
In the Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

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

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

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In the Supreme Court of the United States

No. 23-753

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA,
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v.

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*ON WRIT OF CERTIORARI
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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

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

JURISDICTION

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

STATUTORY AND OTHER PROVISIONS INVOLVED

Pertinent statutory and other provisions are reproduced in an appendix to this brief. App., *infra*, 1a-57a.

STATEMENT

A. The Clean Water Act's National Pollutant Discharge Elimination System Program

The Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, “is a comprehensive water quality statute.” *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994). Congress enacted the CWA as part of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816. The Act is intended to protect “the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. 1251(a), and to achieve a level of “water quality” that provides for “recreation” and “the protection and propagation of fish, shellfish, and wildlife,” 33 U.S.C. 1251(a)(2).

To fulfill those objectives, the CWA generally prohibits “the discharge of any pollutant by any person.” 33 U.S.C. 1311(a). The Act defines the term “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source,” as well as “any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.” 33 U.S.C. 1362(12). The Act defines the term “pollutant” to mean, among other things, “solid waste,” “sewage,” “garbage,” “sewage sludge,” “chemical wastes,” “biological materials,” “sand,” and “industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. 1362(6).

The CWA’s prohibition on “the discharge of any pollutant” is subject to certain exceptions. 33 U.S.C. 1311(a). One of them appears in 33 U.S.C. 1342, which establishes the National Pollutant Discharge Elimination System (NPDES) program. Under that program, the U.S. Environmental Protection Agency (EPA) may “issue a per-

mit for the discharge of any pollutant * * * upon condition that such discharge will meet * * * all applicable requirements under [33 U.S.C.] 1311, 1312, 1316, 1317, 1318, and 1343.” 33 U.S.C. 1342(a)(1); see 33 U.S.C. 1342(a)(2) (authorizing EPA to “prescribe conditions” to “assure compliance with the requirements of [Section 1342(a)(1)], including conditions on data and information collection, reporting, and such other requirements as [EPA] deems appropriate”).

Section 1311(b)(1)(A), in turn, requires the achievement of “effluent limitations” based on certain available “technology,” while Section 1311(b)(1)(C) requires the achievement of “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)(A) and (C). As defined in the CWA, “[t]he term ‘effluent limitation’ means any restriction * * * on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources.” 33 U.S.C. 1362(11).

Water quality standards establish “the desired condition” of the waters receiving the discharge. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). Water quality standards are, “in general, promulgated by the States” under 33 U.S.C. 1313 and subject to federal approval. *Arkansas*, 503 U.S. at 101; see *PUD No. 1*, 511 U.S. at 707. Under Section 1313, water quality standards “shall consist of” the “designated uses” of the receiving waters (*e.g.*, recreation, shellfish harvesting, marine habitat) and the “water quality criteria” for protecting those uses. 33 U.S.C. 1313(c)(2)(A).

Any State may submit to EPA a proposal to administer the NPDES program under state law, and EPA

must approve a proposed state program that meets certain statutory criteria. 33 U.S.C. 1342(b). When EPA approves such a program, the State assumes responsibility for issuing NPDES permits “for discharges into navigable waters within its jurisdiction,” including ocean waters within three miles from shore, while EPA retains responsibility for issuing NPDES permits for discharges beyond state territorial waters. *Ibid.*; see 33 U.S.C. 1342(e)(1), 1362(7) and (8).

If the holder of an EPA- or state-issued NPDES permit fails to comply with the permit’s conditions, EPA may enforce the permit through various mechanisms under 33 U.S.C. 1319. A State may take similar action to enforce a state-issued permit. 33 U.S.C. 1342(b)(7); see, *e.g.*, Pet. App. 187. In addition, under 33 U.S.C. 1365, a private citizen in specified circumstances may commence a civil action “to enjoin or otherwise abate an ongoing violation” of an EPA- or state-issued permit. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987). “Compliance with” an NPDES permit will generally “be deemed compliance, for purposes of sections 1319 and 1365,” with Section 1311 and other CWA provisions. 33 U.S.C. 1342(k).

B. EPA’s Combined Sewer Overflow Control Policy And Congress’s Codification Of That Policy

1. Sewer systems carry sewage (*i.e.*, domestic, commercial, and industrial wastewater) to facilities for treatment. Sewer systems can be “separated” or “combined.” *Milwaukee v. Illinois*, 451 U.S. 304, 308 (1981). “A separated sewer system carries only sewage for treatment; a combined sewer system gathers both sewage and storm water runoff and transports them in the same conduits for treatment.” *Ibid.*

Although most U.S. communities today have separated sewer systems, many older cities still have combined sewer systems, which are “remnants of the country’s early wastewater infrastructure.” H.R. Rep. No. 943, 106th Cong., 2d Sess. 4 (2000) (2000 House Report). In dry weather, a combined sewer system typically has enough capacity to convey all sewage to a facility for treatment before discharging it to a nearby waterbody. But during wet weather, storm water also enters the system, and the combined flow of sewage and storm water can exceed the system’s capacity. C.A. E.R. 1489; see *Milwaukee*, 451 U.S. at 309 n.2 (explaining that combined sewer systems are “more susceptible to overflows after storms because the storm water is transported in the same conduits as the sewage”). When that happens, the excess flow is discharged via various relief outlets, known as “outfalls,” before reaching the treatment facility. C.A. E.R. 1639; see 2000 House Report 4. Those discharges are called “combined sewer overflows.” C.A. E.R. 1489.

Because combined sewer overflows occur before the sewage reaches a treatment facility, they can contain high levels of bacteria, toxic pollutants, oxygen-demanding organic compounds, nutrients, oil, grease, suspended solids, and floatables (including fecal matter). See 59 Fed. Reg. 18,688, 18,689 (Apr. 19, 1994); C.A. E.R. 1489. Those pollutants can “pose risks to human health, threaten aquatic life and its habitat, and impair the use and enjoyment of the Nation’s waterways,” 59 Fed. Reg. at 18,689—causing beach closures, fish kills, and other adverse events, C.A. E.R. 1489.

2. In 1994, EPA published the “Combined Sewer Overflow (CSO) Control Policy.” 59 Fed. Reg. at 18,688. The CSO Control Policy recognizes that combined sewer

overflows “are point sources subject to NPDES permit requirements,” and that they “can cause exceedances of water quality standards.” *Id.* at 18,689. To prevent such exceedances, the CSO Control Policy establishes “a consistent national approach to controlling discharges from [combined sewer overflows] to the Nation’s waters through the [NPDES] permit program.” *Id.* at 18,688.

In accordance with that approach, the CSO Control Policy establishes a phased process through which certain required features are incorporated into NPDES permits. The CSO Control Policy specifies that an initial (or “Phase I”) permit “should at least require” combined sewer systems to implement nine minimum technology-based controls; to develop a long-term control plan; and to “[c]omply with applicable WQS [water quality standards],” “expressed in the form of a narrative limitation”—*i.e.*, a limitation stated in qualitative, rather than quantitative, terms. 59 Fed. Reg. at 18,696. The CSO Control Policy further specifies that, once a combined sewer system has developed a long-term control plan, a subsequent (or “Phase II”) permit should require implementation of that plan. *Ibid.*

In 1995, EPA published *Combined Sewer Overflows: Guidance for Permit Writers*. C.A. E.R. 1479-1641. The guidance “translates the CSO Control Policy into instructions, procedures, and example permit language that permit writers can use to develop defensible and enforceable NPDES permit requirements.” *Id.* at 1494. Among other things, the guidance provides various examples of language that permit writers can use to require compliance with applicable water quality standards. *Id.* at 1546. For instance, the guidance identifies the following language as appropriate for Phase I and Phase II permits alike:

The permittee shall not discharge any pollutant at a level that causes or contributes to an in-stream excursion [*i.e.*, exceedance] above numeric or narrative criteria [adopted] as part of [the State's] water quality standards.

Id. at 1546, 1580, 1601, 1609.

3. In 2000, Congress amended the CWA to require each NPDES permit for discharges from a combined sewer system to “conform to the Combined Sewer Overflow Control Policy signed by the [EPA] Administrator on April 11, 1994.” 33 U.S.C. 1342(q)(1); see Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, sec. 1(a)(4) [Div. B, Tit. I, § 112(a)], 114 Stat. 2763A-224. Congress thus “codifie[d] the CSO Control Policy to help ensure its implementation and consistent application.” 2000 House Report 5.

C. Petitioner's Combined Sewer System And Applicable State Water Quality Standards

Petitioner owns and operates a combined sewer system, the west side of which flows to the Oceanside treatment plant and the east side of which flows to the Bay-side treatment plant. Pet. App. 156. The Oceanside portion of the system, which is the portion at issue here, collects sewage from approximately 250,000 residents in western San Francisco. *Id.* at 252. During dry weather and smaller storms, the Oceanside treatment plant discharges treated wastewater via the Southwest Ocean Outfall, located in the Pacific Ocean approximately 3.3 nautical miles offshore. *Id.* at 16, 257-258. During heavy rain, the Oceanside portion overflows once the treatment plant is at full capacity, discharging untreated and partially treated sewage via the Southwest Ocean Outfall and seven additional outfalls. *Id.* at 16, 81-83, 255, 257-258. The seven additional outfalls discharge into

ocean waters near the shore, including at Ocean, China, and Baker Beaches, “which are popular recreation areas used by the community and tourists.” *Id.* at 533; see *id.* at 16, 159. Those nearshore discharges amount to an estimated 196 million gallons of combined sewage and storm water in a typical year, C.A. E.R. 958, resulting in elevated levels of bacteria in coastal waters and the posting of warning and “no swimming” signs on beaches, Pet. App. 534-535.

California has adopted, and EPA has approved, water quality standards that apply to ocean waters within the State’s jurisdiction. Pet. App. 307; C.A. E.R. 402-404. The designated (or “beneficial”) uses of ocean waters in the San Francisco Bay Region are found in the Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan), adopted by the California Regional Water Quality Control Board for the San Francisco Bay Region (Regional Water Board), as well as the Water Quality Control Plan for Ocean Waters of California (Ocean Plan), adopted by the California State Water Resources Control Board (State Water Board).¹ Those beneficial uses include recreation, aesthetic enjoyment, commercial and sport fishing, fish migration, fish spawning, shellfish harvesting, marine habitat, wildlife habitat, preservation of rare and endangered species, industrial water supply, and navigation. J.A. 32; Pet. App. 265, 269.

The Ocean Plan, in turn, establishes water quality criteria (or “objectives”) for the protection of those beneficial uses. J.A. 32; Pet. App. 268. For example, Chapter II.B of the Ocean Plan establishes various bacterial standards, including limits on concentrations of fecal coliform and enterococci. J.A. 33-35. Chapter II.C es-

¹ The Basin Plan is available at perma.cc/2NKJ-ZMH5. The Ocean Plan is reprinted at J.A. 22-230.

establishes various physical standards—among them, that “[f]loating particulates and grease and oil shall not be visible” and that “[t]he discharge of waste shall not cause aesthetically undesirable discoloration of the ocean surface.” J.A. 37 (footnotes omitted). Chapter II.D establishes various chemical standards, including limits on concentrations of copper, zinc, and other metals. J.A. 38-41. And Chapter II.E establishes various biological standards, including that “[t]he concentration of organic materials in fish, shellfish or other marine resources used for human consumption shall not bioaccumulate to levels that are harmful to human health.” J.A. 39 (footnotes omitted).

In 1979, the State Water Board issued Order No. WQ 79-16. J.A. 1-21; see Pet. App. 270-274. Known as the “1979 Ocean Plan Exception,” that order exempts the seven nearshore outfalls from the bacterial standards in Chapter II.B of the Ocean Plan and allows an average of eight combined sewer overflows per year. Pet. App. 18; see J.A. 17-18. The order provides, however, that with the exception of the bacterial standards, petitioner “shall,” “to the greatest extent practical,” “design, construct and operate facilities” that “will conform to the remaining standards set forth in Chapter II of the Ocean Plan.” J.A. 17.

D. The 2019 Oceanside Permit

1. EPA has approved California’s authority to administer its own NPDES program. Pet. App. 412. Accordingly, California has assumed permitting jurisdiction over petitioner’s nearshore discharges, while EPA retains permitting jurisdiction over discharges at the Southwest Ocean Outfall. *Ibid.* Because discharges from the Oceanside portion require both federal and state authorization, EPA and California have consolidated their

NPDES permitting processes. *Id.* at 425-429; 40 C.F.R. 124.4(c)(2).

