No. 24-350

In the Supreme Court of the United States

PORT OF TACOMA, ET AL., PETITIONERS

v.

PUGET SOUNDKEEPER ALLIANCE

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the citizen-suit provision of the Clean Water Act (CWA), 33 U.S.C. 1365, authorizes plaintiffs to sue in federal court to enforce the terms of State-issued pollutant-discharge permits that mandate a greater scope of coverage than the CWA requires.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

* * * * *

The Clean Water Act (CWA or Act) generally prohibits the discharge of pollutants into navigable waters. See 33 U.S.C. 1311(a). Under the National Pollutant Discharge Elimination System (NPDES) program, however, the U.S. Environmental Protection Agency (EPA), and in some instances the States, may issue a permit that allows a discharge on the "condition" that

the discharger follows specified requirements under the statute. 33 U.S.C. 1342(a)(1). The permit shields the permittee from liability if it complies with the permit's conditions. 33 U.S.C. 1342(k).

The EPA Administrator may bring suit against any person who violates "section 1311, 1312, 1316, 1317, 1318, 1322(p), 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342." 33 U.S.C. 1319(a)(3); see also 33 U.S.C. 1319(a)(1). By its terms, that provision authorizes an EPA enforcement suit only when the relevant "condition or limitation" of an NPDES permit "implement[s]" one of the enumerated CWA provisions. *Ibid.* A longstanding EPA regulation provides that, if a State issues an NPDES permit that has a "greater scope of coverage" than federal law requires, "the additional coverage is not part of the Federally approved program" and is therefore not enforceable in federal court. 40 C.F.R. 123.1(i)(2).

This case raises an important question about the scope of private citizens' authority to enforce State-issued NPDES permits. Under 33 U.S.C. 1365, private citizens may "supplement[]" governmental enforcement actions with their own lawsuits. *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987). Citizens accordingly may bring suit to enforce an "'effluent standard or limitation under this chapter,'" including a "condition of a permit issued under section 1342." 33 U.S.C. 1365(a)(1)(A), (f)(7).

The court of appeals below held that Section 1365 authorizes private citizens to sue in federal court to enforce *any* requirement contained within a State-issued NPDES permit, whether the permit term at issue im-

plements one of the CWA's provisions or instead imposes additional requirements arising solely under state law. By contrast, and consistent with EPA's longstanding regulations, the Second Circuit has correctly held that, if a state permit program has a "greater scope of coverage" than federal law requires, private citizens cannot invoke Section 1365 to enforce the additional coverage in federal court. *Atlantic States Legal Found., Inc.* v. *Eastman Kodak Co.*, 12 F.3d 353, 359 (1993) (quoting 40 C.F.R. 123.1(i)(2)), cert. denied, 513 U.S. 811 (1994). The Court should resolve that circuit conflict to provide a clear and consistent standard on the reach of the citizen-suit provision.

STATEMENT

A. Statutory Background

1. The CWA establishes a comprehensive program that is designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). To achieve that objective, the Act prohibits "the discharge of any pollutant"—defined as "any addition of any pollutant to navigable waters from any point source"—except "as in compliance with" specified provisions of the Act. 33 U.S.C. 1311(a), 1362(12)(A).

The CWA "contains important exceptions to the prohibition on discharge of pollutants." *National Ass'n of Mfrs.* v. *Department of Def.*, 583 U.S. 109, 115 (2018). One of those exceptions is found in 33 U.S.C. 1342, which establishes the NPDES program. Under that program, EPA may "issue a permit" for the discharge of a pollutant "upon condition that such discharge will meet * * * all applicable requirements under [33 U.S.C.] 1311, 1312, 1316, 1317, 1318, and 1343." 33 U.S.C. 1342(a)(1); see 33 U.S.C. 1342(a)(2) (authorizing EPA to "prescribe conditions

for such permits to assure compliance with the requirements of [Section 1342(a)(1)] and such other requirements as [EPA] deems appropriate").

EPA may also authorize a State "to administer its own permit program for discharges into navigable waters within its jurisdiction." 33 U.S.C. 1342(b). Like permits issued by EPA, a State-issued NPDES permit must ensure "compliance with[] any applicable requirements of [33 U.S.C.] 1311, 1312, 1316, 1317, and 1343." 33 U.S.C. 1342(b)(1)(A). To that end, a State may not issue a permit unless "the conditions of the permit * * * provide for compliance with the applicable requirements of the CWA." 40 C.F.R. 122.4; see 40 C.F.R. 123.25(a)(1) (making requirement applicable to state programs). An NPDES permit must specify that "[a]ny permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action." 40 C.F.R. 122.41(a), 123.25(a)(12).

