

No. 23-753

In the Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA,
PETITIONER,

v.

ENVIRONMENTAL PROTECTION AGENCY.

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

**BRIEF OF AMICI CURIAE NATIONAL
MINING ASSOCIATION, ET AL.,
SUPPORTING PETITIONER**

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QUESTION PRESENTED

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

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INTERESTS OF *AMICI CURIAE*¹

Amici Curiae are leading national trade associations whose members have long been impacted by environmental laws and regulations on the business community in general, including the mining, energy, manufacturing, construction, chemical, farming, and agricultural sectors. As relevant here, *Amici* have members who are subject to National Pollutant Discharge Elimination System (“NPDES”) permits, many of which include generic conditions like those at issue in this case. If the Ninth Circuit’s decision stands, *Amici*’s members will likely see drastically increased liability and exposure for alleged violations of such permits.

The National Mining Association (“NMA”) is a national trade association whose 280-plus members include most of the producers of the Nation’s coal, metals, agricultural, and industrial minerals; the manufacturers of mining equipment; and other firms serving the mining industry. NMA’s members produce a range of commodities, all of which are essential to U.S. economic and national security,

¹ Pursuant to this Court’s Rule 37.2, *Amici* provided timely notice to all parties of their intent to file this *amicus* brief. Further, pursuant to this Court’s Rule 37.6, *Amici* state that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from *Amici Curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

supply chain, and energy and infrastructure priorities. The NMA is the only national trade association that serves the voice of the U.S. mining industry and the thousands of American workers it employs before Congress, the federal agencies, and the judiciary.

The American Chemistry Council (“ACC”) represents the leading companies engaged in the business of chemistry, which is a \$639 billion enterprise and a key element of the Nation’s economy. ACC participates on behalf of its members in administrative proceedings and in litigation arising from those proceedings.

The American Farm Bureau Federation (“AFBF”) was formed in 1919 and is the largest nonprofit general farm organization in the United States. Representing about six million member families in all 50 States and Puerto Rico, AFBF’s members grow and raise every type of agricultural crop and commodity produced in the United States. AFBF’s mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. To that end, AFBF regularly participates in litigation, including as an *amicus* in this and other courts.

The American Forest & Paper Association (“AF&PA”) serves to advance U.S. paper and wood products manufacturers through fact-based public policy and marketplace advocacy. The forest products

industry is circular by nature. AF&PA member companies make essential products from renewable and recyclable resources, generate renewable bioenergy, and are committed to continuous improvement through the industry’s sustainability initiative—*Better Practices, Better Planet 2030: Sustainable Products for a Sustainable Future*. The forest products industry accounts for approximately five percent of the total U.S. manufacturing GDP, manufactures about \$350 billion in products annually, and employs about 925,000 people. The industry meets a payroll of about \$65 billion annually and is among the top 10 manufacturing sector employers in 43 States.

The American Fuel and Petrochemical Manufacturers (“AFPM”) is the leading trade association for the domestic refining and petrochemical industry, and its members produce most of the refined petroleum products and petrochemicals manufactured in the United States.

The American Gas Association (“AGA”) represents critical domestic infrastructure—namely, local natural gas distribution companies that deliver natural gas to homes and businesses. AGA, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 77 million residential, commercial, and industrial natural gas customers in the United States, of which 96 percent—more than 74 million customers—receive their gas

from AGA members. AGA and its members advocate for the safe, reliable, and environmentally responsible delivery of natural gas across the country. Today, natural gas meets nearly one-third of the United States' energy needs.

The Associated General Contractors of America (“AGC of America”) is the Nation’s leading construction trade association. AGC of America represents more than 27,000 firms through a network of chapters in all 50 States, the District of Columbia, and Puerto Rico. AGC of America’s commercial construction firms are engaged in building, heavy, civil, industrial, utility, and other construction for both public and private property owners and developers. These construction activities on land and water often require Clean Water Act permits before proceeding.

The American Petroleum Institute (“API”) is a national trade association that represents all segments of America’s natural gas and oil industry, which supports nearly 11 million U.S. jobs and is backed by a growing grassroots movement of millions of Americans. API’s nearly 600 member companies produce, process, and distribute the majority of the Nation’s energy. API was formed in 1919 as a standards-setting organization and has developed more than 800 standards to enhance operational and environmental safety, efficiency, and sustainability.

