

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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CITY AND COUNTY OF SAN FRANCISCO,)
CALIFORNIA,)
) Petitioner,)
) v.) No. 23-753
ENVIRONMENTAL PROTECTION AGENCY,)
) Respondent.)
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CITY AND COUNTY OF SAN FRANCISCO,)

CALIFORNIA,)

Petitioner,)

v.) No. 23-753

ENVIRONMENTAL PROTECTION AGENCY,)

Respondent.)

- - - - -

Washington, D.C.

Wednesday, October 16, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:20 a.m.

APPEARANCES:

TARA M. STEELEY, Deputy City Attorney, San Francisco, California; on behalf of the Petitioner.

FREDERICK LIU, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:20 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument now in Case 23-753, the City and County of San Francisco versus the Environmental Protection Agency.

Ms. Steeley.

ORAL ARGUMENT OF TARA M. STEELEY

ON BEHALF OF THE PETITIONER

MS. STEELEY: Mr. Chief Justice, and may it please the Court:

Section 301(b)(1)(C) of the Clean Water Act assigns EPA the job of setting the effluent limitations necessary to meet and implement water quality standards. The water quality standards are not the limitations themselves. Instead, they set the goals for the water body. EPA must translate those goals into discharge limitations.

The Generic Prohibitions fail this task. As Judge Collins explained below, the Generic Prohibitions erase the distinction between water quality standards and discharge limitations, making them one and the same.

The Generic Prohibitions revive the

1 very "cause or contribute" standard Congress
2 repealed. And they do not function as discharge
3 limitations. As the Second Circuit recognized,
4 they add nothing that tells a permitholder how
5 to control its discharges.

6 EPA claims it uses the Generic
7 Prohibitions as a backstop, an insurance policy
8 against changing circumstances. But the Clean
9 Water Act already gives EPA all the tools it
10 needs to address uncertainty. EPA can reopen,
11 modify, or terminate a permit when conditions
12 change, and it can exercise its statutory
13 authority to protect public welfare in
14 emergencies. What EPA cannot do is expose
15 permitholders to liability based on receiving
16 water conditions it cannot control.

17 The Generic Prohibitions are also
18 inconsistent with the Act's permit shield. The
19 shield protects permitholders from liability as
20 long as they comply with their permit terms.
21 But, by imposing indeterminate requirements, the
22 Generic Prohibitions prevent permitholders from
23 relying on the shield's protections.

24 San Francisco is therefore exposed to
25 crushing criminal and civil penalties even when

1 it otherwise complies with its 300-page permit.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: In Phase -- in -- in
4 -- in your permit Phase I, doesn't that contain
5 a narrative limitation?

6 MS. STEELEY: So San Francisco's
7 permit is a Phase II permit, so we're not
8 subject to the CSO policy for Phase I.

9 But Phase I describes a narrative
10 condition. The Generic Prohibition -- our --
11 our concern about the Generic Prohibitions is
12 not that they are narrative. It's perfectly
13 fine for EPA to use conditions that are
14 narrative, narrative water quality-based
15 effluent limitations.

16 And that's exactly what the CSO --
17 sorry, the CSO control policy requires. It --
18 in EPA's own guidance, it describes what's
19 required under Phase I, and it describes that as
20 a narrative water quality-based effluent
21 limitation.

22 JUSTICE THOMAS: So what is -- with
23 this permit, what is at bottom the problem?

24 MS. STEELEY: What at bottom is the
25 problem is that permit holders don't know what

1 they need to do to comply. We know how to
2 comply with the 300 pages of our permit, which
3 tells us our discharge limitations that we need
4 to achieve.

5 The problem with the Generic
6 Prohibitions is that they don't tell us what in
7 addition that we need to do. And if I could
8 provide an example of that. One of California's
9 water quality standards is no objectionable
10 algae bloom should form in the water body. San
11 Francisco doesn't know how it must control its
12 discharges to prevent that condition from
13 forming in the water body.

14 And we can't know because whether a
15 condition will form in the water body will
16 necessarily depend on what other permit holders
17 or other non-point sources are adding to the
18 water body and the flow of the water itself.

19 What San Francisco can control is our
20 own discharges. We cannot control the receiving
21 water conditions.

22 JUSTICE JACKSON: Are the water
23 quality standards in state law? I -- I thought
24 that the EPA permits were just incorporating
25 obligations that already existed in state law.

1 Am I wrong about that?

2 MS. STEELEY: I think that's not quite
3 correct, Your Honor. The water quality
4 standards set the goal for the water body, but
5 they aren't self-executing. They have to be put
6 into a permit. And what's -- what 301(b)(1)(C)
7 requires is that EPA meet and implement the
8 water quality standards, which means translating
9 them into a -- a permit limitation --

10 JUSTICE JACKSON: I know, but I --

11 MS. STEELEY: -- that permitholders
12 can follow.

13 JUSTICE JACKSON: -- isn't EPA -- I
14 thought the statute allowed for any more
15 stringent limitation, including those necessary
16 to meet water quality standards, treatment
17 standards, or schedules of compliance
18 established pursuant to any state law.

19 MS. STEELEY: So --

20 JUSTICE JACKSON: So California has
21 established certain water quality standards.
22 Are those independently binding on the cities
23 and municipalities in California?

24 MS. STEELEY: They are not binding.
25 They are only binding as a permit limitation.

1 And that's the problem here, is that we don't --
2 they're only binding --

3 JUSTICE JACKSON: Do they -- do you
4 have to have permits under state law so that
5 they get bound -- you get bound through the
6 state permitting process then?

7 MS. STEELEY: The permit at issue here
8 is issued by --

9 JUSTICE JACKSON: No, I understand.
10 But I'm just --

11 MS. STEELEY: Yeah.

12 JUSTICE JACKSON: -- I guess my -- my
13 big problem is that I'm trying to understand why
14 you find these permit provisions so onerous or
15 problematic when they seem to just incorporate
16 standards that already exist under state law
17 that you would have to follow anyway.

18 MS. STEELEY: The standards are not
19 self-executing, so we don't have to follow them
20 anyway. They set the goals for the water body,
21 but they're not limitations on us themselves.

22 JUSTICE KAGAN: So --

23 MS. STEELEY: So they aren't -- they
24 are not binding on us.

25 JUSTICE KAGAN: -- Ms. -- Ms. Steeley,

1 I mean, there are lots of different kinds of
2 regulations in the world. Some people like some
3 kinds; some people like other kinds. Some
4 regulations are really prescriptive, do this,
5 this, this, and this. And then, you know, some
6 people hate those kinds of regulations. They'd
7 rather have regulations that are less
8 prescriptive, that say here's the goal, you
9 decide how to meet it. That gives a party more
10 flexibility and so forth.

11 So, you know, some people, you know,
12 it's -- there's got to be something in this
13 statute that tells you that the agency can't
14 decide to go the less prescriptive, more
15 flexible "you decide how to meet it; this is the
16 goal" route, and I don't see anything in this
17 statute that does that.

18 MS. STEELEY: So I disagree, Your
19 Honor, that this provides a flexible standard.
20 What --

21 JUSTICE KAGAN: Let's talk about the
22 statute. Like, what in the statute prevents the
23 agency from saying, in addition to or instead of
24 the highly prescriptive, you know, you can only
25 discharge X amount, we want to set a goal, and

1 we want to tell you that you're obligated to not
2 contribute to violating that goal?

3 MS. STEELEY: So what the statute
4 provides is that EPA must meet and implement the
5 water quality standards. And those are
6 transitive verbs. They necessarily, in our
7 view, require taking concrete steps to meet --
8 to achieve the goal, right?

9 JUSTICE KAGAN: See, to me, this
10 regulation -- what does this regulation do? It
11 says go meet and implement the water quality
12 standards, because you were exactly right in
13 what you said to Justice Jackson, as without
14 this regulation, or not this regulation but this
15 condition in the permit, you're not
16 independently obligated to -- they're not
17 enforced -- those standards are not enforceable
18 against you.

19 It's the permit condition that makes
20 those standards enforceable against you by the
21 EPA. So that's what this condition does. It --
22 it -- it -- it's -- it's prescribing that you
23 have to meet water quality standards. Like, how
24 more clearly could you meet this statutory
25 language than that?

1 MS. STEELEY: So the problem is, is
2 that it -- it can be used as grounds for
3 enforcement afterwards, but it doesn't tell
4 permit holders in advance what we must do to
5 control our discharges. So, in that sense --

6 JUSTICE SOTOMAYOR: The problem is
7 that there are discharges -- and we get a huge
8 amount of them in the amici briefs -- of
9 discharges that weren't anticipated. You were
10 fine at the time of the permit, and then, all of
11 a sudden, you've got chlorinated or potable
12 water into the waters.

13 So, if the water standards are not
14 self-executing, which you admit, if they're not
15 in the permit because they haven't been put into
16 the permit, then what you're saying is: Well,
17 you can't do anything immediately, EPA. You
18 have to start a review process that takes months
19 and sometimes years to amend the permit and do
20 something about it.

21 This, instead, says to San Francisco:
22 You should be monitoring the water. Don't let
23 it exceed the water quality standards that we
24 met and set together. Now you implement the
25 changes that you think are appropriate to stop

1 this unexpected discharge.

2 MS. STEELEY: So I'm not --

3 JUSTICE SOTOMAYOR: I don't know why
4 that's the wrong way to look at this.

5 MS. STEELEY: I think it's the wrong
6 way to look at it, Your Honor, because, first of
7 all, we are not saying EPA cannot take immediate
8 action. The statutory scheme already provides
9 EPA with emergency powers. They can act
10 immediately to protect public welfare under
11 Section -- sorry -- 1364.

12 JUSTICE SOTOMAYOR: How can they do
13 that? They can't go to court unless there's a
14 permit violation.

15 MS. STEELEY: They can go into court
16 under their emergency powers.

17 JUSTICE SOTOMAYOR: Under their
18 emergency.

19 MS. STEELEY: They can go into
20 court --

21 JUSTICE SOTOMAYOR: But we have to go
22 to that extreme. So how do we get San Francisco
23 to do something about its implementing -- its
24 monitoring obligations? It's supposed to
25 monitor and look at things and, if things are

1 getting out of control, figure out how to put
2 them back into control.

3 MS. STEELEY: So San Francisco's
4 permit requires monitoring of receiving water
5 conditions, as you've noted. You'll see that in
6 the Petition Appendix starting at page --

7 JUSTICE SOTOMAYOR: So --

8 MS. STEELEY: -- 226.

9 JUSTICE SOTOMAYOR: -- in this permit,
10 this is not a permit involving entities --
11 multiple entities that are discharging into most
12 of these waters. So most of these water, it's
13 one permitholder, the City of San Francisco.
14 It's combining sewage and rainwater runoff,
15 correct, so it knows all of the point sources
16 that contribute to that water quality have
17 effluent limitations because you can test those
18 and see whether they're meeting standards.

19 So, if something unexpected happens,
20 it's because one of those water sources has gone
21 awry, correct?

22 MS. STEELEY: That is not correct,
23 Your Honor, and I have two responses to that.

24 First of all, San Francisco is not the
25 only discharger or contributor to the water

1 body. There are eight discharge points at issue
2 in this permit.

3 JUSTICE SOTOMAYOR: Those are the
4 point sources that it's supposed to be --

5 MS. STEELEY: Sorry, no. So
6 San Francisco has its own discharge points, and
7 there are eight of them. One of them is -- I
8 will concede is fairly far out into the ocean.
9 We are the only source for that one. But the
10 other seven have many other contributors to the
11 water body very close nearby.

12 And if I can give you an example.
13 Just a couple weeks ago, there was a bacteria
14 spike near one of those discharge points. It's
15 a point that we are not currently using, so we
16 know we did not cause that spike, but someone
17 else did.

18 Had we been contributing to the water,
19 had we been discharging at the time, we would
20 necessarily have been contributing to that
21 condition and we would be subject to liability.

22 JUSTICE SOTOMAYOR: But how about --
23 but my -- that's my point, which is it -- you
24 can't get past the obligation to meet the water
25 standards unless you put them into the permit.