In 1997, EPA and California issued a consolidated NPDES permit for discharges from the Oceanside portion into the Pacific Ocean. C.A. E.R. 1229-1256. EPA and California issued renewed permits in 2003 and 2009. *Id.* at 1029-1228. While the 2009 permit was in effect, petitioner applied for another renewal. In 2019, after publishing a draft consolidated permit and responding to comments, see Pet. App. 493-567; C.A. E.R. 620-765, 888-932, 936, EPA and California issued the consolidated permit at issue here, Pet. App. 80-401.²

The 2019 permit is a Phase II permit under the CSO Control Policy. Pet. Br. 14 n.7; C.A. E.R. 400 n.4. It authorizes combined sewer overflows at the Southwest Ocean Outfall and the seven nearshore outfalls, on the condition that the discharges comply with the requirements set forth in the permit. Pet. App. 80.³ Those requirements include the nine minimum controls specified in the CSO Control Policy, *id.* at 93, 112-127; requirements set forth in a long-term control plan, *id.* at 97, 128-131; and “receiving water limitations,” *id.* at 97 (capitalization omitted). The permit also requires petitioner to update its long-term control plan, *id.* at 131-138; to monitor the effects of discharges on shoreline

² Although the 2019 Oceanside permit expires on October 31, 2024, Pet. App. 84, petitioner has applied for a renewal, see 40 C.F.R. 122.21(d), and the 2019 permit will continue in force until the effective date of the renewed permit, see 40 C.F.R. 122.6(d). EPA has informed this Office that EPA expects the renewal process to last at least a year beyond the October 2024 expiration date.

³ The 2019 permit also authorizes discharges of treated effluent from the Oceanside treatment plant. Pet. App. 81. Those discharges are subject to effluent limitations during dry weather. *Id.* at 91-92, 95-96.

and offshore receiving waters, *id.* at 226-231, 325; and to report monitoring results to EPA and California, *id.* at 177, 181-182, 231.

2. Petitioner filed a petition for review with EPA’s Environmental Appeals Board (Board), challenging the agency’s issuance of the 2019 permit. C.A. E.R. 442-501.⁴ Among other things, petitioner challenged two permit limitations that prohibit discharges that have certain adverse effects on the quality of the receiving waters. *Id.* at 462-473.

One of the two challenged limitations appears in a section entitled “Receiving Water Limitations” and states:

Discharge shall not cause or contribute to a violation of any applicable water quality standard (with the exception set forth in State Water Board Order No. WQ 79-16 [see p. 9, *supra*]) for receiving waters adopted by the Regional Water Board, [State Water Board], or U.S. EPA.

Pet. App. 97 (capitalization altered). Attachment F to the permit—which sets forth the “legal” basis for the permit’s “requirements,” *id.* at 248—specifically identifies the Basin Plan, the Ocean Plan, and State Water Board Order No. 79-16 as the “applicable” state water quality standards, *id.* at 264-274 (capitalization and emphasis omitted); see *id.* at 308 (reiterating that the permit’s “receiving water limitations are based on Ocean Plan

⁴ Petitioner separately sought review in California state court of California’s issuance of the 2019 permit. See *City & County of San Francisco v. San Francisco Bay Reg’l Water Quality Control Bd.*, No. RG19042575 (Alameda County Super. Ct.); Pet. App. 427 n.11. Those proceedings have been stayed pending the resolution of the current federal-court proceedings.

chapters II.C, II.D, and II.E, and State Water Board Order No. WQ 79-16”).⁵

The other challenged limitation, which appears under the heading “Regional Standard Provisions,” states:

Neither the treatment nor the discharge of pollutants shall create pollution, contamination, or nuisance as defined by California Water Code section 13050.

Pet. App. 334, 339 (capitalization altered).

3. The Board denied the petition for review. Pet. App. 402-486. The Board rejected petitioner’s contention that the challenged limitations were contrary to law. *Id.* at 429-440. The Board noted that, although the parties had sometimes referred to the challenged permit conditions as “effluent limitation[s],” the Board viewed the challenged conditions as something different: “prohibition[s] against exceeding (or violating) water quality standards of the receiving waters.” *Id.* at 431 (emphasis omitted). The Board upheld EPA’s legal authority to impose such prohibitions, explaining that the CWA “requires permit issuers to include—in every NPDES permit—conditions * * * necessary to meet

⁵ Although the Southwest Ocean Outfall is located beyond California’s territorial waters, discharges from that outfall “could affect the quality of the waters of the State” within three miles from shore. J.A. 149. This limitation in the 2019 permit prohibits those discharges from causing or contributing to a violation of the water quality standards that apply to those state waters. See Pet. App. 269 (explaining that the 2019 permit contains “receiving water limitations” to “ensure that discharges from the [Southwest Ocean Outfall] do not affect State waters”); *id.* at 441 (noting that the Ocean Plan applies to “discharges both within and outside of the territorial waters of the state”).

water quality standards.” *Id.* at 433 (citing 33 U.S.C. 1311(b)(1)(C)).

The Board then upheld EPA’s determination that the challenged limitations were necessary in this case because compliance with only the requirements of the long-term control plan would “not necessarily result in compliance with the water quality standards, including beneficial uses” such as recreation on public beaches. Pet. App. 449; see *id.* at 440-450. The Board also rejected petitioner’s contention that the challenged limitations were too “‘vague’ and ‘unclear’” to “provide ‘fair notice’” of petitioner’s “legal obligations.” *Id.* at 450 (citation omitted); see *id.* at 430 n.15. The Board did not find it “unclear which water quality standards apply under the permit,” and it noted that petitioner had “not identified” any “language in any particular water quality standard” that petitioner believed to be “vague or insufficiently clear.” *Id.* at 451.

4. The court of appeals denied petitioner’s petition for review of EPA’s NPDES permit. Pet. App. 1-76.

a. Like the Board, the court of appeals held that the CWA authorized EPA to include the challenged limitations in the permit. Pet. App. 32-36. The court explained that “[t]he plain text of the CWA and its implementing regulations provide NPDES permitting agencies with broad authority to impose limitations necessary to ensure the discharger’s adherence to ‘any applicable water quality standard,’” *id.* at 32 (quoting 33 U.S.C. 1311(b)(1)(C)), “including those beyond ‘effluent limitations,’” *id.* at 32-33 (citation omitted). The court further understood “the CSO Control Policy, which is legally binding under [Section] 1342(q)(1),” to “*require* such narrative limitations when necessary to satisfy applicable [water quality standards].” *Id.* at 33.

Petitioner asserted that the challenged limitations were “too vague to ensure [petitioner’s] control measures will protect water quality.” Pet. App. 32. The court of appeals rejected that argument, emphasizing that the limitations “simply require[d] that [petitioner’s] discharges comply with applicable state [water quality standards].” *Id.* at 34. The court also upheld the factual basis for the challenged limitations, finding that the evidence supported EPA’s decision to include the limitations “as a ‘backstop’ to ensure compliance with [water quality standards] not addressed by specific effluent limitations elsewhere in the permit—namely, protection of beneficial uses such as recreation.” *Id.* at 40; see *id.* at 38-40.

b. Judge Collins dissented. Pet. App. 50-76. In his view, the “particular” challenged limitations in this case violated the CWA, *id.* at 67, “by making the ultimate, overall ‘water quality standards’ themselves the applicable ‘limitation’ for an individual discharger,” *id.* at 63.

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

SUMMARY OF ARGUMENT

Petitioner argues that the only permit conditions EPA may impose under 33 U.S.C. 1311(b)(1)(C) are those that fall within the CWA’s definition of “effluent limitation.” That argument is foreclosed by this Court’s precedents, and by the statutory text, history, and design.

I. This Court has previously recognized that EPA’s authority under Section 1311(b)(1)(C) extends beyond the imposition of “effluent limitations.” In *National Ass’n of Manufacturers v. Department of Defense*, 583 U.S. 109 (2018), the Court construed a CWA judicial-review provision that refers to “any effluent limitation or other limitation under” enumerated CWA provisions,

including Section 1311. 33 U.S.C. 1369(b)(1)(E). In the course of explaining what sorts of ““other limitation[s]”” that judicial-review provision encompasses, the Court recognized that Section 1311(b)(1)(C) authorizes EPA to impose limitations that are related to pollutant discharges but do “not fall within the precise statutory definition of ‘effluent limitation.’” 583 U.S. at 122. In *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), the Court likewise recognized that, where individual dischargers’ compliance with applicable “effluent limitations” fails to produce compliance with state water quality standards, those dischargers “may be further regulated to prevent water quality from falling below acceptable levels.” *Id.* at 704 (citation omitted). Those decisions provide an independently sufficient basis for rejecting petitioner’s argument here.

II.A. The CWA’s text makes clear that Section 1311(b)(1)(C) authorizes limitations other than “effluent limitations.” Most notably, the text of Section 1311(b)(1)(C) itself uses the term “any more stringent limitation,” without the qualifier “effluent,” even though adjacent CWA provisions use the narrower term “effluent limitations.” The Court should assume that this textual difference was intentional and should give the unqualified term “limitation” its natural meaning. Other CWA provisions, which refer to effluent “or other” limitations “under section 1311,” reinforce that conclusion. The same is true of Congress’s 2000 codification by reference of the CSO Control Policy.

B. The CWA’s history bolsters the conclusion that Section 1311(b)(1)(C) authorizes discharge limitations other than “effluent limitations.” The CWA was enacted in 1972 and reflected congressional dissatisfaction with

the Federal Water Pollution Control Act in its then-existing form. The Senate and House agreed that more effective enforcement mechanisms were needed, and they agreed that permits under the new NPDES program should require discharges to comply with technology-based “effluent limitations.” The Senate bill, however, would have eliminated the process for establishing state water quality standards, and its version of Section 1311(b)(1)(C) authorized only “any more stringent effluent limitation.” The House bill, by contrast, expanded the role of state water quality standards, and its version of Section 1311(b)(1)(C) omitted the word “effluent,” instead referring more broadly to “any more stringent limitation.” Congress’s enactment of the relevant text of the House bill, in preference to the text adopted by the Senate, confirms that Congress advertently declined to impose the effluent-limitation-only constraint that petitioner advocates.

C. EPA has consistently understood Section 1311(b)(1)(C) to authorize permit conditions other than “effluent limitations.” EPA expressed that understanding during the legislative deliberations that produced the CWA, and the government took that position during the next decade in briefs filed in this Court. EPA expressed the same view in 1994 when it adopted the CSO Control Policy, and in 1995 when it issued guidance about that Policy. In 2000, Congress codified the CSO Control Policy by reference, and since that time, limitations that do not fall within the statutory definition of “effluent limitation” have frequently been used in a wide variety of NPDES permits. Petitioner cites various EPA pronouncements that petitioner contends have read Section 1311(b)(1)(C) more narrowly. But those agency pronouncements simply recognize that “effluent

limitations” are one tool for protecting water quality; they do not suggest that EPA is foreclosed from using other permit conditions as well.

D. Permit conditions of the kind at issue here, which prohibit discharges that have certain adverse effects on the quality of the receiving waters, are an important part of the statutory design. Compliance with “effluent limitations” will not always be sufficient to achieve a State’s water quality standards. Petitioner expresses concerns about the fairness of enforcing limitations that are framed in terms of a discharge’s effect on receiving-water quality. But those concerns are misplaced and, in any event, do not justify the adoption of an effluent-limitation-only rule. Contrary to petitioner’s contention, there is no necessary relationship between whether a limitation falls within the statutory definition of “effluent limitation” and whether it provides clear notice. For similar reasons, petitioner is wrong in arguing that permit conditions like those at issue here will undermine the “permit shield” conferred by 33 U.S.C. 1342(k).

III. In its opening brief in this Court, petitioner’s *only* ground for contesting the legality of the two permit conditions at issue here is that Section 1311(b)(1)(C) authorizes only “effluent limitations.” Petitioner does not identify any other language in the CWA that would preclude the imposition of permit conditions like these, *i.e.*, prohibitions on discharges that have specified adverse effects on receiving-water quality. And petitioner does not press the argument—which petitioner advanced in the court of appeals, and which the dissenting judge below endorsed—that the particular permit conditions at issue here are arbitrary and capricious because they are insufficiently precise. Petitioner thus has abandoned

any alternative rationale for challenging the permit conditions that are at issue in this Court.

ARGUMENT

The CWA “is a comprehensive water quality statute.” *PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology*, 511 U.S. 700, 704 (1994). To protect water quality, the Act generally prohibits the discharge of any pollutant into navigable or ocean waters. 33 U.S.C. 1311(a). The NPDES program is an exception to that general prohibition. Under that program, EPA may issue permits for discharges that meet certain requirements. 33 U.S.C. 1342(a).

The question presented here concerns EPA’s statutory authority to impose, as a condition of an NPDES permit, a requirement that a permittee’s discharges not have specified adverse effects on the quality of the receiving waters. In petitioner’s view (Br. 23), EPA has no such power. Petitioner interprets (*ibid.*) 33 U.S.C. 1311(b)(1)(C) to authorize only “effluent limitations.” Petitioner correctly explains (Br. 31-34) that prohibitions like the two permit conditions at issue here, which are defined in terms of a discharge’s effect on receiving-water quality, do not fit the statute’s definition of “effluent limitation.”