The Chamber of Commerce of the United States of America (“Chamber”) is the world’s largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation’s business community.

The National Association of Home Builders of the United States (“NAHB”) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB’s more than 140,000 members are home builders or remodelers, who construct 80 percent of all new homes in the United States.

The National Association of Manufacturers (“NAM”) is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 States and in every industrial sector. Manufacturing employs 13 million men and women, contributes \$2.85 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-

sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Federation of Independent Business Small Business Legal Center, Inc. (“NFIB Legal Center”) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the Nation’s courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (“NFIB”), which is the Nation’s leading small business association. NFIB’s mission is to promote and protect the rights of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

The National Pork Producers Council (“NPPC”) is an association of 43 state pork producer organizations and the global voice in Washington, D.C. for the Nation’s nearly 60,000 pork producers. NPPC conducts public policy outreach at both the state and federal level with a goal of meeting growing worldwide demand for pork while simultaneously protecting animal welfare and the capital resources of pork producers and their farms. More broadly, NPPC and its members throughout the United States work to promote the social, environmental, and economic

sustainability of U.S. pork producers and their partners. As part of that mission, it regularly participates as an *amicus* in court proceedings.

The Southeastern Lumber Manufacturers Association is a trade organization established in 1962 to promote family-owned lumber businesses. The Association represents lumber manufacturers in 17 States, primarily in the South. With an emphasis on government affairs, marketing, management, and operational issues, the Association offers programs to support independent lumber manufacturers.

The Fertilizer Institute (“TFI”) represents companies engaged in all aspects of the United States’ fertilizer supply chain. The industry is essential to ensuring farmers receive the nutrients needed to enrich soil and grow the crops that feed our Nation and the world. Fertilizer is critical to feeding a growing global population, which is expected to surpass 9.5 billion people by 2050. Half of all grown food around the world today is made possible through the use of fertilizer production in the United States and foreign markets.² The U.S. fertilizer sector is comprised of producers, importers, wholesalers, and retailers. The industry supports 487,000 American jobs with annual wages in excess of \$34 billion.

² W.M. Stewart, et al., *The Contribution of Commercial Fertilizer Nutrients to Food Production*, *Agronomy Journal*, Jan. 2005, at 1–6.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1972, Congress replaced the Federal Water Pollution Control Act with the Clean Water Act (“CWA”), overhauling the Nation’s clean water regulatory framework. As part of this sea change, Congress created the National Pollutant Discharge Elimination System (“NPDES”) permit program, solving many of the compliance and enforcement difficulties with the prior statutory regime.³ The NPDES program is a critically important, central aspect of the CWA, with over 330,000 facilities nationwide maintaining active NPDES permits. Under this program, a project operator responsible for a discharge applies for a permit either to the State or to the U.S. Environmental Protection Agency (“EPA”), depending on the applicable regulatory agency. The CWA then requires the State or EPA to establish effluent limits that permittees must meet to comply with applicable water quality standards, specifying such limitations in the text of each permit.

An NPDES permit serves the dual purposes of protecting water quality and offering permittees security under the CWA’s “Permit Shield” for actions that conform to the permit. Permittees that comply

³ While similar, the NPDES program differs from the CWA’s Section 404 permit program, which deals only with dredged or fill material into navigable waters of the United States at specified sites. 33 U.S.C. § 1344.

with their NPDES permits know that they cannot be sued based upon allegations that their permitted discharges nevertheless violated the CWA.

The Ninth Circuit's decision upholding generic conditions within NPDES permits—such as those that simply require the permittee to ensure that its discharges do not contribute to a violation of water quality standards in any receiving water—undercuts the NPDES program, including the Permit Shield. For an NPDES permit to provide the permittee with the certainty that the CWA promises, the permit conditions must be expressed in numeric discharge limits or at least be specific enough for operators to know what operational actions or management practices they must employ to ensure compliance. EPA has promulgated regulations specifying how those effluent limitations are to be derived by permit writers. But under the generic conditions that the Ninth Circuit approved, no predictability is possible. After all, any amount of discharge into a receiving water could contribute (or not) to a violation of water quality standards and thus potentially violate a generic condition, subjecting the permittee to a potentially ruinous enforcement action or citizen suit.