1 MS. STEELEY: So the way that EPA can
2 achieve its goals here is to set a discharge
3 limitation in the permit. And if I can perhaps
4 just under --

5 JUSTICE SOTOMAYOR: Oh, so they should
6 take each -- I see in the water standards
7 they're very detailed on any number of -- of
8 discharges. You can only have X amount of feces
9 in the water, X amount -- or Y amount of
10 bacteria. Pages and pages of measurements.

11 You want them to write all of those --
12 take the water standards, and instead of
13 cross-referencing them and telling you to meet
14 those standards, you want them to write each
15 amount?

16 MS. STEELEY: So, Your Honor, EPA's
17 own regulations require it to set an effluent
18 limitation whenever there is a reasonable
19 potential that a discharge will cause or
20 contribute to a water -- water body --

21 JUSTICE SOTOMAYOR: Well, that --
22 that's the point I'm making. It does that.
23 Where there's -- where they're exceeding the
24 limitation, it tells it what technology to put
25 into place to reduce it.

1 But, if they're not exceeding it right
2 now, how do they take care of the -- the
3 unexpected situations?

4 MS. STEELEY: The permit limitations
5 are set in advance, so they're anticipating what
6 the discharge will do to the water body.

7 But, if I can correct, I think, what
8 maybe -- what maybe is a misunderstanding. We
9 don't have real-time monitoring of receiving
10 water conditions. Under our permit, we monitor
11 bacteria on a once-a-week basis. And other
12 things, including effects on animals, sediment,
13 we monitor on a yearly basis, and it takes about
14 nine months for the results to come back.

15 So San Francisco cannot shift on a
16 dime. We don't have the information necessary
17 to know --

18 JUSTICE SOTOMAYOR: I'm sorry, no
19 one's asking you to shift on a dime. What
20 they're asking you to do is to become
21 responsible for doing what's necessary, not on a
22 dime, but -- nothing in the EPA works on a dime
23 -- but to take the steps necessary to control
24 situations that develop.

25 MS. STEELEY: So if I can provide

1 another example of how this runs amuck, the --

2 JUSTICE SOTOMAYOR: By the way, I do
3 accept that there are some provisions of the
4 water standards that are, charitably, a little
5 amorphous. You know, control for the color of
6 the water. But I think that's an as-applied
7 challenge.

8 JUSTICE KAGAN: Yeah, could I just
9 piggyback on that if you'll -- if you'll let me,
10 Justice Sotomayor?

11 JUSTICE SOTOMAYOR: Yeah, sure.

12 JUSTICE KAGAN: Is -- is, when I hear
13 you speaking, I hear one of two things.

14 One is that to the extent that you
15 have objections to particular ones of these
16 water quality standards -- they're too
17 confusing, they're too vague, we can't figure it
18 out, how can you tell between us and other
19 dischargers -- I mean, that does seem like a
20 classic arbitrary and capricious question. So
21 you would go and make an arbitrary and
22 capricious standard as to those particular
23 standards that are in the permit.

24 I mean, the second way I hear you,
25 honestly, is -- is you're making a policy

1 argument to either the agency or to Congress.
2 You're making a policy argument to the agency,
3 essentially: Don't take advantage of your
4 statutory authority in this way because it's
5 very confusing to us, the regulated party. Or
6 you're making a policy argument to Congress: Go
7 fix this statute so that the EPA can't do this.

8 But what I don't hear you telling me
9 is, like, what in the statute prevents the EPA
10 from doing this. And, you know, as I said in
11 the -- in my -- in my first intervention here,
12 the policy arguments, they cut both ways. Some
13 people like these kinds of standards. These
14 kinds of standards -- if the EPA couldn't do
15 these standards, presumably, they would do
16 something else, which might be more
17 prescriptive, which some parties might really
18 hate.

19 So -- so that's such a policy argument
20 that we can't figure out what in the statute
21 prevents the EPA from doing this.

22 MS. STEELEY: So, again, I would
23 point -- I would point you to the requirement to
24 meet and implement the water quality standards.

25 As you noted, Justice Sotomayor, some

1 of the standards are not -- they don't translate
2 easily into a discharge limitation for
3 San Francisco.

4 And I don't agree that it's a policy
5 argument. We simply want to know what we have
6 to do --

7 CHIEF JUSTICE ROBERTS: I --

8 JUSTICE KAGAN: I feel as though
9 it's -- when you say "meet and implement," I
10 feel that those statutory words, they're
11 practically a description of these permit
12 conditions.

13 You know, they -- they basically say:
14 If -- if -- you -- you don't have to do the --
15 just the standard effluent limitations if you
16 think that a regulation is -- you know, further
17 conditions are necessary to achieve the water
18 quality standards.

19 And the EPA is saying at the very
20 least this: We have to obligate you and other
21 entities with permits to comply with those water
22 quality standards. And that's -- that's
23 actually exactly what this statute allows the
24 EPA to do.

25 MS. STEELEY: So I don't agree that

1 you can meet and implement the water quality
2 standards by simply sticking a term in the
3 permit that says: Do not cause or contribute to
4 the violation of water quality standards.

5 They might as well have said: Do not
6 violate the Clean Water Act. It doesn't tell us
7 anything --

8 JUSTICE KAVANAUGH: I thought -- I
9 thought --

10 MS. STEELEY: -- about how to
11 control --

12 CHIEF JUSTICE ROBERTS: I thought
13 the -- I thought the whole reason we have the
14 water permit system is because the water quality
15 system was a failure?

16 MS. STEELEY: That's exactly --

17 CHIEF JUSTICE ROBERTS: Because it
18 didn't tell people in any predictable way what
19 they can and cannot do.

20 MS. STEELEY: That's exactly right.
21 And Congress repealed that system. It replaced
22 that system.

23 JUSTICE KAVANAUGH: And -- and the --
24 and -- I'm sorry, keep going.

25 MS. STEELEY: Oh, no. It replaced

1 that with a system where EPA is supposed to tell
2 us our discharge obligations in advance. That
3 was the entire basis for the Clean Water Act.

4 JUSTICE KAVANAUGH: And I thought the
5 statutory hook that you were relying on in
6 (b)(1)(C), 301(b)(1)(C), was the phrase "any
7 more stringent limitation necessary to meet
8 water quality standards." And you read "any
9 more stringent limitation" to refer back and
10 mean effluent limitation.

11 Is that your statutory hook?

12 MS. STEELEY: That's true, Your Honor.
13 I would also point you to -- Section 301(a) sets
14 the table for what the rest of Section 301(b) is
15 going to accomplish.

16 JUSTICE KAVANAUGH: Absolutely.
17 301(a) sets effluent limitations, and then, when
18 it says "any more stringent limitation," you say
19 the fact that the word "effluent" is not there
20 is -- in context, it's obviously referring to
21 "effluent limitations" and then "meet water
22 quality standards," right?

23 MS. STEELEY: That's correct, Your
24 Honor. What --

25 JUSTICE SOTOMAYOR: I'm sorry. But

1 you -- you say narrative is okay. And that's
2 not an effluent limitation. We also have our
3 own case that says it doesn't have to be an
4 effluent limitation. And I still don't
5 understand how you didn't forfeit this argument.

6 MS. STEELEY: So --

7 JUSTICE SOTOMAYOR: First of all, it
8 wasn't raised before the Ninth Circuit. It was
9 mentioned in the dissent, but, when you filed
10 for certiorari, you didn't make this argument.

11 And you now raise it -- I was quite
12 surprised when I read the question presented and
13 started your brief and thought to myself this is
14 a new theory.

15 How is that argument not forfeited?

16 MS. STEELEY: So, Your Honor, we do
17 not object to narrative water quality-based
18 effluent limitations, and an effluent limitation
19 can be narrative. What an effluent limitation
20 is is a --

21 JUSTICE SOTOMAYOR: Just answer my
22 question. Why didn't you forfeit this argument?

23 MS. STEELEY: Okay. We did not
24 forfeit this argument because we've argued
25 throughout this case, including, you'll see, at

1 pages 24 to 34 of our opening brief, that our
2 theory --

3 JUSTICE SOTOMAYOR: I'm asking about
4 how you didn't forfeit it in your cert petition.

5 MS. STEELEY: So what we are
6 challenging here is the Generic Prohibitions.

7 JUSTICE SOTOMAYOR: And how did you
8 not forfeit it in the court below by not raising
9 it?

10 MS. STEELEY: We did raise --

11 JUSTICE SOTOMAYOR: We're not a court
12 of first impression.

13 MS. STEELEY: We did raise it in the
14 court below, Your Honor. You'll see that at
15 pages --

16 JUSTICE SOTOMAYOR: The Ninth Circuit
17 didn't -- didn't think so. I looked at your
18 briefs from there. I don't think so either.

19 MS. STEELEY: The Ninth Circuit held
20 that 301(b)(1)(C) is not limited to effluent
21 limitations, which are restrictions on
22 discharges. It did reach that holding. You'll
23 see that at pages 32 to 33 of the Ninth
24 Circuit's decision. And we argued this to the
25 Ninth Circuit.

1 JUSTICE SOTOMAYOR: All right.

2 MS. STEELEY: So I -- I don't --

3 JUSTICE SOTOMAYOR: On the "more
4 stringent" area -- question, if it's a different
5 limitation, it's more stringent, isn't it?
6 Meaning you're defining "more stringent" as
7 being more hardship on me than the effluent
8 limitation. But doesn't that answer Justice
9 Kagan's point, which is anytime you have another
10 obligation, it's more stringent?

11 MS. STEELEY: We don't agree that
12 "more stringent" just means additional. I
13 think, if Congress had meant that, it would have
14 said so. And I think that's actually an
15 important part of the statutory --

16 JUSTICE KAGAN: I'm not sure I
17 understand that. I mean, these do impose
18 obligations on you above and beyond what the
19 technology-based limits do, isn't that right?
20 You have to do more?

21 MS. STEELEY: I don't agree, Your
22 Honor, and that's because we cannot tell. It
23 does not tell us in advance how to control our
24 discharges. But --

25 JUSTICE KAGAN: Well, either you have

1 to do only what the technology-based limits tell
2 you to do or you have to do more.

3 MS. STEELEY: But this does not tell
4 us what more we would have to do.

5 JUSTICE KAGAN: Well, for example,
6 suppose a technology-based condition says, you
7 know, don't discharge more than 75 gallons of
8 sewage. And now, in addition to that, a water
9 quality-based condition says don't cause or
10 contribute to meaningful discoloration.

11 Isn't it more stringent than the first
12 condition standing alone because, on a
13 particular day, you might have to cut your
14 discharges more to 60 gallons of -- per day?

15 MS. STEELEY: So we --

16 JUSTICE KAGAN: That is more
17 stringent. Now it's 60 gallons per day because
18 that's what's necessary to prevent
19 discoloration.

20 MS. STEELEY: So I have two arguments
21 to that, Your Honor.

22 One is this doesn't tell us how to
23 control our discharges, so, in our view, it's
24 not more stringent.

25 And the second is, is that we judge

1 permit terms at the time that they are set.
2 When they are set, we cannot tell if it's a more
3 stringent requirement or not because, depending
4 on conditions in the water body, it can be
5 either more or less stringent at that moment in
6 time, and so, therefore, it's not a more
7 stringent restriction.

8 JUSTICE JACKSON: But isn't that the
9 point? I mean, do -- do you dispute that
10 Congress was attempting to have a backstop with
11 respect to requiring or allowing for any more
12 stringent limitation?

13 I mean, the word "any" in here also,
14 it seems to me, does work to suggest that we
15 don't have to stay within the world of effluent
16 limitations. So how do you account for that?
17 And isn't the point of having this that Congress
18 understood that the (1)(A) effluent limitations
19 might not be sufficient, so the authority was
20 given to prescribe any more stringent
21 limitation?

22 MS. STEELEY: So I think you have to
23 read "any" in context. I think my friends on
24 the other side read 301(b)(1)(C) as meaning any
25 limitation. That cannot be right. They've rest

1 out -- they've read out the rest of the words of
2 that section. But I think I -- I want to -- I
3 don't believe that 301(b)(1)(C) is meant to be,
4 you know, an all-encompassing backstop. I don't
5 agree with that. In fact --

6 JUSTICE JACKSON: Well, what is it
7 doing? I mean, we already have a provision that
8 allows for or authorizes effluent limitations.
9 And then we get to this one that says you can
10 put in a permit any more stringent limitation.
11 And -- and speaking of reading out the words, it
12 says "including those necessary."