This Court, however, has previously rejected petitioner’s view that Section 1311(b)(1)(C) authorizes only “effluent limitations.” In *National Ass’n of Manufacturers v. Department of Defense*, 583 U.S. 109 (2018), the Court recognized that Section 1311(b)(1)(C) authorizes not just “effluent limitation[s],” but also “‘other limitation[s]’”—limitations that are related to pollutant discharges but do “not fall within the precise statutory definition of ‘effluent limitation.’” *Id.* at 122. And even if the Court had not already decided the issue, the stat-

utory text, history, and design would compel the same conclusion.

There is consequently no merit to petitioner’s proposed categorical rule that only “effluent limitations” may be included in NPDES permits. And petitioner has abandoned any alternative rationale for challenging the two permit conditions that are at issue here.⁶ The judgment of the court of appeals should be affirmed.

I. THIS COURT HAS PREVIOUSLY INTERPRETED 33 U.S.C. 1311(b)(1)(C) TO AUTHORIZE LIMITATIONS OTHER THAN “EFFLUENT LIMITATIONS”

Petitioner contends (Br. 23) that EPA may never require, as an express condition of an NPDES permit, that a permittee must refrain from discharges that will have specified adverse effects on the quality of the receiving waters. According to petitioner (Br. 24), EPA may not impose such a condition because Section 1311(b)(1)(C) “requires EPA to use effluent limitations—not any other type of permit condition—to meet water quality standards.” This Court’s decisions foreclose that interpretation of Section 1311(b)(1)(C).

In *National Ass’n of Manufacturers*, this Court construed a CWA provision that grants courts of appeals exclusive jurisdiction to review any EPA action “in approving or promulgating any effluent limitation *or other* limitation under section 1311, 1312, 1316, or 1345.” 33 U.S.C. 1369(b)(1)(E) (emphasis added). In the course of its decision, the Court addressed the question whether

⁶ Petitioner does not object to the “narrative” aspect of the permit conditions at issue here. Pet. Br. 4. Petitioner acknowledges that, under Section 1311(b)(1)(C), permit conditions may be stated either “numerically” or “narratively.” *Id.* at 11; see *id.* at 33 n.22. Petitioner’s only objection to the challenged conditions is that they are not “effluent limitations.” *Id.* at 23.

the discharge limitations that EPA may impose pursuant to Section 1311(b)(1)(C) are confined to “effluent limitations.” The Court understood an “‘other limitation,’” within the meaning of Section 1369(b)(1)(E), to be a limitation that is “related to the discharge of pollutants” but does “not fall within the precise statutory definition of ‘effluent limitation.’” *National Ass’n of Mfrs.*, 583 U.S. at 122.

The Court then described Section 1311(b)(1)(C) as “giv[ing] us” a “concrete example[] of the type of ‘other limitation’ Congress had in mind.” *National Ass’n of Mfrs.*, 583 U.S. at 122. “Section 1311(b)(1)(C),” the Court explained, “allows the EPA to issue ‘any more stringent limitation[s]’ if technology-based effluent limitations cannot ‘meet water quality standards, treatment standards, or schedules of compliance.’” *Id.* at 122-123 (brackets in original). The Court thus recognized that Section 1311(b)(1)(C) authorizes EPA to impose limitations that do “not fall within the precise statutory definition of ‘effluent limitation.’” *Id.* at 122.

Petitioner’s view (Br. 24) that Section 1311(b)(1)(C) “requires EPA to use effluent limitations—not any other type of permit condition”—cannot be squared with *National Ass’n of Manufacturers*. Petitioner’s view is likewise inconsistent with other decisions of this Court. In *PUD No. 1*, for example, the Court explained that “state water quality standards provide ‘a supplementary basis . . . so that numerous point sources, *despite individual compliance with effluent limitations*, may be further regulated to prevent water quality from falling below acceptable levels.” 511 U.S. at 704 (emphasis added) (quoting *EPA v. California*, 426 U.S. 200, 205 n.12 (1976)); see *Arkansas v. Oklahoma*, 503 U.S. 91, 101

(1992) (recognizing that EPA may use state water quality standards to “supplement effluent limitations”).

Petitioner does not attempt to reconcile its view of Section 1311(b)(1)(C) with the decisions cited above. Indeed, although the petition for a writ of certiorari argued that the decision below “conflicts with” *PUD No. 1*, Pet. 5; see Pet. 24-27, petitioner’s opening brief does not cite that decision. Accordingly, the Court can decide this case by simply reaffirming its prior interpretation of Section 1311(b)(1)(C).

II. THE CWA MAKES CLEAR THAT SECTION 1311(b)(1)(C)’S AUTHORIZATION EXTENDS BEYOND “EFFLUENT LIMITATIONS”

Even if this Court had not already decided the issue, traditional tools of statutory interpretation would lead to the same conclusion: Section 1311(b)(1)(C) authorizes discharge limitations other than “effluent limitations.”

A. The CWA’s Text Makes Clear That Section 1311(b)(1)(C) Authorizes Limitations Other Than “Effluent Limitations”

The CWA’s text unambiguously authorizes EPA to include discharge limitations other than “effluent limitations” in NPDES permits. This Court’s inquiry therefore may “begin[] with the statutory text, and end[] there as well.” *National Ass’n of Mfrs.*, 583 U.S. at 127 (citation omitted).

1. *The language of Section 1311(b)(1)(C), of other CWA provisions, and of the CSO Control Policy unambiguously establishes that EPA may impose limitations other than “effluent limitations”*

Three sources of relevant text establish that Section 1311(b)(1)(C) authorizes limitations other than “effluent limitations.” Those are (a) the text of Section 1311(b)(1)(C) itself, which refers to “any more stringent

limitation” without using the qualifier “effluent”; (b) the text of other CWA provisions, which identify Section 1311(b)(1)(C) as a source of “other limitations”; and (c) the text of the CSO Control Policy, which Congress codified by reference in the CWA, and which instructs permitting authorities to impose limitations like the ones at issue here when issuing permits for combined sewer systems.

a. The term “effluent limitation” does not appear in Section 1311(b)(1)(C). Instead, Congress used more expansive language, authorizing EPA to 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). “As this Court has repeatedly explained, the word ‘any’ has an expansive meaning.” *Patel v. Garland*, 596 U.S. 328, 338 (2022) (citation and some internal quotation marks omitted). Here, “any” means that Section 1311(b)(1)(C) authorizes more stringent limitations “of whatever kind,” *ibid.* (citation omitted), not just more stringent “effluent limitations.” See *Webster’s Third New International Dictionary* 97 (1971) (defining “any” as “one or some indiscriminately of whatever kind”).

Indeed, if Congress had intended to authorize only more stringent “effluent limitations,” it could have used that term in Section 1311(b)(1)(C), as it did in immediately adjacent provisions. See 33 U.S.C. 1311(b)(1)(A), (b)(1)(B), (b)(2), and (b)(3). But that term does not appear in Section 1311(b)(1)(C), and “Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.” *Department of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015). That canon “applies with particular force here”

because Congress used the term “effluent limitation” “repeatedly” and “in close proximity” to Section 1311(b)(1)(C)—making Congress’s use of different language in that subparagraph “seem quite deliberate.” *Id.* at 392; see *Russello v. United States*, 464 U.S. 16, 23 (1983).

b. The text of other CWA provisions confirms that Congress’s omission of the term “effluent limitation” was no accident. Many CWA provisions refer to effluent “or other” limitations, often with an explicit cross-reference to Section 1311. The Court identified one example in *National Ass’n of Manufacturers*. See 583 U.S. at 122 (discussing 33 U.S.C. 1369(b)(1)(E)); pp. 19-20, *supra*. There are many others. See, *e.g.*, 33 U.S.C. 1318(a) (“effluent limitation, or other limitation”); 33 U.S.C. 1341(b) (“effluent limitations, or other limitations”); 33 U.S.C. 1341(d) (“effluent limitations and other limitations, under section 1311 or 1312”); 33 U.S.C. 1362(17) (“effluent limitation, other limitation”); 33 U.S.C. 1365(f) (“effluent limitation or other limitation under section 1311 or 1312”); 33 U.S.C. 1367(d) (“effluent limitation or other limitation under section 1311 or 1312”); 33 U.S.C. 1370 (“effluent limitation, or other limitation”).

Those provisions confirm that Section 1311(b)(1)(C) authorizes EPA to impose limitations other than “effluent limitations.” Section 1341(a)(1), for instance, addresses situations in which “there is not an applicable effluent limitation *or other limitation* under sections 1311(b) and 1312.” 33 U.S.C. 1341(a)(1) (emphasis added). Section 1312 and every provision of Section 1311(b) *other than* Subparagraph (b)(1)(C) address “effluent limitations” *only*. 33 U.S.C. 1311(b)(1)(A), (b)(1)(B), (b)(2), and (b)(3), 1312(a). Section 1341(a)(1)’s

reference to an “other limitation under sections 1311(b) and 1312” therefore must encompass a “more stringent limitation” imposed under Subparagraph (b)(1)(C)—demonstrating that Congress understood that subparagraph to be a source of “other” limitations.

c. The text of the CSO Control Policy reinforces that understanding. EPA issued the CSO Control Policy in 1994. That Policy instructs that Phase I permits for combined sewer systems should include the type of limitation at issue here: a “narrative limitation” that requires discharges to “[c]omply with applicable WQS [water quality standards].” 59 Fed. Reg. at 18,696. The following year, the agency published implementing guidance with “example permit language” similar to the language of the limitations here. C.A. E.R. 1494; see *id.* at 1546, 1580, 1601, 1609. In 2000, Congress amended the CWA to require that each NPDES permit for a combined sewer system must “conform to” the CSO Control Policy. 33 U.S.C. 1342(q)(1). The text of the CSO Control Policy, and Congress’s codification by reference of that Policy, therefore reinforce the conclusion that Section 1311(b)(1)(C) authorizes EPA to prohibit discharges that have the effect of impairing receiving-water quality.

2. Nothing in the CWA’s text supports petitioner’s contrary interpretation

Petitioner acknowledges (Br. 26) that Section 1311(b)(1)(C) “uses only the word ‘limitation.’” Petitioner nevertheless contends (*ibid.*) that the word “limitation” in that provision should be read “as a shorthand for the defined term ‘effluent limitation.’” Nothing in the statutory text supports that reading.

a. Congress sometimes uses “a shorthand phrase or term” to “provide a succinct way of expressing a concept that would otherwise require a lengthy or complex for-

mulation.” *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 575 U.S. 650, 663 (2015). But “effluent limitation” is a statutorily defined term; far from being “lengthy” or “complex,” the term itself is shorthand for Section 1362(11)’s much longer definition. If Congress had wanted to invoke that definition in Section 1311(b)(1)(C), Congress already had an “economical way[]” of doing so, by simply using the term it had defined. *Kellogg Brown*, 575 U.S. at 663. As noted above, that is precisely what Congress did in neighboring provisions, showing that when Congress wanted to refer to “effluent limitations,” it used that very term, including in the first two subparagraphs of Section 1311(b)(1). See pp. 22-23, *supra*. Had Congress intended to use “limitation” as a shorthand for “effluent limitation,” there is no reason Congress would have done so in only the third subparagraph of Section 1311(b)(1).

Petitioner asserts (Br. 27) that other provisions of Section 1311 do use the word “limitations” to refer to “effluent limitations.” Each of the provisions that petitioner cites, however, *first* refers to “effluent limitations” (or to “any effluent limitation,” 33 U.S.C. 1311(b)(3)(B)), and *then* uses the phrase “such limitations” (or “such limitation,” 33 U.S.C. 1311(n)(7)). See 33 U.S.C. 1311(b)(2)(C), (b)(2)(D), (b)(2)(F), (b)(3)(A), (b)(3)(B), (m)(1), (m)(2), and (n)(7). The word “such” indicates that the “limitations” referenced in that phrase are the same “effluent limitations” mentioned earlier in the provision. See *Slack Techs., LLC v. Pirani*, 598 U.S. 759, 766 (2023) (“The word ‘such’ usually refers to something that has already been ‘described’ or that is ‘implied or intelligible from the context or circumstances.’”) (citation omitted). In Section 1311(b)(1)(C), in contrast, the word “limitation” is not modified by “such,” and there

is no mention of “effluent limitations.” Those textual differences once again cut against petitioner’s reading.

Petitioner’s reliance (Br. 27) on 33 U.S.C. 1311(i)(1) is likewise misplaced. That provision refers to “limitations under subsection (b)(1)(B) or (b)(1)(C)” of Section 1311. 33 U.S.C. 1311(i)(1). Given that Section 1311(b)(1)(B) “addresses only ‘effluent limitations,’” Pet. Br. 27 (citation omitted), the omission of the qualifier “effluent” in Section 1311(i)(1) suggests that Congress understood Section 1311(b)(1)(C) to authorize “limitations” other than “effluent limitations.”