Amici represent nearly every business sector across the U.S. economy and are concerned about the devastating consequences of the Ninth Circuit's wrongheaded decision, which approves such generic conditions. Congress created the CWA's Permit Shield to allow regulators to impose the specific

effluent limitations that are necessary to protect water quality, while providing permittees fair notice of their regulatory obligations and security from unexpected CWA liability. The Ninth Circuit's decision effectively eliminates these protections in the Nation's largest circuit because operators now cannot know whether they are complying with their permits.

In blessing the generic prohibitions at issue in this case, the Ninth Circuit also split with the Second Circuit, while contradicting the text and core design of the CWA. The Second Circuit in *Natural Resources Defense Council v. EPA*, 808 F.3d 556 (2d Cir. 2015) ("*NRDC*"), correctly rejected just these kinds of generic limitations, holding that NPDES permits must provide permittees with specific guidance as to what discharges they may make to comply. Congress made clear in the CWA that permittees need not work backwards from established water quality standards to determine the lawful level of discharge into a receiving water. EPA's conditions in this case do just that, requiring Petitioner to determine (somehow) the lawful levels of discharge based on the relevant receiving water's current water quality, rather than providing Petitioner with appropriate discharge limits.

This Court should grant the Petition.

ARGUMENT

I. The Ninth Circuit's Ruling Harms The Business Community And The Economy

The Ninth Circuit's blessing of generic conditions in NPDES permits will cause widespread regulatory uncertainty and litigation risk for the business community, undermining the core purpose of the NPDES permitting program and the Permit Shield.

Amici's members, who represent virtually every part of the U.S. economy, rely on a clear and predictable permitting process to operate their businesses with confidence, including the CWA's critically important Permit Shield. Under the CWA, "[c]ompliance with a permit issued" pursuant to Section 1342 "shall be deemed compliance" with various substantive provisions of the CWA, 33 U.S.C. § 1342, "plac[ing] the burden on permit writers rather than permittees to search through the applicable regulations and correctly apply them to the permittee through its permit," 45 Fed. Reg. 33,290, 33,312 (May 19, 1980). In other words, with some limited exceptions, "if a permit holder discharges pollutants precisely in accordance with the terms of its permit, the permit will 'shield' its holder from CWA liability." *Piney Run Pres. Ass'n v. Cnty. Comm'rs*, 268 F.3d 255, 266 (4th Cir. 2001); see also *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976). The "purpose" of the Permit Shield is "to insulate permit holders from changes in various regulations during

the period of a permit and to relieve them of having to litigate in an enforcement action the question whether their permits are sufficiently strict.” *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977). The Permit Shield “affords consistent treatment to NPDES permit holders nationwide,” *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 291 (6th Cir. 2015), and works as a “major benefit to a permittee because it protects the permittee from any obligation to meet more stringent limitations promulgated by the EPA unless and until the permit expires,” *Nat. Res. Def. Council, Inc. v. Cnty. of L.A.*, 725 F.3d 1194, 1204 (9th Cir. 2013) (citations omitted). Permit holders can look to their permits and understand what they need to do to comply with the law, offering certainty and “finality.” *E.I. du Pont de Nemours*, 430 U.S. at 138 n.28.

EPA has recognized this important aspect of the NPDES permit program. As EPA explained, the purpose of an NPDES permit “is to prescribe with specificity the requirements that a facility will have to meet . . . so that the facility can plan and operate with knowledge of what rules apply,” while allowing “the permitting authority [to] redirect its standard-setting efforts elsewhere.” 45 Fed. Reg. at 33,312. “[A] permittee may rely on its [] permit document to know the extent of its enforceable duties.” *Id.*

NPDES permits have become ubiquitous. The federal government estimates that more than 330,000 project operators nationwide maintained active

NPDES permits in fiscal year 2020. U.S. Gov't Accountability Off., *Clean Water Act: EPA Needs to Better Assess and Disclose Quality of Compliance and Enforcement Data* 7 (July 2021).⁴ This includes operators that maintain individual permits governing their own activities and many other permittees covered by “general permits,” *id.*, which States or EPA issues “for specific types of activities [that] establish[] specific rules for complying with the permit” for all regulated entities engaging in that activity, *Tex. Indep. Producers & Royalty Owners Ass’n v. EPA*, 435 F.3d 758, 761 (7th Cir. 2006) (citation omitted). The statutory scheme of permits that contain specific effluent limitations, combined with a provision providing that compliance with such limitations shields permittees from liability, affords *Amici*’s members and other operators the predictability that they need to deliver the transportation, infrastructure, manufacturing, agriculture production, and investment in U.S. operations that are essential to the Nation’s well-being.

