality standards;

(3) The permit requires all effluent and ambient monitoring necessary to show that during the term of the permit the limit on the indicator parameter continues to attain and maintain applicable water quality standards; and

(4) The permit contains a reopener clause allowing the permitting authority to modify or revoke and reissue the permit if the limits on the indicator parameter no longer attain and maintain applicable water quality standards.

(vii) When developing water quality-based effluent limits under this paragraph the permitting authority shall ensure that:

(A) The level of water quality to be achieved by limits on point sources established under this paragraph is derived from,

and complies with all applicable water quality standards; and

(B) Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.