Petitioner also argues that the word “limitation” should be read in light of Section 1311’s heading, which refers only to “[e]ffluent limitations.” Pet. Br. 27 (citation omitted). But “matters in the text * * * are frequently unreflected in the headings,” particularly when, as here, “the text is complicated and prolific.” *Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528 (1947). And the fact that Congress elsewhere identified Section 1311 as authorizing “other limitations,” see pp. 23-24, *supra*, demonstrates that Section 1311’s heading is “under-inclusive[,]” as headings often are, *Lawson v. FMR LLC*, 571 U.S. 429, 446 (2014). In any event, “the heading of a section cannot limit the plain meaning of the text,” *Trainmen*, 331 U.S. at 529, which establishes that Section 1311(b)(1)(C) authorizes more than just “effluent limitations,” see pp. 21-24, *supra*.

b. Petitioner contends (Br. 27) that “[t]wo additional aspects” of Section 1311(b)(1)(C) suggest that the provision authorizes “only effluent limitations.” First, petitioner argues (Br. 27-28) that prohibitions on discharges that adversely affect water quality cannot accurately be described as “more stringent” than the technology-based effluent limitations that EPA must

otherwise impose. 33 U.S.C. 1311(b)(1)(C). But this Court has previously recognized that water-quality-based prohibitions can “supplement effluent limitations ‘so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.’” *Arkansas*, 503 U.S. at 101 (citation omitted). A water-quality-based “limitation” that requires the permittee to use additional control measures beyond those needed to comply with applicable “effluent limitations” is naturally described as “more stringent” than the effluent limitations themselves. Of course, compliance with effluent limitations may often be sufficient to avoid adverse effects on receiving-water quality. But in cases where water quality would otherwise “fall[] below acceptable levels” “despite individual compliance with effluent limitations,” *ibid.* (citation omitted), limitations like the ones at issue here can serve as a backstop, providing “more stringent” protection.

Second, petitioner infers from Section 1311(b)(1)(C)’s use of the words “meet” and “implement” that EPA must set limitations that are “distinct from” water quality standards. Pet. Br. 30 (emphases omitted). According to petitioner, it would be “illogical” to read Section 1311(b)(1)(C) to “enable the agency simply to *impose* water quality standards ‘to *meet* water quality standards’ or ‘*implement* any applicable water quality standard.’” *Ibid.* That argument lacks merit.

What EPA imposes on a permittee under Section 1311(b)(1)(C) are not “water quality standards,” but “limitation[s]” on the permittee’s discharges. 33 U.S.C. 1311(b)(1)(C). Water quality standards are promulgated independently, generally by the States. 33 U.S.C. 1313. Water quality standards as such do not bind any per-

mittee under the NPDES program; they have binding force under the program only insofar as discharge limitations based on those standards are incorporated into permits. See 33 U.S.C. 1341(d), 1342(a)(1). Under the first of the challenged limitations here, for example, petitioner is bound not by California’s water quality standards themselves, but by the permit condition stating (with one specified exception) that petitioner’s “[d]ischarge[s] shall not cause or contribute to a violation of any applicable water quality standard.” Pet. App. 97; see p. 11, *supra*. Because the water quality standards in and of themselves impose no constraints on the conduct of dischargers under the NPDES program, limitations like the ones at issue here are naturally described as a way to “meet” or “implement” those standards. 33 U.S.C. 1311(b)(1)(C).

Petitioner also argues that the words “meet” and “implement” in Section 1311(b)(1)(C) imply that permit conditions must be written at a particular level of specificity. Pet. Br. 29-30 (citation omitted). But that argument does not support petitioner’s view that NPDES permits may impose only “effluent limitations.” *Id.* at 27. Even if the CWA imposed implicit requirements as to the specificity of NPDES permits, the Act would not categorically preclude EPA from imposing limitations that are framed in terms of discharges’ effects on receiving-water quality; it would simply require that any such limitations be expressed in a sufficiently specific way. And even assuming that “[a]n *effluent* limitation provides the precision and specificity demanded by Congress’ choice of verbs” (*id.* at 30), it does not follow that *only* an “effluent limitation” can provide adequate specificity. See pp. 38-39, 45, *infra*.

Because petitioner has disclaimed any argument that the permit conditions at issue here are “‘too vague’ or not ‘specific enough,’” Pet. Cert. Reply Br. 2 (quoting Br. in Opp. 9, 10), the Court need not address whether permit conditions other than “effluent limitations” must satisfy some implied specificity requirement. See p. 49, *infra*. But in any event, Section 1311(b)(1)(C) simply describes the “more stringent limitation[s]” that EPA may impose, including limitations that are “necessary to meet water quality standards” or are “required to implement” them. 33 U.S.C. 1311(b)(1)(C). Nothing in Section 1311(b)(1)(C) requires that conditions be written at any particular level of specificity.

c. Petitioner’s structural argument (Br. 34-37) also fails. Petitioner observes (Br. 34) that Sections 1311(a), 1342(a)(1), 1319, and 1365(f)—provisions that “identify which of the Act’s requirements bind individual permit holders”—do not cross-reference Section 1313. According to petitioner (Br. 34-37), the absence of any such cross-reference indicates that Congress did not intend for EPA to impose limitations like the ones at issue here, which prohibit discharges that have the effect of impairing receiving-water quality. But Section 1313 is not the source of EPA’s authority to impose the limitations here; Section 1311(b)(1)(C) is. See Pet. App. 515-516. While Section 1313 requires States to adopt water quality standards, those standards impose no obligations or restrictions on particular dischargers under the NPDES program except insofar as the standards are incorporated into permit conditions pursuant to Section 1311(b)(1)(C). See pp. 27-28, *supra*. It thus makes sense that the provisions petitioner cites would cross-reference Section 1311 but not Section 1313. See 33 U.S.C. 1311(a), 1319(c)(2)(A) and (d), 1342(a)(1), 1365(f).

In *PUD No. 1*, this Court rejected an analogous argument that the absence of a cross-reference to Section 1313 implied a constraint on enforcement of the CWA. 511 U.S. at 712-713. That case involved Section 1341, which requires a State to provide a “certification” before a federal license or permit can be issued for “any activity” that “may result in any discharge into the navigable waters.” 33 U.S.C. 1341(a)(1). As part of the certification process, a State may impose, as a “condition” of the federal license or permit, “any effluent limitations and other limitations * * * necessary to assure” that the licensee or permittee “will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312.” 33 U.S.C. 1341(d). The question presented in *PUD No. 1* was whether the State could impose a limitation to ensure compliance with state water quality standards, even though Section 1313 was “not one of the statutory provisions listed in [Section 1341(d)].” *PUD No. 1*, 511 U.S. at 712.

The Court held that a State may impose such a condition. It observed that Section 1341(d) “allows States to impose limitations to ensure compliance with [Section 1311].” *PUD No. 1*, 511 U.S. at 713. And, citing Section 1311(b)(1)(C), the Court explained that Section 1311 “incorporates [Section 1313] by reference.” *Ibid.*; see *ibid.* (“Section [1313] is always included by reference where section [1311] is listed.”) (quoting H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 96 (1977)); 33 U.S.C. 1311(b)(1)(C) (referencing “any applicable water quality standard established pursuant to this chapter”). The same reasoning applies here. Section 1342(a) authorizes EPA to impose limitations to ensure compliance with Section 1311. See 33 U.S.C. 1342(a)(1) and (2). And, through Section 1311(b)(1)(C), Section 1311 “incorpo-

rates [Section 1313] by reference.” *PUD No. 1*, 511 U.S. at 713. The fact that Sections 1311(a), 1342(a)(1), 1319, and 1365(f) cross-reference Section 1311, but not Section 1313, therefore is of no moment.

B. The CWA’s History Confirms That Section 1311(b)(1)(C) Authorizes Limitations Other Than “Effluent Limitations”

Because this Court’s precedents and the statutory text make clear that Section 1311(b)(1)(C) authorizes limitations other than “effluent limitations,” the Court need go no further. But the CWA’s history reinforces that conclusion, confirming that Congress’s choice of language in Section 1311(b)(1)(C) was no “mistake in draftsmanship.” *Russello*, 464 U.S. at 23.

1. Before it was amended in 1972, the Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155, authorized States to establish “water quality standards” for “inter-state waters.” 33 U.S.C. 1160(c)(1) (1970). The statute provided that the “discharge of matter into such inter-state waters or portions thereof, which reduces the quality of such waters below the water quality standards [so] established * * * , is subject to abatement.” 33 U.S.C. 1160(c)(5) (1970). The Act authorized the United States to bring suit to “secure abatement,” 33 U.S.C. 1160(g) (1970), but only if other avenues, including a “conference” and a “public hearing” involving the discharger and state agencies, had failed to produce remedial action, 33 U.S.C. 1160(d)-(f) (1970). Even then, the United States could not sue without a State’s consent, unless it could show that a discharge originating from one State was endangering the health or welfare of persons in another State. 33 U.S.C. 1160(g)(1) and (2) (1970).

That pre-1972 abatement procedure “proved ineffective.” *California*, 426 U.S. at 202. Many States did not establish water quality standards. S. Rep. No. 414, 92

Cong., 1st Sess. 4 (1971) (Senate Report). And the “cumbrous” abatement procedure, *California*, 426 U.S. at 202, resulted in “an almost total lack of enforcement,” with “only one case * * * reach[ing] the courts in more than two decades,” Senate Report 5.

When Congress considered potential measures to address those problems, a general consensus emerged on the need for two major changes. First, there was broad agreement that the abatement procedure should be replaced with a permit program, whereby discharges would generally be prohibited except in compliance with a permit, which would be subject to direct administrative and judicial enforcement. See *California*, 426 U.S. at 205; Senate Report 8. Second, there was broad agreement that permits should require discharges to comply with “technology-based effluent limitations,” *California*, 426 U.S. at 204 (footnote omitted), which would make it unnecessary to “search for a precise link between pollution and water quality,” Senate Report 8.

Beyond those points of consensus, however, questions remained about whether and how water quality standards should continue to play a role in the new permit program. The Senate and the House passed competing versions of the CWA that incorporated different answers to those questions. See 2 *Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 1414 (Comm. Print 1973) (*Leg. Hist.*) (Senate passage of S. 2770); 1 *Leg. Hist.* 751 (House passage of H.R. 11896).

The Senate bill would have “eliminate[d] over a period of time the concept of water quality standards and instead depend[ed] completely on effluent limitations based on the best available technology or better.” 2 *Leg. Hist.* 1183 (statement of EPA Administrator Ruckelshaus).

haus). The Senate bill thus lacked any analogue to what is now 33 U.S.C. 1313, which requires States to adopt water quality standards. See S. 2770, 92 Cong., 1st Sess. (1971) (S. 2770), *reprinted in 2 Leg. Hist.* 1534-1723. Its version of Section 1311(b)(1)(C) would have authorized only “more stringent *effluent* limitation[s].” S. 2770, § 301(b)(1)(C) (emphasis added), *reprinted in 2 Leg. Hist.* 1609. And its analogues to 33 U.S.C. 1341(d), 1365(f), and 1367(d)—which cross-reference Section 1311, see pp. 23-24, *supra*—would have identified Section 1311 as a source of only “*effluent* limitations.” S. 2770, § 401(d) (emphasis added), *reprinted in 2 Leg. Hist.* 1685; see S. 2770, §§ 505(f), 507(d), *reprinted in 2 Leg. Hist.* 1706, 1709.

The House bill took a different approach. See H.R. 11896, 92 Cong., 2d Sess. (1972) (H.R. 11896), *reprinted in 1 Leg. Hist.* 893-1110. That bill “[r]etain[ed] the process in existing law for establishing water quality standards for interstate waters,” and it “further require[d] that water quality standards be established for all navigable waters.” H.R. Rep. No. 911, 92d Cong., 2d Sess. 73 (1972) (1972 House Report); see H.R. 11896, § 303, *reprinted in 1 Leg. Hist.* 273-282. It omitted the word “effluent” in Section 1311(b)(1)(C), thereby making that House-bill provision broader than the Senate version. H.R. 11896, § 301(b)(1)(C), *reprinted in 1 Leg. Hist.* 963. And the House-bill analogues to current Sections 1341(d), 1365(f), and 1367(d) identified Section 1311 as a source of effluent and “other” limitations. H.R. 11896, § 401(d), 505(f), 507(d), *reprinted in 1 Leg. Hist.* 1052, 1076, 1080.

Members of Congress understood the import of those differences. The chairman of the House Public Works Committee emphasized that, in circumstances where technology-based limitations are “not sufficient to meet

water quality standards,” the House version of Section 1311(b)(1)(C) would impose “more restrictive” requirements than would the Senate version to “assure that water quality standards are met.” 1 *Leg. Hist.* 353 (statement of Rep. Blatnik); see *id.* at 524 (statement of Rep. Harsha) (explaining that the House bill provided “a much more stringent requirement for effluent limitations and water quality standards”). In supporting the House’s approach, EPA stressed the same point. Stating that “the Senate may have sacrificed wisdom for simplicity,” the EPA Administrator argued that, while “[e]ffluent limitations are a means for achievement,” “[t]hey should not become an end in themselves.” 2 *Leg. Hist.* 1183. The Administrator urged Congress to “build on existing foundations of water quality standards,” rather than “totally abandon[.]” them. *Id.* at 1180, 1182; see *id.* at 1183 (“Water quality standards need to be strengthened and expanded to cover all waters—interstate and intrastate. They also need to be achieved.”).