13 So it's not even clear that "those
14 necessary" is the sum total of the limitations.
15 It says "any more stringent limitations." So
16 isn't -- doesn't that just on its textual
17 reading suggest we're beyond the effluent
18 limitations that were previously authorized?

19 MS. STEELEY: So a couple responses
20 that I'd like to give you if I may.

21 JUSTICE JACKSON: Yes, please.

22 MS. STEELEY: The first is that what
23 an effluent limitation is, is a restriction on
24 discharges of pollutants. We know from Section
25 301 that the entire section is about a

1 restriction on the discharges of pollutants. So
2 we believe 301(b)(1)(C) is also about an
3 effluent limitation, but it's necessarily narrow
4 in scope, and if I can explain why.

5 So technology-based effluent
6 limitations, which are set under Section
7 301(b)(1)(A) and (B), are effluent limitations
8 that require controls using the best practicable
9 technology that's economically feasible.

10 What Section 301(b)(1)(C) -- sorry --
11 Section 301(b)(1)(C) allows is additional
12 controls regardless of their economic
13 feasibility, regardless of cost. So those are
14 necessarily a limited thing. They are used only
15 when more stringent, only when necessary to meet
16 and implement. They're not a catch-all.

17 JUSTICE JACKSON: Right. I understand
18 that point.

19 MS. STEELEY: They're not used all the
20 time.

21 JUSTICE JACKSON: I understand that
22 point, but what -- what do we do with the fact
23 that Congress chose, I think, to codify the
24 EPA's interpretation of this -- of this -- the
25 CSO control policy, and that policy, it's my

1 understanding, explicitly endorsed the kind of
2 permit provisions at issue here, those that
3 regulate sewage treatment that incorporate water
4 quality standards beyond effluent limitations?

5 Is -- do you -- do you dispute that
6 Congress endorsed the kinds of permit provisions
7 that exist here?

8 MS. STEELEY: Absolutely. We
9 absolutely --

10 JUSTICE JACKSON: Okay.

11 MS. STEELEY: -- dispute that. So my
12 friends on the other side are not relying on the
13 CSO policy as their source of authority and
14 wisely so because the CSO policy does not give
15 them the permission to put in conditions like
16 the Generic Prohibitions.

17 We are a Phase II permit, which
18 expressly requires water quality-based effluent
19 limitations. Even under Phase I, Phase I allows
20 narrative water quality-based effluent
21 limitations. There's nothing in the CSO policy
22 that suggests that Congress -- that EPA could
23 simply impose something like the Generic
24 Prohibitions, leave San Francisco to figure out
25 its discharge obligations on its own.

1 Congress -- there's nothing suggesting
2 that Congress had that in mind or blessed that
3 system. In fact, when Congress was asked, you
4 know, do we want to leave permitholders to
5 figure it out for themselves or assign EPA as
6 the agency to set limitations, it chose the
7 latter approach.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas, anything further?

11 JUSTICE THOMAS: Are there -- not in
12 your case, but are there any provisions -- is
13 there any prohibition in 1311 against E -- EPA
14 having the generic limitations in a -- in a plan
15 for someone else? Just generically, not you.

16 MS. STEELEY: Is there a prohibition?

17 JUSTICE THOMAS: Yeah. Are they
18 precluded from having generic limitations?

19 MS. STEELEY: I don't think there's
20 anything expressly precluding them, but --
21 except that they are not authorized to do so,
22 right? EPA only has authority when authorized.
23 And so I think Section 301 is silent about
24 Generic Prohibitions. It doesn't authorize
25 them.

1 JUSTICE THOMAS: Well, let me ask it
2 differently. Can EPA impose generic limitations
3 on anyone?

4 MS. STEELEY: No.

5 JUSTICE THOMAS: Why?

6 MS. STEELEY: Because they point to
7 Section 301(b)(1)(C) as their only source of
8 authority to impose Generic Prohibitions.

9 JUSTICE THOMAS: Yeah.

10 MS. STEELEY: And that provision does
11 not allow it.

12 JUSTICE THOMAS: And why is that?

13 MS. STEELEY: Because what can be
14 imposed under Section 301(b)(1)(C) is
15 limitations on discharges. Those are effluent
16 limitations. They need to tell permitholders
17 their obligations. That's the entire point of
18 that section and its requirements.

19 So, by imposing a Generic Prohibition,
20 they're simply telling us to figure it out for
21 ourselves, which we think is contrary to the
22 statutory scheme.

23 JUSTICE THOMAS: So would you have a
24 -- an arbitrary and capricious claim if you did
25 not bring this as a statutory claim?

1 MS. STEELEY: Yes.

2 CHIEF JUSTICE ROBERTS: Justice Alito?

3 JUSTICE ALITO: The government says
4 that there are no other significant point or
5 non-point sources of pollution around the
6 Southwest Ocean Outfall.

7 Assuming for the sake of argument that
8 that is true -- I heard you to dispute it
9 earlier in your argument, but assuming for the
10 sake of argument that it is true, why couldn't
11 you then figure out what is necessary for you to
12 do to comply with the water quality standards?

13 MS. STEELEY: So, if I can just
14 clarify first, there are eight outfalls at
15 issue. So they're saying at one of them that is
16 true. They don't contest that the other seven,
17 that is not true.

18 But the reason is, first of all,
19 Congress assigned EPA this task, not us. But
20 the practical answer is, is that we can't know
21 what we can discharge without knowing in real
22 time, minute by minute, what the conditions are
23 in the receiving waters. That will include the
24 water flow, its currents, and also what others
25 have added to the water body.

1 For instance, if we're trying to meet
2 a --

3 JUSTICE ALITO: Well, it sounds like
4 what you're saying there is not that you object
5 to the fact that EPA hasn't told you what you
6 need to do but that there is really no
7 practicable way of specifying in advance what
8 you are required to do, and, therefore, you can
9 continue to have these combined sewer overflow
10 events where you're discharging raw sewage into
11 the Pacific Ocean.

12 MS. STEELEY: There is a way to tell
13 us in advance. And EPA has done so. It has set
14 effluent limitations in our permit.

15 What EPA hasn't told us is what
16 additional we need to do under the Generic
17 Prohibitions.

18 JUSTICE ALITO: All right. Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor?

21 JUSTICE SOTOMAYOR: And you haven't
22 told me what you do with unanticipated
23 discharges. You ignore them until the permit is
24 amended? Is that your answer?

25 MS. STEELEY: So, if a discharge is

1 not anticipated, if it wasn't disclosed to the
2 agency, then it's an unauthorized discharge.

3 It's simply prohibited under Section 301 --

4 JUSTICE SOTOMAYOR: No, it's not,
5 because the permit tells you what you can or
6 cannot discharge. That's based on what -- and
7 how much. And that's based on what we know
8 you're doing.

9 If you're okay on day one in
10 discharges, we're not going to tell you not to
11 do more. We're giving you permission --

12 MS. STEELEY: So what I'm --

13 JUSTICE SOTOMAYOR: -- to discharge.

14 MS. STEELEY: Right. So, if -- if --
15 if something is not grant -- if you have not
16 been given the authority to discharge a certain,
17 you know, something --

18 JUSTICE SOTOMAYOR: The way the permit
19 --

20 MS. STEELEY: -- a certain
21 constituent --

22 JUSTICE SOTOMAYOR: -- the permit --
23 the way the permit operates is, with the permit,
24 you can discharge anything that the permit tells
25 you you can't. It works in reverse. It tells

1 you, you can't do this thing more than that
2 amount. If it doesn't tell you you can't do
3 this thing, you can continue doing this thing
4 until the permit tells you you can't.

5 MS. STEELEY: So the -- the way it
6 works is that the permitholder goes to EPA and
7 says: This is what we plan to discharge. And
8 then, if you have disclosed that to EPA, then
9 they set the limitations, and that's the scope
10 of your ability. That doesn't allow you to then
11 --

12 JUSTICE SOTOMAYOR: So what they
13 should do is what you told me earlier not to do:
14 Come in and tell you, using the technology
15 you're using now, ensure yourself that you're
16 not doing more than X amount of feces in the
17 water? Would that be an okay limitation?

18 MS. STEELEY: Certainly. EPA can say
19 this is the limit that you can discharge.

20 JUSTICE SOTOMAYOR: So rewrite the
21 water quality standards. Just bring them all
22 into the permit instead of cross-referencing
23 them and say: You can't have at this point
24 source more than X amount of feces discharge.

25 I suspect that Justice Kagan is right

1 that if they start doing something -- because
2 computers now can make that a very easy task --
3 then you'll come in and say the permit is not
4 comprehensible because it's so long and
5 convoluted.

6 MS. STEELEY: So our -- our permit is
7 already quite extensive, and I -- I don't --

8 JUSTICE SOTOMAYOR: Well -- well,
9 you're just ask -- asking to add more.

10 MS. STEELEY: I'm not asking -- I'm --
11 I'm not asking for EPA to add more. What I'm
12 asking is for clear guidance to permit holders
13 about what we have to do to comply with our
14 permit.

15 And I will say that I'm not sure that
16 it is true that others like this. The
17 regulatory community has lined up in the amicus
18 supporting San Francisco.

19 But, in terms of what EPA can do, EPA
20 can reopen the permit. It can modify a permit.
21 But --

22 JUSTICE SOTOMAYOR: Months and years.

23 MS. STEELEY: If it -- if it has -- if
24 it has any reasonable basis for concern, even
25 anticipatory, right, if it anticipates that

1 there may be a problem causing or contributing

2 --

3 JUSTICE SOTOMAYOR: Months and years.

4 MS. STEELEY: I'm sorry?

5 JUSTICE SOTOMAYOR: Months and years.

6 MS. STEELEY: I mean, it can take as

7 little as six weeks to three months --

8 JUSTICE SOTOMAYOR: Only if you're

9 cooperating. All right.

10 MS. STEELEY: I'm not sure --

11 JUSTICE SOTOMAYOR: Thank you. That's

12 fine, counsel.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?

14 JUSTICE KAGAN: If I understood your
15 response to Justice Thomas, Justice Thomas said:

16 What prevents the EPA from doing this? You

17 said: 1311(b)(1)(C) doesn't authorize it

18 because this is not an effluent limitation.

19 But, of course, (1)(C) does not talk

20 about effluent limitations. (1)(C) just talks

21 about limitations. (1)(A) talks about effluent

22 limitations. (1)(B) talks about effluent

23 limitations. You were adding a word to (1)(C)

24 to get effluent limitations there, weren't you?

25 MS. STEELEY: No. I disagree that

1 we're adding a word. So Section --

2 JUSTICE KAGAN: Well, you're
3 definitely adding a word because there's only
4 "limitation" there.

5 MS. STEELEY: So Congress used
6 "limitation" as a shorthand for effluent
7 limitations throughout this section.

8 And if I can explain. So Section
9 301(a), not 301(b)(1)(A) but 301(a), tells us
10 that the universe of Section 301 is about
11 restrictions on discharge of a pollutant.

12 That's the very definition of an
13 effluent limitation. So we believe that the
14 limitations throughout -- and the title also
15 suggests that the limitations throughout Section
16 301 are limitations on discharge.

17 JUSTICE KAGAN: And throughout the
18 statute, it says effluent and other limitations.
19 And then, in this particular section, it says
20 effluent limitations, effluent limitations. And
21 then, when it gets to this kind of backstop
22 provision of something else is necessary, it
23 just says limitations.

24 Okay. I have another question for
25 you, which is, you know, you spend a lot of your

1 brief talking about this legislative history of
2 the statute and suggesting that what the statute
3 was designed to do was to go from a
4 water-quality-based system to an effluent -- to
5 a technology-based effluent limitation system.

6 And that's -- you know, I suppose, if
7 you really wanted to write the picture broadly,
8 you might say that. But there are plenty of
9 places in this statute where water quality makes
10 an appearance.

11 And, indeed, it makes an appearance in
12 this very provision, which is the source of
13 authority for what the EPA did here. You know,
14 it says, well, if the effluent limitations
15 aren't doing enough, EPA can do other
16 limitations that are necessary to meet water
17 quality standards.

18 That's what the text says. We usually
19 don't look at, like, the broadest possible
20 reading of legislative history to do something
21 that's exactly counter to what the relevant
22 textual provision says.