But given the increasingly “frequent[]” use of generic permit conditions, App.34, as well as the Ninth Circuit’s decision approving of such conditions, many permittees will no longer enjoy the recognized benefits of obtaining an NPDES permit. As a practical matter, when an operator discharges a pollutant, its permit application will identify the pollutant, the State or EPA will consider the pollutant

⁴ Available at <https://www.gao.gov/assets/gao-21-290.pdf>.

and any data on discharges, and the relevant agency will establish an effluent limitation based on: (i) the operator's likely discharge and (ii) either the application of a technology-based effluent limit or the development of a water quality-based limit reflecting the level of pollutant the receiving water can assimilate before such waters cannot achieve water quality standards. If the permit application is tied to the construction of a new facility, the permit conditions and effluent limitations will bear greatly on how the permittee designs its operational and treatment systems to ensure compliance with the permit. A permittee may even alter its raw material inputs and processing technology to minimize the presence of certain expensive-to-treat pollutants that may be strictly limited by an NPDES permit. Permittees can spend millions or even billions of dollars designing and building wastewater treatment, storage, and management systems in reliance on their permits. Vague permit requirements undercut those investments and leave permittees vulnerable to "crushing consequences," App.65 (Collins, J., dissenting) (quoting *Sackett v. EPA*, 598 U.S. 651, 660 (2023)), despite their best efforts at compliance.

The consequences can indeed be "crushing." *Id.* The CWA creates the potential for criminal liability for mere negligent discharge of "pollutants," attaching "severe criminal penalties including imprisonment." *Sackett*, 598 U.S. at 660 (citing 33 U.S.C. § 1319). On the civil side, "expansive interpretations of the term 'violation,'" in addition to

a lengthy five-year statute of limitations period, also increase operators' potential exposure in the face of civil penalties, which "can be nearly as crushing as their criminal counterparts." *Id.* (citing 28 U.S.C. § 2462; *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 813, 818 (9th Cir. 2001)). Section 1319 authorizes civil penalties of more than \$66,000 *per day* a permittee remains in "violation," in addition to injunctive relief, which, depending on the nature of the injunctive relief, may come at significant cost. 33 U.S.C. § 1319(b), (d); 40 C.F.R. § 19.4. With its "capacious definition of 'pollutant,' its low *mens rea*, and its severe penalties," "[t]he CWA is a potent weapon." *Sackett*, 598 U.S. at 660.

In addition, the CWA authorizes "citizen suits," such that even if regulators do not choose to pursue an enforcement action, a permittee may still be forced to defend itself in court for potential permit violations. Under Section 1365, the CWA authorizes "any citizen" to "commence a civil action on his own behalf" "against any person" for violation of CWA effluent standards or limitations placed on permits. 33 U.S.C. § 1365(a). Like States and EPA, citizens may seek the "crushing" civil penalties assessed on a per-day basis, *Sackett*, 598 U.S. at 660, and injunctive relief, 33 U.S.C. § 1365(a), as well as litigation costs, *id.* § 1365(d), an incentive for bringing suit, *see* James T. Lang, *Citizens' Environmental Lawsuits*, 47 *Tex. Env't L.J.* 17, 22 (2017). Citizen suits have thus

become commonplace,⁵ increasing permittees' exposure in addition to their expected litigation costs.

“The legal and scientific complexity inherent” in CWA litigation “drives up cost,” often requiring consultants, testifying experts, and laboratory testing, in addition to attorneys' fees and other traditional litigation costs. Lang, *supra*, at 22–23. The complexity is even greater in cases where a plaintiff claims a violation not of specific numerical effluent limits but instead of generic conditions, which involve a much more complex question of whether a discharge is *contributing* to a violation of water quality standards in a receiving water like the Pacific Ocean. In the face of such a citizen suit, a permittee will have to pay its own litigation costs, and, if found liable, may face crippling civil penalties, injunctive terms requiring additional expenditures, and even the payment of a plaintiffs' own costs. See David Adelman & Jori Reilly-Diakun, *Environmental*