In the end, the Conference Committee adopted, and Congress enacted, the relevant text of the House bill. See, *e.g.*, S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 33, 35-39 (1972) (Conf. Rep.); 1 *Leg. Hist.* 223, 279 (agreeing to the Conference Report); 1 *Leg. Hist.* 112, 136 (overriding the President’s veto). In adopting the House’s approach, Congress rejected the Senate-bill language that would have authorized only “more stringent *effluent* limitation[s]” under Section 1311(b)(1)(C). S. 2770, § 301(b)(1)(C) (emphasis added), *reprinted in* 2 *Leg. Hist.* 1609. Instead, Congress enacted language that authorizes other limitations as well, including those necessary to meet water quality standards. The CWA’s history thus confirms that Congress omitted the term “effluent limitation” in Section 1311(b)(1)(C) deliber-

ately and with an intent to expand the provision's scope. See *Warger v. Shauers*, 574 U.S. 40, 48 (2014) (relying on drafting history as evidence that Congress's "choice of language was no accident"); *Doe v. Chao*, 540 U.S. 614, 622-623 (2004) (similar); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987) (similar).

2. Petitioner contends (Br. 38) that the CWA's history supports the view that Section 1311(b)(1)(C) authorizes "only effluent limitations." But if Congress had intended that result, it would have adopted the Senate's version of Section 1311(b)(1)(C). Congress's decision to instead enact the relevant text of the House bill—which omitted the word "effluent" in Section 1311(b)(1)(C), and which contained provisions that identified Section 1311 as a source of authority to impose "other" limitations—can only be understood as a deliberate rejection of the constraint on EPA's permitting authority that petitioner urges.

Petitioner argues (Br. 40) that Section 1311(b)(1)(C) should not be read to "recreate" the pre-1972 enforcement regime. But the government's reading of Section 1311(b)(1)(C) would not have that effect. The problem with the pre-1972 regime was not, as petitioner suggests (Br. 48-52), that enforcing water quality standards was unfair; it was that the then-existing statutory scheme had produced hardly any enforcement at all. Senate Report 5. To address that problem, "the enforcement machinery of [pre-CWA] law [was] superseded by streamlined administrative and legal mechanisms whereby discharges could be compelled to meet permit and effluent limitation requirements through speedy administrative or judicial enforcement actions." 1 *Leg. Hist.* 150 (letter from Administrator Ruckelshaus). But at the same time, Congress did not abandon "the use of water quality

standards.” Conf. Rep. 122. Rather, Congress “provide[d] for continuation of the water quality standards already in existence, *plus* limitations on the amount of effluents a plant may discharge,” 1 *Leg. Hist.* 238 (statement of Rep. Jones), with the understanding that “[w]ater quality standard objectives would continue to be applicable along with the new effluent limitations,” *id.* at 150 (letter from Administrator Ruckelshaus).

Petitioner also quotes a passage from the 1972 House Report and statements by two Senators that describe Section 1311(b)(1)(C) as a source of authority to impose more stringent “effluent limitations.” Pet. Br. 38 & n.29, 39 (citations and emphases omitted). But there is no dispute that, under Section 1311(b)(1)(C), “effluent limitations” are an important tool that EPA may use to achieve compliance with state water quality standards. The contested question here is whether “effluent limitations” are the *only* type of discharge limitation that EPA may incorporate into NPDES permits. None of the materials that petitioner cites suggests that EPA’s authority is limited in that manner.

C. EPA Has Consistently Understood Section 1311(b)(1)(C) To Authorize Permit Conditions Other Than “Effluent Limitations”

In “determining the meaning of statutory provisions,” courts may “seek guidance from the interpretations of those responsible for implementing particular statutes.” *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2262 (2024). EPA has consistently understood Section 1311(b)(1)(C) to authorize permit conditions, including water-quality-based permit conditions like the two at issue here, that fall outside the statutory definition of “effluent limitation.”

1. Even before the CWA was enacted into law, EPA expressed the understanding that, although “effluent limitations” were a “key element” of the bill reported by the Conference Committee (which subsequently became law), “[w]ater quality standard objectives would continue to be applicable along with the new effluent limitations.” 1 *Leg. Hist.* 149-150 (letter from Administrator Ruckelshaus). In the decade after the CWA was enacted, the government maintained that view in briefs filed in this Court, explaining that “water quality standards” could be the basis for “supplement[ing] effluent limitations” with “more stringent” requirements. Gov’t Br. at 5 n.5, *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977) (No. 75-978); see U.S. Amicus Br. at 8, *Milwaukee v. Illinois*, 451 U.S. 304 (1981) (No. 79-408) (explaining that NPDES permits may “incorporate effluent limitations, water quality standards, and other applicable requirements”).

2. In 1994, EPA adopted its CSO Control Policy to address discharges from combined sewer systems. EPA instructed permitting authorities to impose “narrative limitation[s]” that require “[c]omply[ing] with applicable WQS [water quality standards].” 59 Fed. Reg. at 18,696. Although that instruction appeared in a section of the Policy that addressed Phase I permits, EPA emphasized that “the entire process” of developing appropriate requirements “must be coordinated to control CSOs effectively.” *Id.* at 18,690. In guidance about the Policy issued the following year, EPA explained that “permits may contain both Phase I and Phase II elements.” C.A. E.R. 1497. EPA identified, as an example of appropriate language for permits issued during both phases, the type of requirement at issue here: a requirement that a discharge not have the effect of impairing

receiving-water quality. *Id.* at 1546, 1580, 1601, 1609; see pp. 6-7, *supra*.⁷

By amending the CWA in 2000 to require “conform[ance] to” the CSO Control Policy, 33 U.S.C. 1342(q)(1), Congress reaffirmed and ratified EPA’s understanding of the types of permit conditions that the Act authorizes. Since that time, prohibitions on discharges based on their effects on receiving-water quality have frequently been used in NPDES permits, not only in the context of combined sewer overflows, but also in other areas, including in general permits covering tens of thousands of permittees.⁸ Such prohibitions come in a wide range of forms, describing the prohibited effect numerically or narratively and at varying levels of specificity. See, *e.g.*, C.A. E.R. 1043 (“Floating particulates and grease and oil shall not be visible.”); *ibid.*

⁷ EPA’s 1995 guidance about the CSO Control Policy refers to the type of limitation at issue here as an “[e]ffluent [l]imit[.]” C.A. E.R. 1546. The agency has sometimes used that phrase loosely, to refer to discharge limitations generally, whether or not they fall within the statutory definition of “effluent limitation.” Cf. Pet. App. 431 (noting that both parties had referred to “the contested provision” as an “effluent limitation”). In the permit at issue here, EPA used the phrase “receiving water limitation[.]” *Id.* at 97 (capitalization omitted). Whatever the label, the agency has consistently understood the CWA to authorize the type of permit condition that is at issue in this Court.

⁸ See, *e.g.*, Pet. App. 430 n.15; EPA, Construction General Permit § 3.1 (2022), [perma.cc/L8PU-NSDW](https://www.epa.gov/npdes/npdes-permits). By “authorizing discharges from a category of point sources within a specified geographic area,” *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108 n.* (2004), general permits provide expedited coverage for the majority of dischargers under the NPDES program, including large and important sectors of the economy, such as the construction industry, which often require permit coverage in a short period of time.

(“The dissolved oxygen concentration shall not at any time be depressed more than 10 percent from that which occurs naturally.”); Pet. App. 339 (prohibiting the “creat[ion]” of “pollution” as “defined by California Water Code section 13050”).

3. Petitioner contends (Br. 41-44) that EPA’s own pronouncements support a categorical rule that would invalidate all of those permit conditions, in whatever form. But the sources that petitioner cites show only that water quality standards may be the *basis* for “effluent limitations,” *i.e.*, that EPA may use effluent limitations as one tool for protecting water quality and may consider applicable water quality standards in determining the appropriate stringency of the effluent limitations to be imposed. None of those sources casts doubt on EPA’s authority to protect water quality through other limitations as well.

For example, the 1976 decision of EPA’s general counsel (see Pet. Br. 26 & n.13) recognized that, when EPA imposes “effluent limitations to meet water quality standards,” it does so pursuant to Section 1311(b)(1)(C). EPA, *2 Decisions of the Administrator and Decisions of the General Counsel—National Pollutant Discharge Elimination System Adjudicatory Hearing Proceedings* 116 (Jan. 1976-Dec. 1976) (*Decisions*); see *1 Decisions* 374 (Sept. 1974-Dec. 1975) (similar). But the decision does not suggest that EPA may impose *only* “effluent limitations.”

Likewise, the regulations that petitioner cites (Br. 42-43) require EPA to impose pollutant-specific effluent limitations when the agency determines that a particular pollutant “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). But as EPA has explained, those regulations “do not require” that “all permit conditions necessary to meet water quality standards” must take the form of pollutant-specific effluent limitations. Pet. App. 434; see *id.* at 37-38. The regulations therefore do not preclude EPA from imposing other limitations, like the two at issue here.

EPA’s *National Water Permit Program* guide and *NPDES Permit Writers’ Manual* (see Pet. Br. 42, 43) also recognize that water quality standards may be the basis for “effluent limitations,” but they do not suggest that EPA lacks authority to impose other, water-quality-based limitations. See Pet. App. 439 (rejecting petitioner’s reliance on the manual). In fact, the guide expressly contemplates such other limitations, which it calls “water quality limitations.” EPA, *The National Water Permit Program* 23 (June 1973). The manual repeats the CSO Control Policy’s instruction that Phase I permits “should at least require permittees” to “[c]omply with applicable water quality standards,” “expressed in the form of a narrative limitation.” EPA, *NPDES Permit Writers’ Manual* 9-17 to 9-18 (Sept. 2010). EPA’s regulations and guidance therefore do not support petitioner’s proposed limitation on the agency’s authority under Section 1311(b)(1)(C).

D. Limitations Of The Kind At Issue Here Are An Important Part Of The Statutory Design

1. Congress viewed limitations like the ones at issue here, which measure compliance according to a discharge’s effect on water quality, as an important means of protecting “the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. 1251(a). Congress understood that “compliance with effluent limitations” might not always be sufficient “to prevent water

quality from falling below acceptable levels.” *PUD No. 1*, 511 U.S. at 704 (citation omitted). Rather than requiring permitting authorities to address those circumstances by developing additional, more stringent “effluent limitations” or by denying a permit altogether, the CWA allows permitting authorities to issue permits on the condition that the permittee’s discharges will not have specified adverse effects on the quality of the receiving waters.

Imposing such a condition makes particular sense when the information necessary to develop additional “effluent limitations” is unavailable. That is often the case in the context of general permits. Whereas “[a]n applicant for an *individual* NPDES permit must provide information about, among other things, the point source itself, the nature of the pollutants to be discharged, and any water treatment system that will be used,” “[g]eneral permits greatly reduce that administrative burden” by providing expedited authorization of discharges from an entire “category of point sources within a specified geographic area.” *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108 n.* (2004) (emphases added); see p. 38 n.8, *supra*. As a result, the location and nature of particular discharges may not be known at the time a general permit is issued.

Permitting authorities often confront a similar lack of necessary information in the context of combined sewer overflows. The CSO Control Policy recognizes that “data and modeling of wet weather events often do not give a clear picture of the level of CSO controls necessary to protect [water quality standards].” 59 Fed. Reg. at 18,692. When a “clear picture” is lacking, *ibid.*, the CWA does not require permitting authorities to delay issuing

a permit until better information becomes available and additional, more stringent “effluent limitations” can be developed. Instead, the statute allows permitting authorities to issue permits, even without that information, on the condition that the permittee’s discharges will “[c]omply with applicable WQS [water quality standards].” *Id.* at 18,696; see C.A. E.R. 1545-1546.

In this case, for example, petitioner failed to provide a long-term control plan that included accurate, up-to-date information about the design and operation of its combined sewer system and the characteristics of its discharges. Pet. App. 47, 474-486. As the CSO Control Policy recognizes, such information is critical for permitting authorities to develop “effluent limitations” sufficient to protect water quality. See 59 Fed. Reg. at 18,691 (recognizing the need for “a thorough understanding of [the] sewer system, the response of the system to various precipitation events, the characteristics of the overflows, and the water quality impacts that result”). Rather than delay issuance of a permit, however, EPA issued a permit that required petitioner to update its long-term control plan, Pet. App. 131-138, and prohibited discharges that would “cause or contribute to a violation of” applicable water quality standards, *id.* at 97; see *id.* at 339. Petitioner subsequently submitted an application for permit renewal that includes additional monitoring data, and petitioner has submitted an update to the long-term control plan. If those submissions provide sufficient information, EPA in future permits could impose additional “effluent limitations” in lieu of the challenged prohibitions.

2. Petitioner expresses concerns (Br. 44-52) about the fairness of enforcing limitations that are framed in terms of a discharge’s effect on receiving-water quality.