23 MS. STEELEY: It's absolutely true
24 that Congress preserved water quality standards,
25 but they preserved them as a basis for setting

1 discharge limitations.

2 So it's -- it's -- there's no conflict
3 between preserving water quality standards and
4 setting discharge limitations. In fact, that's
5 the way that you preserve the environment.
6 That's the way you protect water quality
7 standards, is you tell permitholders in advance
8 what we must do to control our discharges.

9 But the question presented here is
10 about the --

11 JUSTICE KAGAN: Thank you,
12 Ms. Steeley.

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch?

15 JUSTICE GORSUCH: Ms. Steeley, as I
16 understand your argument -- I just want to make
17 sure I understand it -- there are -- there are
18 two arguments. One is that (b)(1)(C) should be
19 read to regard effluent limitations. That's
20 your primary argument.

21 I had thought in the briefs that there
22 was a backup argument that, nonetheless,
23 whatever it has to be, it has to be a limitation
24 on your discharges given that that's what
25 1311(a) is all about, the discharge of any

1 pollutant by a person, except -- except as
2 specified here, is unlawful and that whatever
3 limitation is, it can't be the applicable water
4 quality standard itself because that -- that is
5 used in contradistinction with limitations
6 throughout this statute.

7 Is that -- is that correct?

8 MS. STEELEY: That is correct. I
9 would only quibble with the idea that if there's
10 a primary and secondary argument, what a
11 restrictional discharges are is an effluent
12 limitation. So I think those arguments are one
13 and the same.

14 JUSTICE GORSUCH: But --

15 MS. STEELEY: But yes --

16 JUSTICE GORSUCH: -- but if we -- if
17 we disagree on that or at least don't want to
18 reach it --

19 MS. STEELEY: Mm-hmm.

20 JUSTICE GORSUCH: -- the point, the
21 secondary point remains.

22 MS. STEELEY: Absolutely.

23 JUSTICE GORSUCH: That we have to deal
24 with.

25 MS. STEELEY: Absolutely, that's

1 correct. I mean, the question presented here is
2 about the -- is the -- whether the Generic
3 Prohibitions are authorized by law. And those
4 Generic Prohibitions re-create the test -- the
5 statutory scheme Congress rejected, so we think
6 they are not.

7 JUSTICE GORSUCH: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh?

10 JUSTICE KAVANAUGH: A few questions.
11 Just to pick up on Justice Thomas's question
12 when he asked if anything prohibits, your
13 response, and I just want to make sure I have
14 this clear, was nothing in the statute
15 authorizes something like the generic
16 limitations, correct?

17 MS. STEELEY: That's correct.

18 JUSTICE KAVANAUGH: And that -- and
19 your point about water quality standards, I want
20 to make sure, I think with Justice Gorsuch, the
21 water quality standards are the goal or the end,
22 that the statutory means to that end that are
23 authorized by the statute are the effluent
24 limitations?

25 MS. STEELEY: That's exactly correct.

1 JUSTICE KAVANAUGH: And when you say
2 narrative effluent limitations, I think footnote
3 22 of your brief talks about that and you've
4 mentioned it at oral argument.

5 Can you -- and Justice Sotomayor
6 picked up on that. Can you just describe
7 briefly what you mean there?

8 MS. STEELEY: Sure, and maybe an
9 example would be helpful.

10 JUSTICE KAVANAUGH: Yes.

11 MS. STEELEY: In San Francisco's
12 permit, for instance, we have a narrative water
13 quality-based effluent limitation that requires
14 San Francisco to increase its rate of pumping
15 when wet weather is expected. So if there's a
16 30 percent chance of rain, we have to clear
17 capacity in the facility so that we are able to
18 absorb the capacity of stormwater.

19 That's a narrative water quality-based
20 effluent limitation. It tells us about the rate
21 of our discharge, so it's squarely within the
22 definition of effluent limitation, but it's
23 simply a narrative form. And we don't object to
24 that. It's -- it's perfectly fine to use words
25 or numbers. We just want to know how to control

1 our discharges and not have our compliance
2 determined based on conditions in the receiving
3 water.

4 JUSTICE KAVANAUGH: And then the
5 practical way this works, to pick up on Justice
6 Alito and Justice Sotomayor's questions, let's
7 say there are ten different entities discharging
8 at a particular source. If the water quality is
9 not good in that area, EPA can go back to one or
10 more of the ten and tighten up the effluent
11 limitations in the permits, which may take some
12 time, as Justice Sotomayor points out, and you
13 quibble with that, but, in any event, that's the
14 means for EPA to do this, right?

15 MS. STEELEY: That's exactly correct.
16 I mean, that tells permitholders their -- the
17 obligations they need to meet, so it -- it --
18 yes, that's exactly how this statute is --

19 JUSTICE KAVANAUGH: Okay. And the
20 overarching problem, I think, but you haven't
21 gotten to this, so I'm going to give you -- you
22 know, in terms of how this all works is you
23 don't know what your obligations are ahead of
24 time and yet you're on the hook for millions of
25 dollars and potential prison time even though

1 you didn't know what your obligations were ahead
2 of time, which strikes at least me as more -- as
3 definitely a policy problem but one that's
4 rooted in the statute. You don't know what your
5 obligations are and you can go to prison.

6 MS. STEELEY: Exactly, right. I mean,
7 it's hard to imagine --

8 JUSTICE KAVANAUGH: What are -- what
9 are you on the hook for? There's an EPA suit
10 against you. What is the amount San Francisco
11 is on the hook for, for something they didn't
12 know they needed to do? At least that's your
13 claim. What's the amount?

14 MS. STEELEY: What's the amount? So
15 the statutory penalties are 66,000 per day per
16 violation. So that can add up quite fast. In
17 the --

18 JUSTICE KAVANAUGH: They're seeking
19 how much from you?

20 MS. STEELEY: I think it's in the --
21 it's in the millions. It's over ten years of --
22 of penalties that can add up quite quickly.

23 JUSTICE KAVANAUGH: Yeah. Okay.
24 Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: No.

3 CHIEF JUSTICE ROBERTS: Justice
4 Jackson?

5 JUSTICE JACKSON: So I understand that
6 you say that the issue here is whether the
7 Generic Prohibitions are authorized by law. Is
8 that right?

9 MS. STEELEY: That's correct.

10 JUSTICE JACKSON: And that's the core
11 of your argument, and that you say that Congress
12 did not contemplate this, having this general
13 prohibition -- Generic Prohibition. But I guess
14 I can't square that with 33-1342(q)(1), which is
15 the 2000 amendment in which Congress appears to
16 be saying that each permit for a discharge
17 "shall conform to the Combined Sewer Overflow
18 Control Policy" signed by the agency. And then
19 when you look at the control sewer overflow
20 control policy -- or the Combined Sewer Overflow
21 Control Policy, that policy, I think, the
22 long-standing policy of the agency was to
23 include these generic kinds of -- what you call
24 generic kinds of limitations.

25 I mean, it's very explicit in the

1 policy. It says the authority should at least
2 require permittees to comply with the applicable
3 water quality standards. And, apparently, EPA
4 had guidance that said it didn't matter whether
5 this was Phase I or Phase II; these kinds of
6 permitting conditions we're going to put in our
7 permits.

8 So how -- how can it be, given the
9 amendment here, that Congress did not intend for
10 these kinds of provisions to exist in permits?

11 MS. STEELEY: So there's nothing in
12 the policy that authorizes the Generic
13 Prohibitions. What Congress was authorizing is
14 that EPA set limitations in a permit that
15 require our compliance with water quality
16 standards. They can do that through effluent
17 limitations. Our -- you know --

18 JUSTICE JACKSON: No, no. Congress
19 was very specific. It said we are requiring the
20 permits to "conform to the," capital, "Combined
21 Sewer Overflow Control Policy." It was
22 referencing a particular policy that had been
23 established by the administration that included
24 the Generic Prohibitions that you say Congress
25 did not consider, endorse, or whatnot.

1 MS. STEELEY: Right.

2 JUSTICE JACKSON: And I don't
3 understand how that's possible.

4 MS. STEELEY: So there's nothing in
5 the policy itself that says, EPA, impose
6 restrictions on causing or contributing to a
7 violation of water quality standards alone.
8 That's what -- that's not what the policy says.

9 For -- as we've discussed, for Phase
10 II permits, the policy expressly requires --

11 JUSTICE JACKSON: Was it EPA's --

12 MS. STEELEY: -- water quality-based
13 effluent --

14 JUSTICE JACKSON: Was it EPA's
15 guidance and weren't they saying this is what
16 you have to do pursuant to our policy? It would
17 -- EPA has never taken the position, I think,
18 that their own policy did not require these.

19 MS. STEELEY: EPA's policy, not --
20 sorry, EPA's guidance --

21 JUSTICE JACKSON: Yes.

22 MS. STEELEY: -- not the policy
23 itself, but EPA's guidance says conflicting
24 things. It sometimes says for both Phase I and
25 for Phase II permits, that both require effluent

1 limitations. Other times, it gives something
2 that looks like the Generic Prohibitions as an
3 example of what to do. I think that just simply
4 reflects the confusion.

5 But what Congress actually blessed or
6 required is compliance with the policy. And the
7 policy does not require or authorize anything
8 that looks like the Generic --

9 JUSTICE JACKSON: One final thing.
10 Did you -- did you waive an arbitrary and
11 capricious claim? I know Justice Thomas was
12 talking about -- with you about having an
13 arbitrary and capricious claim. But I thought
14 you had waived that.

15 MS. STEELEY: Our argument before this
16 Court is that the condition -- the Generic
17 Prohibitions are not authorized by law.

18 JUSTICE JACKSON: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Mr. Liu.

22 ORAL ARGUMENT OF FREDERICK LIU
23 ON BEHALF OF THE RESPONDENT

24 MR. LIU: Mr. Chief Justice, and may
25 it please the Court:

1 San Francisco's opening brief makes
2 one and only one argument, that Section
3 1311(b)(1)(C) authorizes only effluent
4 limitations. This Court, however, already
5 rejected that argument in National Association
6 of Manufacturers. And, in any event, the
7 statutory text and history make clear that
8 Section 1311(b)(1)(C) also authorizes other
9 limitations. San -- San Francisco is therefore
10 wrong to argue that limitations like the ones
11 challenged here are never okay.

12 But that does not mean that they are
13 always okay. Under the statute, EPA may rely on
14 limitations like the ones here only when EPA
15 lacks assurance that the permit's effluent
16 limitations alone are insufficient to protect
17 water quality. Even then, EPA may rely on
18 limitations like the ones here only when EPA
19 lacks the information necessary to develop more
20 tailored limitations. And, finally, EPA may not
21 impose limitations of any kind that are
22 unconstitutionally vague.

23 San Francisco pressed each of those
24 limiting principles below. But the court of
25 appeals rejected each of San Francisco's

1 case-specific challenges. The court held, at
2 Petition Appendix 40, that the permit's effluent
3 limitations alone would be insufficient to
4 protect water quality. The court held, at
5 Petition Appendix 46 to 47, that San Francisco
6 had failed to update its long-term control plan,
7 thus, depriving EPA of the information necessary
8 to develop more tailored limitations.

9 And the court at Petition Appendix 32
10 rejected San Francisco's vagueness challenge.
11 San Francisco did not seek this Court's review
12 of any of those parts of the decision below.
13 Rather than pursue an individualized challenge
14 to the limitations in this case, San Francisco
15 has put before this Court only a facial
16 challenge: That all limitations that prohibit
17 discharges based on their effects on water
18 quality are invalid on their face because they
19 don't fit the statutory definition of effluent
20 limitation.

21 Because that argument can't be squared
22 with this Court's precedents or the statute
23 itself, this Court should affirm. I welcome the
24 Court's questions.

25 JUSTICE THOMAS: Mr. Liu, do you agree

1 that 1311 seems to focus primarily on effluents
2 and discharge?

3 MR. LIU: I think most -- basically
4 all of the provisions of 1311, except for
5 1311(b)(1)(C), focus on effluent limitations.

6 JUSTICE THOMAS: Okay. Now, that
7 provision, (C), talks about limitations,
8 including those necessary to meet water quality
9 standards, and it also talks -- mentions "or
10 required to implement any applicable water
11 quality standards."

12 How exactly does the generic
13 limitation do that?

14 MR. LIU: It does in two sentences.
15 We think that phrase "necessary to meet or
16 implement water quality standards" imposes two
17 limitations on our authority.