⁵ See, e.g., *S. River Watershed All., Inc. v. Dekalb Cnty., Georgia*, 69 F.4th 809 (11th Cir. 2023); *Naturaland Tr. v. Dakota Fin. LLC*, 41 F.4th 342 (4th Cir. 2022); *Cebollero-Bertran v. Puerto Rico Aqueduct & Sewer Auth.*, 4 F.4th 63 (1st Cir. 2021); *Cal. Sportfishing Prot. All. v. Chico Scrap Metal, Inc.*, 728 F.3d 868 (9th Cir. 2013); *La. Env't Action Network v. City of Baton Rouge*, 677 F.3d 737 (5th Cir. 2012); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387 (4th Cir. 2011); *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., MD*, 523 F.3d 453 (4th Cir. 2008); *Nw. Env't Advocs. v. City of Portland*, 56 F.3d 979 (9th Cir. 1995).

Citizen Suits and the Inequities of Races to the Top, 92 U. Colo. L. Rev. 377, 424 (2021).

This case exemplifies problems that *Amici*'s members face under the Ninth Circuit's approach. Petitioner cannot translate the generic conditions in its NPDES permit into numeric discharge limits or definitive actions, requirements, or practices that Petitioner may reference to "know the extent of its enforceable duties." 45 Fed. Reg. at 33,312. Petitioner cannot look to its permit and know whether its discharges are "precisely in accordance with" its terms. *Piney Run*, 268 F.3d at 266. After all, depending on the pollution levels of the receiving water, *any* amount of discharge of certain pollutants could "contribute" to a violation of water quality standards. App.65 (Collins, J., dissenting). Without specific permit conditions establishing the "limitations" necessary "to implement any applicable water quality standard," 33 U.S.C. § 1311(b)(1)(C), Petitioner may not know whether a discharge violates its NPDES permit until after the discharge is made, Petitioner is sued, and a reviewing court determines the precise level of discharge that may contribute to a violation of a water quality standard, *see, e.g., Ohio Valley Env't Coal. v. Fola Coal Co.*, 845 F.3d 133, 136–38 (4th Cir. 2017). Petitioner's permit provides it no "finality," *E.I. du Pont de Nemours*, 430 U.S. at 138 n.28, and leaves Petitioner exposed to enormous liability and "crushing consequences" . . . 'even for inadvertent violations.'" App.65 (Collins, J., dissenting) (quoting *Sackett*, 598 U.S. at 660).

II. The Ninth Circuit’s Ruling Creates A Split With The Second Circuit, While Conflicting With The CWA’s Text And Design

As Petitioner well explains, Pet.21–27, the Ninth Circuit’s decision also creates a split with the Second Circuit and contradicts the CWA.

A. The Ninth Circuit majority’s decision below conflicts with the Second Circuit’s holding that generic conditions instructing permittees to “comply with water quality standards” are not permissible in NPDES permits. *See* Sup. Ct. R. 10(a).

In *NRDC*, the Second Circuit decided whether EPA could regulate the discharge of ballast water from ships with a permit condition requiring that any “discharge must be controlled as necessary to meet applicable water quality standards in the receiving water body or another water body impacted by [the] discharges.” 808 F.3d at 577–78. The Second Circuit held that EPA’s imposition of this generic condition was unlawful because the condition did not “ensure compliance with water quality standards” and failed to “giv[e] specific guidance on the discharge limits” applicable to the permittee. *Id.* *NRDC* explained that a critical problem was that the generic condition was “insufficient to give a [permittee] guidance as to what is expected or to allow any permitting authority to determine whether a [permittee] is violating water quality standards.” *Id.* at 578. Instead, the condition

simply instructed the permittee to comply with any applicable water quality standards. *Id.*

In blessing EPA's NPDES permit here, the Ninth Circuit split with the Second Circuit regarding whether it is permissible for States and EPA to impose generic prohibitions as a part of the NPDES permitting program. The panel majority held that the generic prohibitions "are consistent with the CWA and its implementing regulations" because they "simply require that [Petitioner]'s discharges comply with applicable state [water quality standards]," a requirement that "is frequently employed by EPA in other NPDES permits." App.34. That is contrary to the Second Circuit's holding that NPDES permits must "giv[e] specific guidance on the discharge limits" applicable to a permittee to "ensure compliance." *NRDC*, 808 F.3d at 578. And the "frequen[cy]," App.34, of these generic conditions in NPDES permits is a powerful reason for this Court's review.