But petitioner’s concerns do not justify the line that petitioner urges between “effluent limitations” and other limitations.

a. As an initial matter, petitioner’s concerns (Br. 48-52) about the fairness of enforcing prohibitions on discharges based on their effects on water quality are misplaced. Permittees have fair notice of the applicable water quality standards, including from the permit itself. See, *e.g.*, Pet. App. 264-274, 308; C.A. E.R. 1043-1044.⁹ Permittees also have fair notice of the relevant facts. The CSO Control Policy, for example, requires operators of combined sewer systems to “develop a comprehensive, representative monitoring program” that “assesses the impact of the CSOs on the receiving waters.” 59 Fed. Reg. at 18,692. Permits require such monitoring to be conducted at specified locations, where the permittee’s discharges would be “the cause” of any “water quality impacts.” C.A. E.R. 1548, 1583; see 40 C.F.R. 122.48(b) (requiring permits to specify monitoring “sufficient to yield data which are representative of the monitored activity”); see also, *e.g.*, Pet. App. 230 (requiring petitioner to collect “[t]issue samples to assess bioaccumulation” at “two locations”). And because permittees themselves conduct the monitoring, they are typically the first to know if a discharge has had the effect of impairing receiving-water quality.

Moreover, the plaintiff in an enforcement action bears the burden of establishing the relevant facts and proving a violation of an applicable permit condition. For permit conditions like the ones at issue here, a

⁹ EPA publishes information identifying the water quality standards that are in effect. See 33 U.S.C. 1314(a)(6); EPA, *State-Specific Water Quality Standards Effective Under the Clean Water Act (CWA)* (July 18, 2024), perma.cc/V4LQ-DEY6.

plaintiff must establish the requisite link between the permittee's discharges and specified adverse effects on the quality of the receiving waters. And even in cases where the plaintiffs have proved that the defendants violated their permits, courts "can mitigate any hardship or injustice when they apply the statute's penalty provision." *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 186 (2020). "That provision vests courts with broad discretion to set a penalty that takes account of many factors, including 'any good-faith efforts to comply' with the Act, the 'seriousness of the violation,' the 'economic impact of the penalty on the violator,' and 'such other matters as justice may require.'" *Ibid.* (quoting 33 U.S.C. 1319(d)).

As evidence of the supposed "unfairness" of prohibiting discharges based on their effects on receiving-water quality, petitioner cites a recent suit filed by EPA and California to enforce such a prohibition in a permit for the Bayside portion of petitioner's combined sewer system. Pet. Br. 48; see *id.* at 50-52. But the complaint in that case alleges that petitioner's discharges caused bacteria, un-ionized ammonia, and copper to exceed concentrations specified in the Basin Plan, a source of applicable water quality standards long familiar to petitioner. Compl. ¶¶ 106-108, 110-112, *United States v. San Francisco*, No. 24-cv-2594 (N.D. Cal. May 1, 2024), perma.cc/HT8M-SS35. The complaint relies on "data collected, reported, and certified as accurate by" petitioner itself, *id.* ¶ 109, as well as observations of "floating material, including toilet paper," in Mission Creek, *id.* ¶ 115. Petitioner thus had fair notice of both the legal and the factual bases for the enforcement action. To the extent petitioner regards the action as unjustified, it can hold EPA and California to their burden of proof

in court; but there is nothing “unfair[]” (Pet. Br. 48) about requiring petitioner to defend against the action.

b. In any event, the line that petitioner urges this Court to draw between “effluent” and other limitations is a poor proxy for petitioner’s concerns about adequacy of notice. Consider, for example, a company that discharges red dye into receiving waters. A prohibition on discharges that caused “discoloration” of the waters’ surface would provide a clearer measure of compliance than a prohibition on discharges that contained “excessive” amounts of dye. That is so even though the latter prohibition would fall within the statutory definition of “effluent limitation,” while the former would not. Because there is no necessary relationship between whether a limitation falls within that definition and whether it provides clear notice, adoption of an effluent-limitation-only rule would not further the policy objectives that petitioner attributes to Congress.

Petitioner’s concerns about a multiple-discharger situation likewise do not justify such a rule. Petitioner contends (Br. 47) that, when “multiple sources” discharge pollutants into the same “receiving water,” it will be “impossible” for individual permittees to know “how much they need to control their discharges to prevent a violation.” But many cases, including this one, do not involve that sort of multiple-discharger situation. Here, for example, there are no other significant point or nonpoint sources of pollution around the Southwest Ocean Outfall. J.A. 227. While there may be some nonpoint sources of pollution near the shore, none is similar enough to petitioner’s combined sewer overflows as to raise any real question about who would be responsible for particular violations of applicable water quality standards in that area. The categorical rule that petitioner

proposes—*i.e.*, that the Court should construe Section 1311(b)(1)(C) to authorize only “effluent limitations”—is untethered both to the statutory text and to the hypothetical multiple-discharger problem.

c. Finally, petitioner argues (Br. 45-48) that limitations of the kind at issue here undermine the “permit shield” conferred by Section 1342(k), which generally provides that “[c]ompliance with a permit * * * shall be deemed compliance” with the CWA. 33 U.S.C. 1342(k). Section 1342(k) “insulate[s] permit holders from changes in various regulations during the period of a permit” and “relieve[s] them of having to litigate in an enforcement action the question whether their permits are sufficiently strict.” *Du Pont*, 430 U.S. at 138 n.28. For example, if EPA promulgated a new regulation that established industry-wide effluent limitations for a category of discharges, a permittee could not be held liable for violating the new regulatory limits unless and until those effluent limitations were “actually made a condition of [its] permit.” 1972 House Report 128.

Section 1342(k) is not directly relevant to the question presented in this case. Section 1342(k) does not speak to what conditions NPDES permits may include. And because petitioner’s current lawsuit is a challenge to the NPDES permit itself, not to any effort to enforce the permit, this case does not present any question concerning the proper way to determine whether a permittee has breached conditions like those at issue here.¹⁰

¹⁰ In any event, petitioner is wrong in asserting (Br. 48) that, once water quality falls below acceptable levels, permittees will necessarily have to cease their operations to avoid contributing to the violation. In *Arkansas*, the Court found “nothing in the Act to support” that understanding. 503 U.S. at 107. The Court treated the issue as one that turned on the content of the applicable state water

Petitioner argues (Br. 46-48) that Section 1342(k) will provide inadequate protection to permittees, and therefore will not fully serve its intended purpose, if NPDES permits may include conditions that do not provide clear notice of what discharges are allowed. But that is simply a close variant of petitioner’s fairness argument discussed above, see pp. 42-46, *supra*, and it lacks merit for the same reasons.

III. PETITIONER HAS ABANDONED ANY ALTERNATIVE RATIONALE FOR CHALLENGING THE PERMIT CONDITIONS THAT ARE AT ISSUE IN THIS COURT

In contending that EPA lacked authority to impose the two permit conditions that are at issue in this Court, petitioner relies solely on the argument addressed above—*i.e.*, that Section 1311(b)(1)(C) does not authorize EPA to impose any limitations other than “effluent limitations.” Petitioner does not articulate, and thus has not preserved, any alternative rationale for challenging the limitations at issue here. See *Ohio v. EPA*, 144 S. Ct. 2040, 2057 (2024) (“declining to consider forfeited arguments”).

A. Petitioner has not preserved any argument that, even if Section 1311(b)(1)(C) authorizes some limitations other than “effluent limitation[s],” the “other limitation[s]” that are permissible under the Act do not include permit conditions like those at issue here, *i.e.*,

quality standards, and the Court rejected an interpretation of those standards that would have compelled a “categorical ban on new discharges” when the quality of a particular waterway falls below acceptable levels. *Id.* at 109. Instead, the Court interpreted the standard in question, which provided that “no degradation of water quality shall be allowed,” *id.* at 95 (brackets and citation omitted), to prohibit only discharges that “effected an ‘actually detectable or measurable’ change in water quality,” *id.* at 111 (citation omitted).

prohibitions on discharges that have specified adverse effects on receiving-water quality. *National Ass'n of Mfrs.*, 583 U.S. at 122; cf. Pet. Br. 31-34 (arguing only that the challenged limitations do not fall within the statutory definition of “effluent limitation”). Such an argument would fail in any event.

In *National Ass'n of Manufacturers*, this Court explained that an “other limitation” within the meaning of various CWA provisions must be “a limitation related to the discharge of pollutants.” 583 U.S. at 122. Prohibitions on discharges that have the effect of impairing receiving-water quality plainly satisfy that requirement. Such prohibitions “restrict the discharge of pollutants,” *id.* at 123, by barring a specified category of discharges. See Pet. App. 432 n.16 (explaining that the challenged limitations serve as “a check on the effect that the discharge has on the quality of the receiving water”); *id.* at 514-515 (explaining that compliance with the challenged limitations “is determined with respect to the discharge’s effect on the receiving water”).

The language of the two limitations at issue here illustrates the point. Each limitation is expressed in terms of what a “[d]ischarge shall not” do. Pet. App. 97; see *id.* at 339 (specifying what a “discharge of pollutants shall” not “create”). To be sure, the challenged limitations do not “restrict[]” the “quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged,” as the statutory definition of “effluent limitation” requires. 33 U.S.C. 1362(11). But that is what makes the challenged limitations “other limitation[s],” which “Section 1311(b)(1)(C) allows the EPA to issue * * * if technology-based effluent limitations cannot ‘meet water quality standards.’” *National Ass'n of Mfrs.*, 583 U.S. at 122-123.

B. Petitioner likewise has not preserved any argument that, even if NPDES permits may sometimes impose limitations other than “effluent limitations,” EPA acted arbitrarily and capriciously in imposing the particular limitations that are at issue here. Petitioner argued below, for example, that “EPA’s action was arbitrary and capricious” because the limitations here were “too imprecise.” Pet. C.A. Br. 36 (quoting *NRDC v. United States EPA*, 808 F.3d 556, 570 (2d Cir. 2015)); see Pet. C.A. Reply Br. 12 (similar). The dissenting judge below accepted that argument, deeming “*this* particular narrative limitation” too “vague,” Pet. App. 67, while reserving judgment on the question whether a similar limitation would be permissible in a Phase I permit, *id.* at 66 n.3.

In its certiorari-stage reply brief, however, petitioner disclaimed any case-specific argument about “whether any permit provision or water quality standard is ‘too vague’ or not ‘specific enough.’” Pet. Cert. Reply Br. 2 (quoting Br. in Opp. 9, 10). Petitioner then pivoted to its categorical argument that permit conditions like the ones at issue here are never permissible because Section 1311(b)(1)(C) authorizes only limitations that fall within the statutory definition of “effluent limitation.” See *id.* at 5 & n.2. Petitioner did not make that definitional argument below. See Pet. App. 431 (noting that petitioner itself had “characterize[d] the contested provision” as an “effluent limitation”); Pet. C.A. Br. 32-47 (making no reference to the statutory definition of “effluent limitation”); Pet. C.A. Reply Br. 4-20 (same). But that definitional argument is the only argument that appears in petitioner’s opening brief and therefore is the only argument for reversal that is before this Court. Because that argument lacks merit, the Court should affirm the judgment below.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 33 U.S.C. 1251(a) and (b) (CWA § 101(a) and (b)) provide:

Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(1a)

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

2. 33 U.S.C. 1311(a) and (b) (CWA § 301(a) and (b)) provide:

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 regula-

tions 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.

3. 33 U.S.C. 1312 (CWA § 302) provides:

Water quality related effluent limitations

(a) Establishment

Whenever, in the judgment of the Administrator or as identified under section 1314(*l*) of this title, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311(b)(2) of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

(b) Modifications of effluent limitations

(1) Notice and hearing

Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall publish such proposed limitation and within 90 days of such publication hold a public hearing.

(2) Permits

(A) No reasonable relationship

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this

section for pollutants other than toxic pollutants if the applicant demonstrates at such hearing that (whether or not technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this chapter) from achieving such limitation.

(B) Reasonable progress

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for toxic pollutants for a single period not to exceed 5 years if the applicant demonstrates to the satisfaction of the Administrator that such modified requirements (i) will represent the maximum degree of control within the economic capability of the owner and operator of the source, and (ii) will result in reasonable further progress beyond the requirements of section 1311(b)(2) of this title toward the requirements of subsection (a) of this section.

(c) Delay in application of other limitations

The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 1311 of this title.

4. 33 U.S.C. 1313(a)-(d) (CWA § 303(a)-(d)) provide:

Water quality standards and implementation plans

(a) Existing water quality standards

(1) In order to carry out the purpose of this chapter, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before October 18, 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after October 18, 1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this chapter unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such stand-

ards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3)(A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, if—

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the pur-

poses of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State.

If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision

(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required

by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such

part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314(a)(2) of

this title as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish, and wildlife.