18 One, we can invoke (b)(1)(C) only when
19 we lack assurance that the other limitations in
20 the permit are insufficient to protect water
21 quality. We think we've satisfied that
22 condition here. The court of appeals so found,
23 and San Francisco hasn't sought review of that.

24 We think that language imposes a
25 second limit, which is that for a limitation

1 like this to be necessary, it needs to be
2 necessary in the sense that EPA lacked the
3 information necessary to develop a more -- more
4 tailored information. And here that's satisfied
5 too.

6 I want to be clear about the sort of
7 information that we're missing that made it
8 impossible for us to impose anything other than
9 these generic limitations. It's not information
10 about the water. It's information about San
11 Francisco's own sewer system.

12 We're talking about where do the flows
13 go? What's the conditions of the pipes and the
14 pumping stations? How does the system respond
15 to wet weather events? That's the information
16 that we've been lacking for the past ten years
17 and that we asked San Francisco to provide as
18 part of the long-term control update.

19 Without that information, we're
20 basically flying blind as to how we're going to
21 tell exactly what San Francisco should do to
22 protect water quality.

23 JUSTICE THOMAS: Well --

24 CHIEF JUSTICE ROBERTS: Counsel -- I'm
25 sorry.

1 JUSTICE THOMAS: Oh, I'm sorry. Go
2 ahead.

3 CHIEF JUSTICE ROBERTS: The -- I don't
4 understand, you know, the bad old days is when
5 we had water quality standards, right, people
6 didn't know what they were supposed to do, how
7 it was going to be allocated, sort of a problem
8 with the -- the comments. And they put in the
9 permit system.

10 And I think the danger here is that
11 you're going back to the other system because
12 it, one, gives more power to you because you
13 don't have to tell the people who are
14 discharging what they have to do or not, you can
15 sit back, and then -- and also you don't even
16 have to allocate among many different polluters
17 who's responsible for -- for what.

18 So what prevents you -- I know you
19 touched on a couple of things in response to
20 Justice Thomas, but I'm not sure that was
21 significant limitations from saying, as you are
22 doing here, we're going to go with water quality
23 standards because that's maybe harder for the
24 people with effluent, but it's a lot easier for
25 us.

1 MR. LIU: No, it's not easier for us.
2 In our ideal world, we would have perfect
3 information about how San Francisco's system
4 works.

5 And based on that information, we
6 would be telling San Francisco things like:
7 Reroute flows from X to Y. Upgrade your pumping
8 station at Sea Cliff. Increase the storage
9 capacity of your Westside storage facility.

10 We were unable to include limitations
11 of that tailoring in this permit because San
12 Francisco deprived us of the very information we
13 would need to do that. So we don't --

14 CHIEF JUSTICE ROBERTS: How do you-

15 MR. LIU: We have no interest in
16 putting in generic provisions like this when we
17 have the information available to supply more
18 tailored -- more tailored limitations. And
19 that's why -- it's precisely because it's so
20 much easier to enforce a more tailored
21 limitation. These limitations --

22 CHIEF JUSTICE ROBERTS: What do you do
23 with multiple people discharging effluent and
24 you have a water quality standard. There are
25 eight different industries, ten different water

1 districts, whatever. They're all doing it. And
2 you look at the water quality and you say
3 there's too much of this.

4 MR. LIU: Yeah.

5 CHIEF JUSTICE ROBERTS: What do you do
6 then?

7 MR. LIU: Well --

8 CHIEF JUSTICE ROBERTS: How do you
9 allocate -- this was the problem that led to the
10 permit system. I mean, how do you allocate
11 responsibility for that?

12 MR. LIU: There are provisions in this
13 statute that authorize states in their
14 development of water quality standards to
15 apportion pollutant loads to different
16 polluters. 1313(d) is an example of this.

17 But I don't think that concern about
18 multiple dischargers is any reason to throw out
19 all of the receiving water limitations in this
20 case. That sort of situation might be the basis
21 for an individualized sort of as-applied type of
22 challenge to a provision like --

23 JUSTICE KAVANAUGH: Oh, no --

24 CHIEF JUSTICE ROBERTS: How would an
25 as-applied challenge work in that case?

1 Somebody is supposed to come and say: Well, you
2 put this much on me. I think you should put
3 different amounts on other three because I think
4 they're doing more or they can afford more or
5 they have more modern plants. And you're just
6 going to go back and say: Well, this is how we
7 -- we want to allocate?

8 MR. LIU: Oh, no, the statute supplies
9 plenty of tools to address the problem of an
10 overpolluted water body. The state can -- can
11 grant a variance or an exception from its
12 standards, as we've actually granted San
13 Francisco --

14 CHIEF JUSTICE ROBERTS: I'm talking
15 about the specific question about allocating
16 responsibility for the water quality to
17 different point sources.

18 MR. LIU: Oh, well, one way to do it
19 is for the state to say: Look, we recognize
20 this water body is overpolluted. Let's grant a
21 variance to certain of the dischargers so they
22 can continue doing their business.

23 JUSTICE KAVANAUGH: But do -- keep
24 going.

25 MR. LIU: I just want to make this

1 point. Their rule isn't going to fix the
2 problem of the overpolluted water body. If a --
3 if a water body is, in fact, overpolluted, thus
4 leaving no room for anyone else to pollute, the
5 appropriate effluent limitation in that case is
6 going to be zero.

7 It's not as if Petitioner's rule is
8 going to magically allow dischargers and
9 petitioners --

10 CHIEF JUSTICE ROBERTS: I don't
11 understand that answer, it could be zero, but it
12 may not have to be zero across the board. It
13 may be 20 percent in each of the point sources.
14 It may be 10 percent in the antiquated system
15 that can't do any better, but 30 percent in
16 someone else.

17 And I'm saying what the permit system
18 was designed to do was give some notice to the
19 different dischargers about what was going to be
20 required of them. Your water quality system
21 gives you complete discretion in which -- who's
22 going to bear the burden and who's not.

23 MR. LIU: I don't think that's right.
24 Like -- like I said, there are multiple tools in
25 the statute that address that problem.

1 There are variances that the states
2 can -- can provide. There are schedules of
3 compliance that EPA can provide in issuing the
4 -- the standards. The CSO control policy
5 discusses apportioning pollutant loads, so as --
6 so each discharger can stay within the loads.

7 JUSTICE KAVANAUGH: But the problem is
8 you can go after an individual entity, like the
9 City of San Francisco, based on the past when
10 they didn't know what the relevant limitation on
11 them was and seek retroactively, without
12 fairness, huge penalties, including criminal
13 punishment, based on something that was -- they
14 didn't know what they could discharge or not
15 discharge, correct?

16 MR. LIU: I don't --

17 JUSTICE KAVANAUGH: A lot of what
18 you're talking about in response to the Chief
19 Justice is here's things that could help going
20 forward.

21 MR. LIU: Right.

22 JUSTICE KAVANAUGH: You're suing San
23 Francisco separately for a lot of money, based
24 on a standard that they had no idea -- you know,
25 at least that's the theory --

1 MR. LIU: No. I mean --

2 JUSTICE KAVANAUGH: That's the theory.
3 And your position -- your position would allow
4 that.

5 MR. LIU: I don't -- I don't think so.

6 JUSTICE KAVANAUGH: Yes, it would.

7 MR. LIU: I mean, the Bayside
8 complaint is Exhibit A for why what you said is
9 not going to be true. The standards that are
10 violated in those cases are numeric water
11 quality criteria.

12 JUSTICE KAVANAUGH: The standards, the
13 generic limitations contain water quality
14 standards that you don't know as an individual
15 entity what you need to do to comply with that.

16 MR. LIU: You know, San Francisco has
17 not pointed to any instance of that. The best
18 shot they gave at pointing to a limitation that
19 they said they didn't know what the meaning was,
20 was a standard that said marine communities
21 can't be degraded. Well, if you look at
22 Petition Appendix 143, there's a definition of
23 degrade in Attachment A to the permit.

24 That definition spells out exactly how
25 one goes about figuring out how marine

1 communities --

2 JUSTICE KAVANAUGH: They talked about
3 the algae just now. They talked about the
4 natural taste, odor, and color of fish.

5 MR. LIU: Yeah. And you can look at
6 footnote 2 of their cert reply brief. And it
7 says San Francisco did not challenge the clarity
8 of any water quality standard below.

9 And, you know, we're talking about
10 quality for the first --

11 JUSTICE KAVANAUGH: That's because
12 they say, as an antecedent matter, you don't
13 have the authority under the statute to do so.
14 They would have, if you did have the authority,
15 separate arbitrary and capricious challenges.

16 MR. LIU: And my point is -- my point
17 is there's no reason to invalidate all of these
18 on their face. San Francisco --

19 JUSTICE KAVANAUGH: Yeah, no. That --
20 the facial challenge thing's a total
21 distraction. The question is whether the
22 statute authorizes these kinds of generic
23 limitations.

24 It really comes down to what Justice
25 Kagan was talking about, how you read that

1 precise sentence in 301.

2 MR. LIU: And if -- and if Congress
3 had wanted to do away with these standards as
4 limits entirely, it would have simply adopted
5 the Senate version of the bill that was before
6 it. The Senate version accomplished exactly
7 what San Francisco is urging here.

8 It very meticulously put the word
9 "effluent" into 1311(b)(1)(C) and then
10 meticulously, in all the other provisions that
11 cross-reference 1311, deleted "or other."

12 JUSTICE KAGAN: May I ask, Mr. Liu, is
13 this a multiple discharge situation? There
14 seems to be some conflict between the
15 government's position and San Francisco's
16 position on that. As I understood Ms. Steeley,
17 she said that's true of one, would you say, but
18 it's not true of all eight.

19 What's the situation there?

20 MR. LIU: It's -- so there's no
21 dispute, it's true of the one, and the one is
22 the only outfall at issue here because the one
23 is the only federal outfall. There's a division
24 of jurisdiction here between the federal
25 government and the states. The states are the

1 permitting authority for all the near shore
2 outfalls. That's the seven outfalls that my
3 friend mentioned.

4 But the only Respondent here is the
5 federal government. We are responsible for
6 permitting the -- the southwest ocean outfall,
7 which is 3.3 miles into the Pacific Ocean.

8 JUSTICE KAGAN: I see. And if -- this
9 issue of, like, we don't know what we're
10 supposed to do, it's horribly unfair, and -- and
11 you think, well, they've really not come up with
12 any particular way in which that's true, I mean,
13 I thought that most of these were something like
14 this: There's a California water quality
15 standard that says waters shall not contain
16 floating material in concentrations that
17 adversely affect fishing and swimming.

18 And it turns out EPA says that,
19 notwithstanding that standard, San Francisco has
20 left lots of toilet paper floating in Mission
21 Creek. I mean, that's not a "we don't know what
22 to do" issue. Like, we know you're not supposed
23 to leave toilet paper floating in Mission Creek,
24 don't we?

25 MR. LIU: That's right. And -- and --

1 JUSTICE KAVANAUGH: And that's one
2 example. There are plenty of others.

3 JUSTICE KAGAN: Well, but this --
4 there -- I mean, there might be examples where
5 they don't know something, although they haven't
6 come up with any --

7 MR. LIU: They haven't.

8 JUSTICE KAGAN: -- but there are
9 plenty of examples. I could go on and on.
10 There are plenty of examples where it's obvious.
11 You know, don't, like -- like, spew the kind of
12 chemicals that discolor the water.

13 MR. LIU: It would be --

14 JUSTICE KAGAN: When you have brown
15 water --

16 MR. LIU: It would be strange if
17 concerns that are individualized to other types
18 of limitations that may or may not be vague
19 cause the court to throw out the whole set of
20 these types of limitations.

21 CHIEF JUSTICE ROBERTS: So --

22 JUSTICE BARRETT: Mr. Liu --

23 CHIEF JUSTICE ROBERTS: -- we should
24 -- so we could limit the decision to items like
25 that, but in terms of particular concentrations

1 of chemicals that you cannot see floating in the
2 water, we would have -- we could reserve that
3 decision because that interferes with the permit
4 system in a way that the others may not?

5 MR. LIU: We would certainly
6 appreciate a decision from this Court that was
7 tailored to the particular concerns that may be
8 motivating Petitioner's position.