The Ninth Circuit tried to distinguish the Second Circuit's decision in *NRDC* by reasoning that the *NRDC* challenger sought "more stringent enforcement than the EPA required," whereas, here, Petitioner "seeks less stringent enforcement." App.35. But the question in both cases is the same: whether a generic NPDES condition complies with the CWA. Just like the challenged provision in *NRDC*, the generic conditions in the present case require the permittee to prevent the receiving waters from exceeding water quality standards, App.22,

rather than providing the permittee actual “guidance as to what is expected” for controlling its own *discharge* to achieve compliance with the CWA, *NRDC*, 808 F.3d at 578. By allowing these generic conditions that do not “give a [permittee] guidance as to what is expected or . . . allow any permitting authority to determine whether a [permittee] is violating water quality standards,” *id.* at 577–78, the Ninth Circuit created a clear circuit split.

B. The Ninth Circuit’s approval of generic NPDES conditions violates the CWA, reviving a core aspect of the pre-CWA regulatory regime that Congress deliberately rejected in 1972.

The CWA’s predecessor, the Federal Water Pollution Control Act, Pub. L. 91-224, 84 Stat. 91 (1970), differed fundamentally from the CWA in a respect directly relevant here. Under the Federal Water Pollution Control Act’s now-repealed regime, regulatory agencies focused on managing polluted waters, rather than preventing pollution in the first place, and routinely found themselves “work[ing] backward from an overpolluted body of water to determine which point sources [were] responsible and which must be abated.” *Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. at 204. Acknowledging the significant flaws in this approach, Congress adopted the CWA regulatory framework in 1972 and created the NPDES permit program. *Id.*

The CWA’s new permit-based system focuses on limiting the level of effluent that may be discharged from a point source. 33 U.S.C. §§ 1311(a)–(b), 1342(a); 40 C.F.R. § 122.1(b)(1). For any operator to “discharge . . . any pollutant,” that operator must receive an NPDES permit, 33 U.S.C. §§ 1311(a)–(b), 1342(a), which permit must ensure that the discharge of a pollutant satisfies water quality standards, *id.* §§ 1342(a), 1343. A permit, in turn, must sufficiently describe any “limitation” that is “required to implement any applicable water quality standard established pursuant to this chapter.” *Id.* § 1311(b)(1)(C). EPA regulations define effluent limitations as “any restriction imposed . . . on quantities, discharge rates, and concentrations of ‘pollutants’ which are ‘discharged’ from ‘point sources’ into ‘waters of the United States.’” 40 C.F.R. § 122.2. Effluent limitations are commonly expressed either numerically, as the maximum amount of pollutant that a permittee may discharge, *id.* § 122.45(f); *see also* 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d), or by imposition of “best management practices” through specific schedules of activities, prohibition of practices, maintenance procedures, and specific operational mandates or prohibitions where numeric effluent limitations are not feasible, 40 C.F.R. §§ 122.2, 122.44(k)(3). Despite the Ninth’s Circuit’s conflation of the terms, “effluent limitations” are different than “water quality standards”—effluent limitations are the specific limits and/or tools necessary to ensure compliance with water quality standards. Here, EPA did not provide specific

effluent limitations, guidance, or best management practices to ensure that Petitioner's discharges would comply with its NPDES permit.

The Ninth Circuit's blessing of generic conditions violates the CWA's mandatory framework. EPA in this case imposed generic conditions requiring the permittee to prevent the *receiving waters* from exceeding water quality standards, thereby forcing Petitioner to "work backward[s]" from acceptable pollution levels to Petitioner's own discharges, rather than "defin[ing]" appropriate discharge limits and "facilitat[ing]" compliance with the CWA. *Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. at 204, 205. EPA's permit tied Petitioner's CWA compliance to the ultimate water quality standards, not to any specific effluent limitation or demonstrable best management practice. App.31–36. Indeed, *any* amount of discharge into a receiving water "taken together with any *other* sources of pollution" could cause or contribute to that water violating applicable standards. *See* App.64–65 (Collins, J., dissenting). In allowing such generic conditions within NPDES permits, the Ninth Circuit violated the statutory requirement that States and EPA issue NPDES permits that ensure permittees can demonstrate compliance with effluent limitations or best management practices, and therefore show that they are not violating water quality standards.

CONCLUSION

This Court should grant the Petition.

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