(4) LIMITATIONS ON REVISION OF CERTAIN EFFLUENT LIMITATIONS.—

(A) STANDARD NOT ATTAINED.—For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) STANDARD ATTAINED.—For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

5. 33 U.S.C. 1318(a) (CWA § 308(a)) provides:

Records and reports; inspections

(a) Maintenance; monitoring equipment; entry; access to information

Whenever required to carry out the objective of this chapter, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this chapter; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 1315, 1321, 1342, 1344 (relating to State permit programs), 1345, and 1364 of this title—

(A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require; and

(B) the Administrator or his authorized representative (including an authorized contractor acting as a representative of the Administrator), upon presentation of his credentials—

(i) shall have a right of entry to, upon, or through any premises in which an effluent source

is located or in which any records required to be maintained under clause (A) of this subsection are located, and

(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause.

6. 33 U.S.C. 1341 (CWA § 401) provides:

Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such

State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection

to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent

limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not vio-

late the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or

other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Monies received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

7. 33 U.S.C. 1342(a)-(c), (k), and (q) (CWA § 402(a)-(c), (k), and (q)) provide:

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.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it

proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to

require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the

State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) LIMITATIONS ON PARTIAL PERMIT PROGRAM RETURNS AND WITHDRAWALS.—A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of—

(A) a State partial permit program approved under subsection (n)(3) only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) only if an entire phased com-

ponent of the permit program being administered by the State at the time is returned or withdrawn.

* * * * *

(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.

* * * * *

(q) Combined sewer overflows

(1) Requirement for permits, orders, and decrees

Each permit, order, or decree issued pursuant to this chapter after December 21, 2000, for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the “CSO control policy”).

(2) Water quality and designated use review guidance

Not later than July 31, 2001, and after providing notice and opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

(3) Report

Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

* * * * *

8. 33 U.S.C. 1362(11), (12), (17), and (19) (CWA § 502(11), (12), (17), and (19)) provide:

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.

* * * * *

(17) The term “schedule of compliance” means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

* * * * *

(19) The term “pollution” means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

* * * * *

9. 33 U.S.C. 1365(a) and (f) (CWA § 505(a) and (f)) provide:

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

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

* * * * *

(f) Effluent standard or limitation

For purposes of this section, the term “effluent standard or limitation under this chapter” means (1) ef-

fective 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.

* * * * *

10. 33 U.S.C. 1367(a) and (d) (CWA § 507(a) and (d)) provide:

Employee protection

(a) Discrimination against persons filing, instituting, or testifying in proceedings under this chapter prohibited

No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

* * * * *

(d) Deliberate violations by employee acting without direction from his employer or his agent

This section shall have no application to any employee who, acting without direction from his employer (or his agent) deliberately violates any prohibition of effluent limitation or other limitation under section 1311 or 1312 of this title, standards of performance under section 1316 of this title, effluent standard, prohibition or pretreatment standard under section 1317 of this title, or any other prohibition or limitation established under this chapter.

* * * * *

11. 33 U.S.C. 1369(b)(1) (CWA § 509(b)(1)) provides:

Administrative procedure and judicial review

(b) Review of Administrator's actions; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating

any individual control strategy under section 1314(l) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

12. 33 U.S.C. 1370 (CWA § 510) provides:

State authority

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with re-

spect to the waters (including boundary waters) of such States.

13. EPA, Combined Sewer Overflow (CSO) Control Policy, 59 Fed. Reg. 18,688 (Apr. 19, 1994), provides in pertinent part:

ENVIRONMENTAL PROTECTION AGENCY

[FRL-4732-7]

Combined Sewer Overflow (CSO) Control Policy

Tuesday, April 19, 1994

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final policy.

SUMMARY: EPA has issued a national policy statement entitled "Combined Sewer Overflow (CSO) Control Policy." This policy establishes a consistent national approach for controlling discharges from CSOs to the Nation's waters through the National Pollutant Discharge Elimination System (NPDES) permit program.

* * * * *

Combined Sewer Overflow (CSO) Control Policy

I. Introduction

A. Purpose and Principles

The main purposes of this Policy are to elaborate on EPA's National Combined Sewer Overflow (CSO) Control Strategy published on September 8, 1989 at 54 FR 37370 (1989 Strategy) and to expedite compliance with the requirements of the Clean Water Act (CWA). While implementation of the 1989 Strategy has resulted in pro-

gress toward controlling CSOs, significant water quality risks remain.

A combined sewer system (CSS) is a wastewater collection system owned by a State or municipality (as defined by section 502(4) of the CWA) which conveys sanitary wastewaters (domestic, commercial and industrial wastewaters) and storm water through a single-pipe system to a Publicly Owned Treatment Works (POTW) Treatment Plant (as defined in 40 CFR 403.3(p)). A CSO is the discharge from a CSS at a point prior to the POTW Treatment Plant. CSOs are point sources subject to NPDES permit requirements including both technology-based and water quality-based requirements of the CWA. CSOs are not subject to secondary treatment requirements applicable to POTWs.

CSOs consist of mixtures of domestic sewage, industrial and commercial wastewaters, and storm water runoff. CSOs often contain high levels of suspended solids, pathogenic microorganisms, toxic pollutants, floatables, nutrients, oxygen-demanding organic compounds, oil and grease, and other pollutants. CSOs can cause exceedances of water quality standards (WQS). Such exceedances may pose risks to human health, threaten aquatic life and its habitat, and impair the use and enjoyment of the Nation's waterways.

This Policy is intended to provide guidance to permittees with CSOs, National Pollutant Discharge Elimination System (NPDES) permitting authorities, State water quality standards authorities and enforcement authorities. The purpose of the Policy is to coordinate the planning, selection, design and implementation of CSO management practices and controls to meet the re-

quirements of the CWA and to involve the public fully during the decision making process.

This Policy reiterates the objectives of the 1989 Strategy:

1. To ensure that if CSOs occur, they are only as a result of wet weather;
2. To bring all wet weather CSO discharge points into compliance with the technology-based and water quality-based requirements of the CWA; and
3. To minimize water quality, aquatic biota, and human health impacts from CSOs.

This CSO Control Policy represents a comprehensive national strategy to ensure that municipalities, permitting authorities, water quality standards authorities and the public engage in a comprehensive and coordinated planning effort to achieve cost-effective CSO controls that ultimately meet appropriate health and environmental objectives and requirements. The Policy recognizes the site-specific nature of CSOs and their impacts and provides the necessary flexibility to tailor controls to local situations. Four key principles of the Policy ensure that CSO controls are cost-effective and meet the objectives of the CWA. The key principles are:

1. Providing clear levels of control that would be presumed to meet appropriate health and environmental objectives;
2. Providing sufficient flexibility to municipalities, especially financially disadvantaged communities, to consider the site-specific nature of CSOs and to determine the most cost-effective means of reducing

pollutants and meeting CWA objectives and requirements;

3. Allowing a phased approach to implementation of CSO controls considering a community's financial capability; and
4. Review and revision, as appropriate, of water quality standards and their implementation procedures when developing CSO control plans to reflect the site-specific wet weather impacts of CSOs.

This Policy is being issued in support of EPA's regulations and policy initiatives. This Policy is Agency guidance only and does not establish or affect legal rights or obligations. It does not establish a binding norm and is not finally determinative of the issues addressed. Agency decisions in any particular case will be made by applying the law and regulations on the basis of specific facts when permits are issued. The Administration has recommended that the 1994 amendments to the CWA endorse this final Policy.

B. Application of Policy

The permitting provisions of this Policy apply to all CSSs that overflow as a result of storm water flow, including snow melt runoff (40 CFR 122.26(b)(13)). Discharges from CSSs during dry weather are prohibited by the CWA. Accordingly, the permitting provisions of this Policy do not apply to CSOs during dry weather. Dry weather flow is the flow in a combined sewer that results from domestic sewage, groundwater infiltration, commercial and industrial wastewaters, and any other non-precipitation related flows (e.g., tidal infiltration). In addition to the permitting provisions, the Enforcement and Compliance section of this Policy describes an

enforcement initiative being developed for overflows that occur during dry weather.

Consistent with the 1989 Strategy, 30 States that submitted CSO permitting strategies have received EPA approval or, in the case of one State, conditional approval of its strategy. States and EPA Regional Offices should review these strategies and negotiate appropriate revisions to them to implement this Policy. Permitting authorities are encouraged to evaluate water pollution control needs on a watershed management basis and coordinate CSO control efforts with other point and nonpoint source control activities.

C. Effect on Current CSO Control Efforts

EPA recognizes that extensive work has been done by many Regions, States, and municipalities to abate CSOs. As such, portions of this Policy may already have been addressed by permittees' previous efforts to control CSOs. Therefore, portions of this Policy may not apply, as determined by the permitting authority on a case-by-case basis, under the following circumstances:

1. Any permittee that, on the date of publication of this final Policy, has completed or substantially completed construction of CSO control facilities that are designed to meet WQS and protect designated uses, and where it has been determined that WQS are being or will be attained, is not covered by the initial planning and construction provisions in this Policy; however, the operational plan and post-construction monitoring provisions continue to apply. If, after monitoring, it is determined that WQS are not being attained, the permittee should be required to submit a revised CSO control plan that, once implemented, will attain WQS.

2. Any permittee that, on the date of publication of this final Policy, has substantially developed or is implementing a CSO control program pursuant to an existing permit or enforcement order, and such program is considered by the NPDES permitting authority to be adequate to meet WQS and protect designated uses and is reasonably equivalent to the treatment objectives of this Policy, should complete those facilities without further planning activities otherwise expected by this Policy. Such programs, however, should be reviewed and modified to be consistent with the sensitive area, financial capability, and post-construction monitoring provisions of this Policy.

3. Any permittee that has previously constructed CSO control facilities in an effort to comply with WQS but has failed to meet such applicable standards or to protect designated uses due to remaining CSOs may receive consideration for such efforts in future permits or enforceable orders for long-term CSO control planning, design and implementation.

In the case of any ongoing or substantially completed CSO control effort, the NPDES permit or other enforceable mechanism, as appropriate, should be revised to include all appropriate permit requirements consistent with Section IV.B. of this Policy.

* * * * *

F. Policy Development

This Policy devotes a separate section to each step involved in developing and implementing CSO controls. This is not to imply that each function occurs separately. Rather, the entire process surrounding CSO controls, community planning, WQS and permit development/re-

vision, enforcement/compliance actions and public participation must be coordinated to control CSOs effectively. Permittees and permitting authorities are encouraged to consider innovative and alternative approaches and technologies that achieve the objectives of this Policy and the CWA.

In developing this Policy, EPA has included information on what responsible parties are expected to accomplish. Subsequent documents will provide additional guidance on how the objectives of this Policy should be met. These documents will provide further guidance on: CSO permit writing, the nine minimum controls, long-term CSO control plans, financial capability, sewer system characterization and receiving water monitoring and modeling, and application of WQS to CSO-impacted waters. For most CSO control efforts however, sufficient detail has been included in this Policy to begin immediate implementation of its provisions.

II. EPA Objectives for Permittees

A. Overview

Permittees with CSSs that have CSOs should immediately undertake a process to accurately characterize their sewer systems, to demonstrate implementation of the nine minimum controls, and to develop a long-term CSO control plan.

* * * * *

C. Long-Term CSO Control Plan

Permittees with CSOs are responsible for developing and implementing long-term CSO control plans that will ultimately result in compliance with the requirements of the CWA. The long-term plans should consider the

site-specific nature of CSOs and evaluate the cost effectiveness of a range of control options/strategies. The development of the long-term CSO control plan and its subsequent implementation should also be coordinated with the NPDES authority and the State authority responsible for reviewing and revising the State's WQS. The selected controls should be designed to allow cost effective expansion or cost effective retrofitting if additional controls are subsequently determined to be necessary to meet WQS, including existing and designated uses.

This policy identifies EPA's major objectives for the long-term CSO control plan. Permittees should develop and submit this long-term CSO control plan as soon as practicable, but generally within two years after the date of the NPDES permit provision, Section 308 information request, or enforcement action requiring the permittee to develop the plan. NPDES authorities may establish a longer timetable for completion of the long-term CSO control plan on a case-by-case basis to account for site-specific factors which may influence the complexity of the planning process. Once agreed upon, these dates should be included in an appropriate enforceable mechanism.

EPA expects each long-term CSO control plan to utilize appropriate information to address the following minimum elements. The Plan should also include both fixed-date project implementation schedules (which may be phased) and a financing plan to design and construct the project as soon as practicable. The minimum elements of the long-term CSO control plan are described below.

1. Characterization, Monitoring, and Modeling of the Combined Sewer System

In order to design a CSO control plan adequate to meet the requirements of the CWA, a permittee should have a thorough understanding of its sewer system, the response of the system to various precipitation events, the characteristics of the overflows, and the water quality impacts that result from CSOs. The permittee should adequately characterize through monitoring, modeling, and other means as appropriate, for a range of storm events, the response of its sewer system to wet weather events including the number, location and frequency of CSOs, volume, concentration and mass of pollutants discharged and the impacts of the CSOs on the receiving waters and their designated uses. The permittee may need to consider information on the contribution and importance of other pollution sources in order to develop a final plan designed to meet water quality standards. The purpose of the system characterization, monitoring and modeling program initially is to assist the permittee in developing appropriate measures to implement the nine minimum controls and, if necessary, to support development of the long-term CSO control plan. The monitoring and modeling data also will be used to evaluate the expected effectiveness of both the nine minimum controls and, if necessary, the long-term CSO controls, to meet WQS.