9 But to be clear, we understand
10 Petitioner's legal argument in this Court, the
11 textual hook on which they've hung their entire
12 presentation, to be a facial challenge to these
13 limitations --

14 JUSTICE BARRETT: Can you agree --

15 JUSTICE KAVANAUGH: It's just a --
16 it's just an argument that the statute doesn't
17 authorize these kinds of -- of conditions.

18 MR. LIU: And that --

19 JUSTICE KAVANAUGH: And the answer is
20 just yes or no for us.

21 MR. LIU: And I don't think there's
22 anything in 1311(b)(1)(C) that says --

23 JUSTICE KAVANAUGH: I -- I get that.

24 MR. LIU: -- San Francisco can -- EPA
25 can include a standard that says don't cause

1 floatable materials to be in the water.

2 JUSTICE BARRETT: And you agree that
3 all of these concerns would make you vulnerable
4 to an arbitrary and capricious challenge. Let's
5 just assume they're all right. I know you're
6 disputing that they're vague --

7 MR. LIU: Absolutely.

8 JUSTICE BARRETT: -- or that they're
9 not on notice, but if they were, you would be
10 vulnerable to an arbitrary and capricious
11 challenge?

12 MR. LIU: Yes. I mean, in this very
13 case, San Francisco brought three variations of
14 that type of challenge. They said the existing
15 limitations in the permit are already
16 sufficient. You don't need to resort to
17 (b)(1)(C). They said these limitations are
18 vague. They said we gave you the information in
19 the -- we don't need to provide you more
20 information via the updated long-term control
21 plan to -- to -- to create more tailored
22 limitations.

23 JUSTICE BARRETT: How common are these
24 permits? These ones that are more generic,
25 narrative form, and they're getting at

1 non-effluent limitations.

2 MR. LIU: So I would separate the
3 universe into -- into two buckets. There are
4 individual permits like these, where we're
5 talking about an individual discharger. And
6 then there are general permits that we issue,
7 that cover a whole swath of -- of discharges
8 within a particular geographic area, like all
9 construction sites, for example.

10 These types of limitations are pretty
11 common in the general permits. And the reason
12 why is precisely because of this information
13 problem. The more information we have, the more
14 tailoring we can do. The less information we
15 have, the less tailoring we can do.

16 And the general permit context is one
17 where we -- and I think all the dischargers --
18 value efficiency and very little administrative
19 burden. So we don't ask for a lot of
20 information, and they don't give it.

21 In exchange, we do include these type
22 of, quote/unquote, "Generic Prohibitions." In
23 the individual permit context, it's -- it's --
24 it's as applied to the circumstances. It really
25 depends on where we are in the development of a

1 permit. The --

2 JUSTICE BARRETT: How often do you
3 seek criminal penalties?

4 MR. LIU: We have never sought -- I am
5 not aware of any instance, and I have been told
6 we're not aware of any instance, in which we
7 have pursued criminal prosecution of a
8 municipality that violated a condition like
9 this.

10 JUSTICE ALITO: Mr. --

11 JUSTICE JACKSON: And if we --

12 JUSTICE ALITO: Mr. Liu, you said at
13 one point that you lacked the information
14 necessary to provide a more specific provision
15 than the provisions that are in question here.
16 But is there anything that prevented you from
17 obtaining whatever information you thought you
18 needed?

19 MR. LIU: Yes, San Francisco. Under
20 this statute, San Francisco --

21 (Laughter.)

22 JUSTICE ALITO: You have no -- you
23 have no ability and the state has no ability to
24 require them to produce any information that --

25 MR. LIU: We did require them. We

1 issued information requests under 33 U.S.C.
2 1318(a). All of that resulted in San Francisco
3 coming up in 2018 with what it called a
4 long-term control plan synthesis.

5 That synthesis did not reflect current
6 conditions. Why? Because the most recent
7 document in that plan was dated in the 1990s.

8 JUSTICE ALITO: And do you have -- do
9 -- when a regulated party doesn't provide the
10 information that you think you need, do you lack
11 tools to require that to be done?

12 MR. LIU: We -- no. We -- what we did
13 here, because it had been five years since their
14 last -- last permit had expired, the only way we
15 thought, the best way left to get the
16 information was to put the requirement in the
17 next permit. And so in the instant permit, we
18 said as a condition of this very permit -- this
19 is Petition Appendix 131 to 138 -- please
20 provide us with the information we need to
21 develop more tailored limitations.

22 And in that request, Pet. App. 135, we
23 said, while you're at it, why don't you tell us
24 what additional control alternatives you think
25 makes sense, given your existing infrastructure

1 --

2 JUSTICE ALITO: All right. So -- so

3 --

4 MR. LIU: -- and the cost.

5 JUSTICE ALITO: -- do you want us to
6 hold -- and maybe this would be an appropriate
7 disposition of this case -- that permit
8 requirements like these are required -- are
9 permitted in the specific situation in which EPA
10 or the State has made every reasonable effort to
11 get the necessary information from the regulated
12 party and the regulated party has refused to
13 provide the information?

14 MR. LIU: We think that is --

15 JUSTICE ALITO: In that limited
16 situation, you can resort to this sort of permit
17 condition?

18 MR. LIU: We think -- our reading of
19 the -- yes. Our reading of this statute is
20 these -- to -- to satisfy the requirement that
21 these be necessary to implement, they need to be
22 necessary in the sense that we lack the
23 information necessary to develop more tailored
24 information.

25 JUSTICE ALITO: Well, in that response

1 and some of the other arguments that you've made
2 suggests that perhaps what you're saying is that
3 we never should have granted review in this case
4 to review the broad question that was presented
5 in the cert petition.

6 MR. LIU: I am saying that. I mean,
7 just track the shifting positions that we've
8 seen thus far. The -- the -- the cert petition
9 -- the certiorari petition focused on whether
10 these provisions were too vague or not specific
11 enough. We responded that -- to that in our
12 opposition. And the response we got on the cert
13 -- in the cert reply was we're disclaiming any
14 argument that any standard or any limitation was
15 too vague. We're shifting to an argument based
16 on the meaning of effluent limitation and the
17 definition of it.

18 We get their opening brief. It's
19 consistent with the cert reply, but then page 3
20 of their merits reply starts out by saying even
21 if this provision does authorize things other
22 than effluent limitations, they're still
23 invalid.

24 JUSTICE ALITO: All right. Thank you.

25 JUSTICE JACKSON: Mr. Liu, can I

1 invite you to go back to the text and comment on
2 the statutory interpretation question, which is
3 what I understood counsel on the other side to
4 say this all reduces to whether or not the
5 statute authorizes these kinds of generic
6 limitations?

7 Her argument -- I mean, the -- the way
8 I'm looking at the statute, we have (A), talking
9 about the discharge being unlawful and (B),
10 talking about the objectives. (b)(1)(A) is
11 specific to effluent limitations, and then there
12 are some subsections about those. And then (C)
13 says "any more stringent limitation, including
14 those necessary," et cetera.

15 So, on its, face it looks like "any
16 more stringent limitations" is taking us outside
17 of effluent limitations because the "more" is
18 relevant to something or relative to something.

19 But she suggests that (a)(1) is
20 setting effluent limitations with the best
21 practicable control technology requirement, and
22 the anymore stringent limitations is limited to
23 allowing -- well, is allowing -- is allowing for
24 effluent limitations that go beyond best
25 control.

1 Do you understand what I'm saying?
2 She suggests that it's still cabined by effluent
3 limitations.

4 MR. LIU: She's --

5 JUSTICE JACKSON: And I guess I'm
6 wondering what we do with anymore stringent
7 limitation. Doesn't that defeat her argument?
8 Or how does the government respond to that
9 point?

10 MR. LIU: Yeah, I -- I -- I think
11 the -- the short answer is: If Congress wanted
12 to limit (b)(1)(C) to anymore stringent effluent
13 limitation, Congress would have put in the word
14 "effluent" there. After all, effluent
15 limitation is a statutorily defined term.

16 JUSTICE GORSUCH: Mr. Liu, I -- I -- I
17 think that addresses the primary argument. I
18 haven't heard -- and I'd appreciate some
19 response. I just want to hear what you have to
20 say about the second -- what I understood, at
21 least, to be the secondary argument, is even if
22 (b)(1)(C) allows other limitations, it is
23 necessary to meet a water quality standard.
24 Which means they can't mean the same thing that
25 you -- in other words, a limitation can't be the

1 water quality standard.

2 It has to be some restriction on
3 discharge. That's what 1311's all about, you
4 said. (A) says that. The title says that.
5 Some limitation on what they do, rather than
6 just saying -- creating a circle, that the
7 limitation is a water quality standard, that
8 there -- that Congress meant those two terms to
9 do different work.

10 MR. LIU: Well, there -- there's --
11 under the statute, there is always a distinction
12 between the limitations and the water quality
13 standards.

14 JUSTICE GORSUCH: Yes. And I'm
15 wondering what remains of that when you say,
16 hypothetically, in a limitation: Do not violate
17 the water quality standards. Do not cause or
18 contribute to the violation of water quality
19 standards.

20 MR. LIU: Well, as my friend
21 acknowledged --

22 JUSTICE GORSUCH: Is -- is that -- is
23 that circular --

24 MR. LIU: I --

25 JUSTICE GORSUCH: -- or is there some

1 way to break the circle?

2 MR. LIU: I don't think it's circular.
3 As my friend acknowledged, the water quality
4 themselves are not self-executing. And so it's
5 natural to describe --

6 JUSTICE GORSUCH: For sure. For sure.
7 I get that. But -- but when you just say: Go
8 forth and do good, okay, right, and -- and --
9 and -- or, you know, do not create a nuisance,
10 or, you know, don't -- what is it? One of them
11 is -- do not cause aesthetically undesirable
12 dislocation -- discoloration of the ocean.

13 That's our water quality standard.
14 And you put that -- is that a limitation on what
15 they do, on what they discharge, in any
16 meaningful sense, or is that the water quality
17 standard itself?

18 MR. LIU: I -- I -- I think it is a
19 limitation on the discharge. It's -- it's
20 prohibiting an entire category of discharges,
21 i.e., those that fit that description.

22 And if you look at the text of the
23 limitations themselves, they're written in terms
24 of what the discharges can or cannot do.

25 JUSTICE JACKSON: Is that because --

1 JUSTICE GORSUCH: If that's the case,
2 then I -- I guess I -- I'm kind of circling back
3 to the Chief Justice's question. And, really,
4 maybe administrative agencies generally. The
5 point was to -- to give people notice ex ante of
6 their legal obligations, rather than rely on
7 tort ex post, nuisance law.

8 What -- what value added is there to
9 just an ex post tort nuisance law regime when
10 you say: Don't -- don't create a nuisance?

11 MR. LIU: Well, as -- as I think the
12 prior discussion also revealed, a lot of these
13 water quality standards are not self-executing.
14 They are not independently enforceable.

15 And so the only way these standards
16 are applied to a discharger like San Francisco
17 is if we incorporate those standards in a
18 limitation.

19 That's where the -- we -- we need
20 these limitations to bridge the gap between the
21 existence of the standards, which merely specify
22 a desired condition of the -- of the waterway,
23 and the permittee's own responsibilities.

24 JUSTICE GORSUCH: No, I understand
25 that. But -- but -- but does it add anything to

1 an ex post tort nuisance regime?

2 MR. LIU: I think it does. I mean --
3 I mean, to be honest, these -- these standards
4 are much more specific than just a general tort
5 regime.

6 JUSTICE GORSUCH: Sure. I could call
7 an expert witness up, though, and say: Here is
8 what constitutes a nuisance. Or I can point
9 to --

10 MR. LIU: Yeah.

11 JUSTICE GORSUCH: -- what EPA's water
12 quality standards are. And I'm not sure what
13 difference --

14 MR. LIU: I --

15 JUSTICE GORSUCH: -- as a practical
16 matter, it would make.

17 MR. LIU: I -- I just
18 think Congress -- I think Congress would -- the
19 Congress of 1972 would have vociferously
20 disagree. I mean, they thought water quality
21 standards were the linchpin on which the water
22 of the United States would remain clean.