The major elements of a sewer system characterization are described below.

a. Rainfall Records—The permittee should examine the complete rainfall record for the geographic area of its existing CSS using sound statistical procedures and best available data. The permittee should evaluate

flow variations in the receiving water body to correlate between CSOs and receiving water conditions.

b. Combined Sewer System Characterization—The permittee should evaluate the nature and extent of its sewer system through evaluation of available sewer system records, field inspections and other activities necessary to understand the number, location and frequency of overflows and their location relative to sensitive areas and to pollution sources in the collection system, such as indirect significant industrial users.

c. CSO Monitoring—The permittee should develop a comprehensive, representative monitoring program that measures the frequency, duration, flow rate, volume and pollutant concentration of CSO discharges and assesses the impact of the CSOs on the receiving waters. The monitoring program should include necessary CSO effluent and ambient in-stream monitoring and, where appropriate, other monitoring protocols such as biological assessment, toxicity testing and sediment sampling. Monitoring parameters should include, for example, oxygen demanding pollutants, nutrients, toxic pollutants, sediment contaminants, pathogens, bacteriological indicators (e.g., *Enterococcus*, *E. Coli*), and toxicity. A representative sample of overflow points can be selected that is sufficient to allow characterization of CSO discharges and their water quality impacts and to facilitate evaluation of control plan alternatives.

d. Modeling—Modeling of a sewer system is recognized as a valuable tool for predicting sewer system response to various wet weather events and assessing water quality impacts when evaluating different control strategies and alternatives. EPA supports the proper and effective use of models, where appropriate, in the

evaluation of the nine minimum controls and the development of the long-term CSO control plan. It is also recognized that there are many models which may be used to do this. These models range from simple to complex. Having decided to use a model, the permittee should base its choice of a model on the characteristics of its sewer system, the number and location of overflow points, and the sensitivity of the receiving water body to the CSO discharges. Use of models should include appropriate calibration and verification with field measurements. The sophistication of the model should relate to the complexity of the system to be modeled and to the information needs associated with evaluation of CSO control options and water quality impacts. EPA believes that continuous simulation models, using historical rainfall data, may be the best way to model sewer systems, CSOs, and their impacts. Because of the iterative nature of modeling sewer systems, CSOs, and their impacts, monitoring and modeling efforts are complementary and should be coordinated.

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IV. Expectations for Permitting Authorities

A. Overview

CSOs are point sources subject to NPDES permit requirements including both technology-based and water quality-based requirements of the CWA. CSOs are not subject to secondary treatment regulations applicable to publicly owned treatment works (*Montgomery Environmental Coalition vs. Costle*, 646 F.2d 568 (D.C. Cir. 1980)).

All permits for CSOs should require the nine minimum controls as a minimum best available technology

economically achievable and best conventional technology (BAT/BCT) established on a best professional judgment (BPJ) basis by the permitting authority (40 CFR 125.3). Water quality-based requirements are to be established based on applicable water quality standards.

This policy establishes a uniform, nationally consistent approach to developing and issuing NPDES permits to permittees with CSOs. Permits for CSOs should be developed and issued expeditiously. A single, system-wide permit generally should be issued for all discharges, including CSOs, from a CSS operated by a single authority. When different parts of a single CSS are operated by more than one authority, permits issued to each authority should generally require joint preparation and implementation of the elements of this Policy and should specifically define the responsibilities and duties of each authority. Permittees should be required to coordinate system-wide implementation of the nine minimum controls and the development and implementation of the long-term CSO control plan.

The individual authorities are responsible for their own discharges and should cooperate with the permittee for the POTW receiving the flows from the CSS. When a CSO is permitted separately from the POTW, both permits should be cross-referenced for informational purposes.

EPA Regions and States should review the CSO permitting priorities established in the State CSO Permitting Strategies developed in response to the 1989 Strategy. Regions and States may elect to revise these previous priorities. In setting permitting priorities, Regions and States should not just focus on those permittees that have initiated monitoring programs. When

setting priorities, Regions and States should consider, for example, the known or potential impact of CSOs on sensitive areas, and the extent of upstream industrial user discharges to the CSS.

During the permittee's development of the long-term CSO control plan, the permit writer should promote coordination between the permittee and State WQS authority in connection with possible WQS revisions. Once the permittee has completed development of the long-term CSO control plan and has coordinated with the permitting authority the selection of the controls necessary to meet the requirements of the CWA, the permitting authority should include in an appropriate enforceable mechanism, requirements for implementation of the long-term CSO control plan, including conditions for water quality monitoring and operation and maintenance.

B. NPDES Permit Requirements

Following are the major elements of NPDES permits to implement this Policy and ensure protection of water quality.

1. Phase I Permits—Requirements for Demonstration of Implementation of the Nine Minimum Controls and Development of the Long-Term CSO Control Plan

In the Phase I permit issued/modified to reflect this Policy, the NPDES authority should at least require permittees to:

- a. Immediately implement BAT/BCT, which at a minimum includes the nine minimum controls, as determined on a BPJ basis by the permitting authority;

b. Develop and submit a report documenting the implementation of the nine minimum controls within two years of permit issuance/modification;

c. Comply with applicable WQS, no later than the date allowed under the State's WQS, expressed in the form of a narrative limitation; and

d. develop and submit, consistent with this Policy and based on a schedule in an appropriate enforceable mechanism, a long-term CSO control plan as soon as practicable, but generally within two years after the effective date of the permit issuance/ modification. However, permitting authorities may establish a longer timetable for completion of the long-term CSO control plan on a case-by-case basis to account for site-specific factors that may influence the complexity of the planning process.

The NPDES authority should include compliance dates on the fastest practicable schedule for each of the nine minimum controls in an appropriate enforceable mechanism issued in conjunction with the Phase I permit. The use of enforceable orders is necessary unless Congress amends the CWA. All orders should require compliance with the nine minimum controls no later than January 1, 1997.

2. Phase II Permits—Requirements for Implementation of a Long-Term CSO Control Plan

Once the permittee has completed development of the long-term CSO control plan and the selection of the controls necessary to meet CWA requirements has been coordinated with the permitting and WQS authorities, the permitting authority should include, in an appropriate enforceable mechanism, requirements for imple-

mentation of the long-term CSO control plan as soon as practicable. Where the permittee has selected controls based on the “presumption” approach described in Section II.C.4, the permitting authority must have determined that the presumption that such level of treatment will achieve water quality standards is reasonable in light of the data and analysis conducted under this Policy. The Phase II permit should contain:

a. Requirements to implement the technology-based controls including the nine minimum controls determined on a BPJ basis;

b. Narrative requirements which insure that the selected CSO controls are implemented, operated and maintained as described in the long-term CSO control plan;

c. Water quality-based effluent limits under 40 CFR 122.44(d)(1) and 122.44(k), requiring, at a minimum, compliance with, no later than the date allowed under the State’s WQS, the numeric performance standards for the selected CSO controls, based on average design conditions specifying at least one of the following:

i. A maximum number of overflow events per year for specified design conditions consistent with II.C.4.a.i; or

ii. A minimum percentage capture of combined sewage by volume for treatment under specified design conditions consistent with II.C.4.a.ii; or

iii. A minimum removal of the mass of pollutants discharged for specified design conditions consistent with II.C.4.a.iii; or

iv. performance standards and requirements that are consistent with II.C.4.b. of the Policy.

d. A requirement to implement, with an established schedule, the approved post-construction water quality assessment program including requirements to monitor and collect sufficient information to demonstrate compliance with WQS and protection of designated uses as well as to determine the effectiveness of CSO controls.

e. A requirement to reassess overflows to sensitive areas in those cases where elimination or relocation of the overflows is not physically possible and economically achievable. The reassessment should be based on consideration of new or improved techniques to eliminate or relocate overflows or changed circumstances that influence economic achievability;

f. Conditions establishing requirements for maximizing the treatment of wet weather flows at the POTW treatment plant, as appropriate, consistent with Section II.C.7. of this Policy;

g. A reopener clause authorizing the NPDES authority to reopen and modify the permit upon determination that the CSO controls fail to meet WQS or protect designated uses. Upon such determination, the NPDES authority should promptly notify the permittee and proceed to modify or reissue the permit. The permittee should be required to develop, submit and implement, as soon as practicable, a revised CSO control plan which contains additional controls to meet WQS and designated uses. If the initial CSO control plan was approved under the demonstration provision of Section II.C.4.b., the revised plan, at a minimum, should provide for controls that satisfy one of the criteria in Section

II.C.4.a. unless the permittee demonstrates that the revised plan is clearly adequate to meet WQS at a lower cost and it is shown that the additional controls resulting from the criteria in Section II.C.4.a. will not result in a greater overall improvement in water quality.

Unless the permittee can comply with all of the requirements of the Phase II permit, the NPDES authority should include, in an enforceable mechanism, compliance dates on the fastest practicable schedule for those activities directly related to meeting the requirements of the CWA. For major permittees, the compliance schedule should be placed in a judicial order. Proper compliance with the schedule for implementing the controls recommended in the long-term CSO control plan constitutes compliance with the elements of this Policy concerning planning and implementation of a long term CSO remedy.

3. Phasing Considerations

Implementation of CSO controls may be phased based on the relative importance of and adverse impacts upon WQS and designated uses, as well as the permittee's financial capability and its previous efforts to control CSOs. The NPDES authority should evaluate the proposed implementation schedule and construction phasing discussed in Section II.C.8. of this Policy. The permit should require compliance with the controls proposed in the long-term CSO control plan no later than the applicable deadline(s) under the CWA or State law. If compliance with the Phase II permit is not possible, an enforceable schedule, consistent with the Enforcement and Compliance Section of this Policy, should be issued in conjunction with the Phase II permit which

specifies the schedule and milestones for implementation of the long-term CSO control plan.

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14. EPA, *Combined Sewer Overflows: Guidance for Permit Writers* (Aug. 1995), provides in pertinent part:

3.6.2 Water Quality-Based Requirements

* * * * *

Exhibit 3-8 provides example permit language requiring compliance with narrative WQS. The specific narrative standards a permit writer should include as permit conditions will depend on, and should be consistent with, State WQS. All State WQS have narrative criteria that address aesthetic qualities (e.g., all waters shall be free from discharges that settle to form objectionable deposits). Although State narrative standards can be incorporated into the permit by reference, EPA recommends that the permit writer include the specific narrative language in the permit to ensure that the permittee understands exactly what standards it must meet.

**Exhibit 3-8. Example Permit Language for
Requiring Compliance with
Narrative Water Quality Standards**

I. Effluent Limits

B. Water quality-based requirements for CSOs.

The permittee shall not discharge any pollutant at a level that causes or contributes to an in-stream excursion above numeric or narrative criteria developed and adopted as part of [insert State name] water quality standards.

Site-Specific Language:

- 1. The permittee shall not discharge any floating debris, oil, grease, scum, foam, or other objectionable materials that may result in amounts sufficient to be unsightly or otherwise objectionable or to constitute a nuisance under State law.*
- 2. The permittee shall not discharge settleable solids, sediments, sludge deposits, or suspended particles that may coat or cover submerged surfaces.*
- 3. The permittee shall not discharge any pollutants that may impart undesirable odors, tastes, or colors to the receiving water body or to the aquatic life found therein, may endanger public health, or may result in the dominance of nuisance species.*

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4.6.2.1 Presumption Approach

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Exhibit 4-4. Example Permit Language for Performance Standards for the Presumption Approach

<p>I. Effluent Limits</p> <p>B. Water quality-based requirements for CSOs.</p> <p>The permittee shall not discharge any pollutant at a level that causes or contributes to an in-stream excursion above numeric or narrative criteria adopted as part of [insert State name] water quality standards.</p> <p>The permittee shall comply with the following performance standards. These standards shall apply during [insert average design conditions upon which controls are based].</p> <p>* * * * *</p>

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**APPENDIX A
COMPILATION OF EXAMPLE CSO PERMIT
CONDITIONS**

This appendix is a compilation of all of the example CSO permit conditions contained in the exhibits in Chapters 3 and 4 of this manual. It is intended for reference purposes only, and does not necessarily repre-

sent the Agency's recommendations for CSO permit language in all cases. Permit conditions should be developed based on careful consideration of site-specific factors.

PHASE I PERMIT

* * * * *

B. Water quality-based requirements for CSOs

The permittee shall not discharge any pollutant at a level that causes or contributes to an in-stream excursion above numeric or narrative criteria developed and adopted as part of [insert State name] water quality standards.

* * * * *

PHASE II PERMIT

* * * * *

B. Water quality-based requirements for CSOs

The permittee shall not discharge any pollutant at a level that causes or contributes to an in-stream excursion above numeric or narrative criteria adopted as part of [insert State name] water quality standards.

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