23 JUSTICE GORSUCH: I agree with that.
24 Yeah.

25 MR. LIU: And they

1 didn't think relying --

2 JUSTICE GORSUCH: No, I'm just asking
3 as a practical matter. If -- if -- if we're
4 essentially saying don't create a nuisance, and
5 EPA sets the standard as opposed to an expert
6 witness, what -- what value has been added?

7 MR. LIU: To be clear, it's the states
8 that are set -- setting the standards. EPA is
9 merely issuing permits so that the state's own
10 view of clean water --

11 JUSTICE GORSUCH: So then --

12 MR. LIU: -- is achieved.

13 JUSTICE GORSUCH: -- that even begs
14 the question further, right? If -- if this is
15 just a circle, the state standard is the state
16 standard. That would be set in nuisance law,
17 too. And so what -- what -- what --

18 MR. LIU: And -- and this was
19 basically the arguments that the proponents of
20 the House bill made. They said: Why do we even
21 need state water quality standards anymore?
22 Let's take out of the statute 33 U.S.C. 1313.

23 But the House bill retained the water
24 quality standard --

25 JUSTICE GORSUCH: Sure.

1 MR. LIU: -- provision.

2 JUSTICE GORSUCH: Because then you're
3 going to have an administrative agency ex ante
4 create limitations on what you can do as a
5 permittee in order to make sure that those water
6 quality standards were met.

7 But if you take that away, and there's
8 no ex ante limitation anymore on what you can
9 do, aren't we just sort of back to a state law
10 nuisance regime in which the state's setting the
11 standard of care?

12 MR. LIU: I -- I don't think so. I
13 mean, these limitations incorporate much more
14 specific standards than just general state tort
15 law. They say things like: Don't cause
16 floatable materials to be in the water. Don't
17 cause the water to have --

18 JUSTICE GORSUCH: Okay. That would
19 be -- that would be pretty good evidence of the
20 duty in a nuisance suit, wouldn't it, the duty
21 of care?

22 MR. LIU: It may -- it may well be; it
23 may not be. I think Congress -- one -- one of
24 the problems with the prior regime wasn't that
25 enforcement of these standards was unfair, but

1 that it was nonexistent. And so Congress
2 actually wanted to up the ante --

3 JUSTICE GORSUCH: You don't think
4 Congress wanted to -- to ensure advance notice
5 to permittees of their obligations under the law?

6 MR. LIU: I -- no.

7 JUSTICE GORSUCH: That wasn't part of
8 the purposes? You just --

9 MR. LIU: I think if permittees think
10 they lack -- they lack fair notice, they can
11 bring that sort of challenge. Again --

12 JUSTICE GORSUCH: -- that's not --
13 Mr. Liu, my question was: Was part of what
14 Congress was trying to do is, as the Chief
15 Justice indicated, try to provide some certainty
16 on the ex ante, rather than just adjudicating
17 all this ex post in nuisance cases?

18 MR. LIU: Yeah, I -- I think San
19 Francisco actually knows well what it can do to
20 improve its own sewer system. I mean, San
21 Francisco is an outlier here. If you look --

22 JUSTICE GORSUCH: Okay, thank -- I got
23 it.

24 JUSTICE KAVANAUGH: Why -- you know,
25 some of these standards are not as specific:

1 Marine community shall not be degraded. The
2 odor of fish shall not be altered. It's hard
3 to --

4 MR. LIU: I mean, to take the first
5 example, Justice Kavanaugh --

6 JUSTICE KAVANAUGH: It's just hard --
7 I'm not looking for comment on the specific
8 example. It's just hard to know in advance,
9 when multiple other people are also discharging
10 into the same waters, when you're going to have
11 crossed the line, right?

12 MR. LIU: I don't think --

13 JUSTICE KAVANAUGH: Right?

14 MR. LIU: -- that concern can justify
15 throwing all of these out across the board,
16 because --

17 JUSTICE KAVANAUGH: Well, Justice
18 Gorsuch's question was, I think, and the Chief
19 Justice's, combining the water quality standards
20 and the effluent limitations. And part of what
21 we have to do is figure out how they fit
22 together in 30 -- 301 there, (b)(1)(C).

23 And it strikes me that the way
24 Congress ensured both more effectiveness and
25 fair notice was to say that the end is water

1 quality standards -- things like this,
2 discoloration of fish, marine communities,
3 et cetera -- but the means to the end were
4 effluent limitations, which would both be, as
5 the Chief Justice said, more effective, and as
6 Justice Gorsuch said, fair notice.

7 And if they're not tight enough, EPA
8 has mechanisms to tighten them up. What's wrong
9 with that reading of the two things together?

10 MR. LIU: I think it would read the
11 statute --

12 JUSTICE KAVANAUGH: How does that hurt
13 EPA, if you want to say that -- if you want to
14 respond to that? How does that harm EPA's
15 ability to regulate, if they have to do it that
16 way?

17 MR. LIU: Oh, it's going to lead to
18 more permit denials, more permit delays as we
19 wait for the information to come in. It's going
20 to lead to less flexibility and more burdens for
21 the dischargers.

22 Again, look at my -- look at the
23 context of general permits. These cover the
24 vast majority of NPDES dischargers. They are
25 covered by general permits. And the whole point

1 of the general permit is that the dischargers
2 can get away with not providing us a lot of
3 information. That's how you get a construction
4 site approved in 14 days.

5 You take away our ability to rely on
6 these sorts of prohibitions and we're going to
7 need to ask for more information, because it's
8 only with that information that we're going to
9 be -- be able to develop more tailored
10 limitations that assure us that water quality
11 standards are going to be achieved.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas, anything further?

16 Justice Alito?

17 JUSTICE ALITO: To what -- do we know
18 to what degree the problem with the water
19 quality in the affected body of water is the
20 result of water that the City is intentionally
21 discharging and to what degree it is the result
22 of these sewer overflows?

23 MR. LIU: Well, to be -- I mean, I
24 don't -- I don't think San Francisco is
25 intentionally discharging anything or --

1 JUSTICE ALITO: Well, the water that
2 it treats.

3 MR. LIU: Oh.

4 JUSTICE ALITO: It treats water, and
5 some water --

6 MR. LIU: Yes.

7 JUSTICE ALITO: -- is -- some water
8 flows out --

9 MR. LIU: Right.

10 JUSTICE ALITO: -- when there's an
11 overflow.

12 MR. LIU: Yeah. So the permit in
13 Attachment E contains a long list of monitoring
14 locations. And those locations help us
15 disaggregate what's causing what.

16 So there are monitoring locations that
17 -- that sample the flow out of the treatment
18 facility, and that tells us the quality of the
19 discharge there. And then there are monitoring
20 locations that sample the effluent coming out of
21 the outflow at issue here, as well as along the
22 shore and in the ocean.

23 JUSTICE ALITO: All right. Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor?

1 JUSTICE SOTOMAYOR: Mr. Liu, maybe I
2 need to start from the beginning. When you're
3 obligated to give effluent limitations, could
4 you give a permit that says just meet water
5 quality controls?

6 MR. LIU: No.

7 JUSTICE SOTOMAYOR: Why not?

8 MR. LIU: Because the statute says
9 exhaust the technology-based effluent
10 limitations first. And we read "more stringent"
11 to mean resort to the (b)(1)(C) authority only
12 when those technology-based effluent limitations
13 aren't going to be enough.

14 JUSTICE SOTOMAYOR: You called this an
15 individual permit versus a general permit.

16 MR. LIU: Right.

17 JUSTICE SOTOMAYOR: I'm not sure I
18 understand what each is. I know that this is a
19 permit that's issued to San Francisco --

20 MR. LIU: Right.

21 JUSTICE SOTOMAYOR: -- for its
22 combined rainwater and -- or stormwater and
23 sewage systems. So it's individual in that
24 sense. What does that mean as opposed to a
25 general permit?

1 MR. LIU: So you've exactly accurately
2 described the individual permit here. A general
3 permit, you know, the -- the prototypical one is
4 our construction general permit, and what it
5 says is all the people who want to engage in
6 construction in a particular geographic area, it
7 can be a whole state or a set of states, if you
8 want to engage in construction, file with us a
9 notice of intent to do that, and within 14 days,
10 you'll have authorization to do it.

11 And part of that authorization -- it's
12 basically an agreement that once you get that
13 authorization, you're going to abide by the
14 terms of that general permit. And the general
15 permit has a long list of conditions but
16 typically includes a provision like this.

17 And the reason why we don't -- we are
18 unable to provide a more tailored limitation in
19 the general permitting context is that everyone
20 in that context agrees that the lack of
21 information is a good thing. No constructor
22 want -- no -- no one engaged in construction
23 wants to take the six months to a year to apply
24 for an individual permit. They want to be able
25 to get that authorization quickly and

1 efficiently.

2 But -- but the tradeoff between not
3 having that information about how their
4 individual site operates is that we have to rely
5 on a more general prohibition like this.

6 JUSTICE SOTOMAYOR: So that -- this
7 presumes a general permit, it presumes when it's
8 talking about a general category of industry,
9 that --

10 MR. LIU: Yes.

11 JUSTICE SOTOMAYOR: -- certain
12 protocols are being followed.

13 MR. LIU: Right. There are some
14 protocols in the --

15 JUSTICE SOTOMAYOR: Those protocols
16 generally produce X amount or Y amount of
17 pollutant or effluents, and we're saying you can
18 do that, but only if you're going to go over
19 those set limits are we going to require you to
20 step in and do something else, correct?

21 MR. LIU: Yeah. Exactly. Those --

22 JUSTICE SOTOMAYOR: That's what --
23 that's what happens with a general permit.

24 Now this individual permit, there was
25 a -- there was a concern by Justice -- the Chief

1 Justice that this individual permit, they have
2 many point sources of the sewerage coming in. I
3 mean, everybody's bathroom is a point source.
4 And they have -- yeah, that's what sewerage is,
5 isn't it? It's what goes into the sewer waters,
6 okay? And that unless they know -- unless they
7 have effluent limitations, they won't know how
8 to control those individual point sources or
9 figure out how to control who's the bad actor
10 here, what neighborhood's the bad actor.

11 Does that matter in a situation like
12 this?

13 MR. LIU: No, it doesn't matter in a
14 situation --

15 JUSTICE SOTOMAYOR: Explain why.

16 MR. LIU: Well, because the one point
17 source that's at issue here, the one that's
18 within the federal government's jurisdiction, is
19 the Southwest Ocean Outfall, and that outfall
20 discharges into the Pacific Ocean 3.3 miles away
21 from the coast. And there are no other
22 dischargers -- I think my friend acknowledged
23 this morning -- there are no other dischargers
24 in the vicinity. So there's no possibility of
25 confusing San Francisco's contribution to water

1 quality versus anyone else's.

2 JUSTICE SOTOMAYOR: So your effluent
3 limitations are already telling it control all
4 these things that we know you can control and
5 control them in this way because there's better
6 technology you could put in?

7 MR. LIU: Yes. This permit exhausts
8 as far as we can exhaust the technology-based
9 effluent limitations.

10 JUSTICE SOTOMAYOR: Now what you're
11 saying with respect to the other water standards
12 that you're incorporating by reference is we
13 can't tell that because -- whatever reasons?

14 MR. LIU: Yeah. What -- here's what
15 we do know.

16 JUSTICE SOTOMAYOR: Mm-hmm.

17 MR. LIU: We do know that San
18 Francisco's system is resulting in 196 million
19 gallons of sewage poured onto San Francisco's
20 beaches. We know that it's leading to sewer
21 backups into homes and businesses. We know that
22 their infrastructure is aging and failing. We
23 know that the discharges are leading to
24 excessive concentrations of bacteria, copper,
25 and other metals.

1 So we know that the limitations that
2 already exist in the permit are not enough to
3 protect water quality. Then the question is,
4 how do we fill that gap? And we would like to
5 fill that gap with additional effluent
6 limitations. After all, they're more -- they're
7 easier for us to enforce.

8 But I think the last thing San
9 Francisco wants us to do is to start telling
10 them what to do without the information of how
11 their system works. We could write into the
12 permit reroute flows from X to Y --

13 JUSTICE SOTOMAYOR: That goes back to
14 Justice Alito's point, which is you don't mind
15 an opinion that says you can only do this if you
16 don't have enough information to issue.

17 MR. LIU: We don't mind an opinion
18 that says that.

19 JUSTICE SOTOMAYOR: Okay.

20 CHIEF JUSTICE ROBERTS: Justice Kagan,
21 anything further?

22 JUSTICE KAGAN: Yeah. So that's true
23 for the individualized permit holders. And then
24 you said, for the general permits that you
25 issue, if we took up this invitation to say that

1 this mechanism is just not authorized and you
2 could not write the general permits that you
3 write in the way that you do --

4 MR. LIU: Right.

5 JUSTICE KAGAN: -- what would you do
6 instead and who would suffer from that?

7 MR. LIU: All the small businesses,
8 small farmers that rely on the general permits.
9 These are permittees who don't have the huge
10 companies that are able to navigate what
11 admittedly can be a complicated individualized
12 permit system. They rely on the simple thing of
13 filing a form with us and being able to engage
14 in construction 14 days later.

15 And so saying we cannot across the
16 board rely on these provisions is going to
17 undermine the whole point of the general permit
18 system and, you know, affect the economy of --
19 of small business owners.

20 JUSTICE KAGAN: And one last question
21 is: How long have you been doing this for, in
22 either the individualized context or the general
23 context? You know, when did this start? Is
24 this a consistent practice that EPA has
25 developed?

1 MR. LIU: So we -- in the CS -- CSO
2 context, it certainly has existed since the CSO
3 policy itself in 1994, which we understand as
4 blessing this sort of condition.

5 JUSTICE KAGAN: So, in this particular
6 context, almost 30 years?

7 MR. LIU: That -- that -- that's
8 right. And -- and I guess what I would say is,
9 again, it's our view of the statute that when we
10 are able to avoid relying on these, we should
11 avoid relying on these. Dischargers raise
12 concerns, but we have concerns too.

13 I mean, the Second Circuit case that
14 was alleged to be in conflict with the decision
15 below was a case brought by NRDC, and they said,
16 well, these are hard to enforce. And so
17 stepping into those shoes, they are, indeed,
18 harder to enforce.

19 In an ideal world, we would be able to
20 get perfect information and then use that
21 information to craft very tailored limitations
22 that are specific to a particular site and
23 particular discharges. It -- it's just, in the
24 real world, we lack that information.

25 JUSTICE KAGAN: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Gorsuch?

3 Justice Kavanaugh?

4 JUSTICE KAVANAUGH: I have a few
5 questions.

6 You just referenced farmers would be
7 helped by -- the Farm Bureau Federation's in
8 here representing 6 million farm families, along
9 with an amicus brief that represents, as they
10 say, nearly ever business sector across the U.S.
11 economy. They're not happy with just leaving it
12 up to you to represent their interests, frankly,
13 and they say that your position will make it
14 impossible for many permittees to protect
15 themselves from unanticipated liability. They
16 say that their members, including the Farm
17 Bureau Federation, those farmers, and other
18 permittees are left exposed to the potentially
19 devastating and unnecessarily costly
20 consequences of a government enforcement action
21 or citizen suit.

22 So they're not -- they're not happy
23 with "trust us." Do you want to respond to the
24 Farm Bureau Federation argument?

25 MR. LIU: Sure. I think all regulated

1 parties would prefer to essentially have their
2 cake and eat it too, to not have to give us the
3 information but also not have to face these
4 Generic Prohibitions.

5 So I think what that -- the message of
6 that brief is that in their ideal world, not
7 only would they not have to give us the
8 information, but they wouldn't have to meet the
9 more generalized prohibitions. The statute
10 takes that option off.

11 JUSTICE KAVANAUGH: Presumably,
12 they're aware of that and filed the amicus brief
13 with that in mind, but, in any event, on to the
14 next one.

15 On the -- what you said to Justice
16 Alito about what the opinion could say, and you
17 said when we should avoid relying on these, when
18 we can avoid relying on these. Would you be
19 okay with an opinion that said we must avoid
20 relying on these when we can avoid relying on
21 them?

22 MR. LIU: Yeah, I want to be careful
23 here because of the general --

24 JUSTICE KAVANAUGH: Yeah, I thought
25 you would.

1 MR. LIU: -- because of the general
2 permitting context.

3 JUSTICE KAVANAUGH: Yeah.

4 MR. LIU: I -- I -- I think this is a
5 -- a balance of priorities. And in some
6 contexts, like the general permitting context,
7 the lack of information is an affirmative good.

8 It is something we want -- we don't
9 want to demand more information. And I don't
10 think any of the dischargers actually want to
11 have to go through the rigamarole of actually
12 providing it. And so, when there is good reason
13 that we are not relying -- that we don't have
14 the information necessary, whether it's because
15 of resistance by a party like San Francisco or
16 because it just doesn't make sense to demand
17 more information, then I -- then I don't think
18 these -- these limitations should be
19 invalidated.

20 JUSTICE KAVANAUGH: On the criminal
21 penalties point that Justice Barrett raised and
22 you said that hadn't been pursued, but,
23 obviously, civil and citizen suits are pursued.
24 And how much are you seeking from San Francisco?

25 MR. LIU: So we have not calculated

1 the damages, but --

2 JUSTICE KAVANAUGH: Roughly?

3 MR. LIU: I mean, it's -- it is -- I
4 don't have a rough even back-of-the-napkin
5 estimate. It is --

6 JUSTICE KAVANAUGH: Tens of millions?
7 Hundreds of millions?

8 MR. LIU: It may well be tens of
9 millions of dollars. I think what that reflects
10 is the over decades long failure of San
11 Francisco to update a system that it itself in
12 its own planning documents on CAER 947 admits
13 are aging and deteriorating.

14 JUSTICE KAVANAUGH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Barrett?

17 JUSTICE BARRETT: Just a quick
18 follow-up to that.

19 I think, when I asked you that
20 question about criminal penalties, you cabined
21 your answer to municipalities. Have you pursued
22 them in the context in this general permitting
23 context, you know, on farmers or small
24 businesses?

25 MR. LIU: So I don't think so. I -- I

1 don't know for sure, but --

2 JUSTICE BARRETT: Is that why you
3 cabined your answer to municipalities?

4 MR. LIU: No. I think it is -- it is
5 only because I had an answer for municipalities.

6 (Laughter.)

7 MR. LIU: My answer for -- my answer
8 in the other context is I don't know. But
9 here's -- here's what I can tell you. We view
10 it as exceedingly difficult to obtain a criminal
11 conviction for violating a provision like this.
12 That's because of the mens rea requirements in
13 this statute, as well as the
14 beyond-a-reasonable-doubt burden of proof.

15 And the -- the other thing I would say
16 is we have no interest in pursuing criminal
17 penalties because, when we have a situation -- a
18 situation like this, where the welfare of a
19 whole city is at stake, our main concern is
20 prospective injunctive relief.

21 We're not look -- our main focus is
22 not to see that we can penalize and put in jail.
23 Our main focus is how can we make this situation
24 better going forward. So our -- our main tool
25 for rectifying a situation like this is to seek

1 civil prospective injunctive relief.

2 JUSTICE BARRETT: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Jackson?

5 JUSTICE JACKSON: I'm a little
6 surprised by the suggestion that the goal of the
7 statutory permitting process here was fair
8 notice. I thought the goal was to ensure that
9 there were clean waters in the United States and
10 that that was not actually happening under the
11 previous regime, and so Congress was giving the
12 EPA additional tools to effectuate that result.

13 MR. LIU: That -- that's correct. And
14 the problem with the pre-1972 regime was not
15 that it was unfair. It wasn't that enforcement
16 under the pre -- the pre-1972 regime was -- was
17 unfair. It was that it was nonexistent.

18 JUSTICE JACKSON: Right. So we don't
19 have congressional findings, for example, that
20 the statute needs to be interpreted consistent
21 with an understanding of what would be most fair
22 to the polluters who are putting the sewage into
23 the water, is that correct?

24 MR. LIU: I don't think -- well, I'll
25 say this. I think Congress struck a balance in

1 the statute between pursuing clean water and
2 protecting the prerogatives of -- of polluters.

3 JUSTICE JACKSON: How so?

4 MR. LIU: If you look at 1319(d),
5 there is a statutory penalty provision that
6 says, when courts are crafting the correct
7 amount of statutory penalties, courts should
8 take into account things like the seriousness of
9 the violation, the economic impact of the
10 penalty on the violator.

11 JUSTICE JACKSON: I thought you were
12 going to say in terms of the -- the direct
13 statutory interpretation that you're putting
14 forward here. I hear the balance in your
15 statement that effluent limitations, it's clear
16 from the statute, are the first go-to --

17 MR. LIU: Yeah.

18 JUSTICE JACKSON: -- in trying to
19 ensure that the waters are clean but that what
20 (C) is doing is also allowing for other kinds of
21 limitations to potentially include generic
22 limitations when the effluent limitations don't
23 suffice.

24 MR. LIU: Right.

25 JUSTICE JACKSON: That's what I

1 thought your argument was.

2 MR. LIU: Exactly. Congress didn't --

3 JUSTICE JACKSON: And that's why I
4 think it's not circular in any sort of real
5 sense because these other limitations are being
6 adjudged relative to the effectiveness of the
7 effluent limitations, so they only come in as
8 necessary to make sure that we reach the clean
9 water standards when the effluent limitations
10 aren't working.

11 MR. LIU: Exactly. And San Francisco
12 below made the argument that, well, these --
13 these limitations are not necessary because, in
14 their view, the other limitations in the permit
15 were already sufficient to protect water
16 quality, and the Ninth Circuit rejected that
17 argument and there was no cert petition on that
18 issue.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Rebuttal, Ms. Steeley?

23 REBUTTAL ARGUMENT OF TARA M. STEELEY

24 ON BEHALF OF THE PETITIONER

25 MS. STEELEY: San Francisco's ask in

1 this case is simple. We simply want to
2 understand our permit limitations so that we can
3 comply with them.

4 My friends on the other side say they
5 use the Generic Prohibitions when they lack
6 information. That's simply inconsistent with
7 the way this has actually played out.

8 As we've noted in our reply brief,
9 certain divisions of EPA have put this in every
10 permit they issue. They've been very common in
11 San Francisco. But EPA already has tools that
12 address lack of information. They have an
13 entire regulatory guidance document for their
14 permit writers that tells them exactly how to do
15 it, and it tells them to set water quality-based
16 effluent limitations with a reopener clause in
17 the permit that allows them to reopen the permit
18 and impose additional limitations when they need
19 to.

20 And in San Francisco's particular
21 circumstance, we've been sending monitoring
22 information to EPA for decades about this
23 facility. It's a well-known facility to EPA.

24 I'd like to correct a couple -- a
25 couple things. Justice Kavanaugh, I -- my

1 friends on the -- my colleagues here have
2 calculated the numbers for the amount sought in
3 the litigation for the Bayside permit and it
4 comes to \$10 billion. That's the statutory
5 penalties for the days at issue.

6 And in terms of, like, what's covered
7 under our permit, all of the outfalls are
8 covered. You'll see that at Petition Appendix
9 page 428. There's one permit that governs the
10 entirety of the facility and all of its
11 outfalls. That's joint by the state regional
12 board and EPA, but it's -- it's one system of
13 obligations that covers all the outfalls.

14 And then, finally, I'd like to explain
15 as another example of why this is such a
16 hardship for San Francisco, and I'll use our
17 friends in L.A. as an example.

18 Los Angeles versus NRDC on remand from
19 this Court, the Ninth Circuit considered a
20 cause-and-contribute requirement that's nearly
21 identical to the one before this Court.

22 In that case, NRDC argued that
23 monitoring data alone, monitoring data showing
24 an exceedance of water quality standards, was
25 enough by itself to impose liability on Los

1 Angeles. Los Angeles said: No, look, there's
2 80 other dischargers into this water. It's not
3 just us. You need to show something about our
4 own discharges in order to find liability.

5 The Ninth Circuit said no. The Ninth
6 Circuit said the monitoring data alone
7 exclusively per se established a violation of
8 law with no need to show anything about Los
9 Angeles's own discharges.

10 This is the problem here. With such a
11 broad standard, with such a broad basis for
12 liability, cities like Los Angeles and like San
13 Francisco can be subject to liability without
14 any advance notice that anything about our
15 discharges is going to cause a problem and --
16 and without the ability to prevent that
17 liability.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel. The case is submitted.

20 (Whereupon at 12:58 p.m., the case was
21 submitted.)

22

23

24

25

Official - Subject to Final Review

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