EPA anticipated that States might regulate beyond the CWA's requirements, and the agency has therefore carefully defined the "scope" of a state NPDES program. 40 C.F.R. 123.1. When a State adopts requirements that are "more stringent" than federal law requires, those conditions become part of the federally approved NPDES permit, 40 C.F.R. 123.1(i)(1), consistent with the CWA's requirement that dischargers must comply with "any more stringent limitation * * * established pursuant to any State law or regulations," 33 U.S.C. 1311(b)(1)(C). But "[i]f an approved State program has greater scope of coverage than required by Federal law[,] the additional coverage is not part of the Federally approved program." 40 CF.R. 123.1(i)(2).

2. The CWA authorizes enforcement suits by federal or state officials, 33 U.S.C. 1319, and in certain circum-

stances by private citizens, 33 U.S.C. 1365. The EPA Administrator may pursue an enforcement action for violations of several enumerated CWA provisions, as well as for a "violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342" of Title 33. 33 U.S.C. 1319(a)(3); see also 33 U.S.C. 1319(a)(1) and (b).

The Act's citizen-suit provision authorizes private enforcement suits against any person who is "alleged to be in violation of * * * an effluent standard or limitation under this chapter." 33 U.S.C. 1365(a). The Act defines the term "'effluent standard or limitation'" to include, *inter alia*, "a permit or condition of a permit issued under section 1342 of this title that is in effect under this chapter." 33 U.S.C. 1365(f)(7).[1] A successful enforcement action may result in injunctive relief and monetary penalties, assessed on a per-day, per-violation basis, 33 U.S.C. 1365(a), as well as attorney's fees and other litigation costs, 33 U.S.C. 1365(d).

Citizen suits under Section 1365 are "meant to supplement rather than to supplant governmental action," *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987), and they may be brought only in specified circumstances. Before filing

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[1] Before December 4, 2018, Section 1365 defined the term "effluent standard or limitation" to include "a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter." 33 U.S.C. 1365(f)(6) (2012). The Frank LoBiondo Coast Guard Authorization Act of 2018, Pub. L. No. 115-282, 132 Stat. 4192, made non-substantive changes to the text of that provision. Although respondent alleged that permit violations had occurred both before and after December 4, 2018, see D. Ct. Doc. 254, at 11-24 (June 5, 2019), the parties have focused on the current statutory text. The government accordingly cites the current text, but its arguments would apply equally to the previous version.

suit, a citizen must give 60 days' notice to the EPA Administrator. See 33 U.S.C. 1365(b)(1)(A). If EPA or a State is diligently prosecuting an action, a citizen may not bring suit but may intervene as a matter of right in any federal-court proceeding. 33 U.S.C. 1365(b)(1)(B).

B. The Present Controversy

1. EPA has approved the Washington Department of Ecology (Ecology) to issue NPDES permits in the State of Washington. 39 Fed. Reg. 26,061 (July 16, 1974); see 40 C.F.R. 123.1(d)(1). Under state law, Ecology also administers the State Water Pollution Control Act, Wash. Rev. Code. Ann. ch. 90.48, which prohibits "any person" from discharging pollutants into waters of the State without a permit. §§ 90.48.080, 90.48.160 (West 2015). As relevant here, Ecology regulates stormwater discharges from industrial facilities through a general permit. Wash. Admin. Code § 173-226-010. Every five years, Ecology issues the Washington Industrial Stormwater General Permit (ISGP), which serves as both an NPDES permit and a State Waste Discharge Permit. Pet. App. 27a.

EPA regulation of industrial stormwater at transportation facilities, like ports, applies to "[o]nly those portions of the facility" that conduct "industrial activity," which means, as relevant here, vehicle maintenance, equipment cleaning, and airport deicing. 40 C.F.R. 122.26(b)(14)(viii). Since 2010, the ISGP has not included that limitation. See Pet. App. 5a. The ISGP's stormwater discharge requirements therefore apply to the "entire footprint" of any facility that conducts "industrial activity," not simply to the particular portions of the facility where such activity occurs. *Id.* at 6a, 8a.

2. Petitioners are the owners and operators of the Port of Tacoma's West Sitcum Terminal (Terminal).

The Terminal is a 137-acre marine cargo terminal at the Port of Tacoma located in south Puget Sound, Washington. Pet. App. 3a. "The Wharf" is a 12.6-acre overwater portion of the Terminal with five large cranes used for loading and unloading cargo containers. *Ibid.* The courts below decided this case on the understanding that no vehicle maintenance, equipment cleaning, or airport deicing occurs at the Wharf. See *id.* at 4a, 46a.[2]

In 2017, respondent Puget Soundkeeper Alliance filed suit in the Western District of Washington against the then-tenant of the Terminal, and respondent later amended its complaint to add petitioners as co-defendants. Pet. App. 51a. Respondent alleges that, since 2010, petitioners' stormwater discharges have routinely exceeded the ISGP's benchmarks for minerals such as copper and zinc. C.A. E.R. 242-247. Respondent also alleges that petitioners have failed to monitor and control pollution from the Wharf as required by the ISGP. *Id.* at 789-790.

The district court granted petitioners' motion for summary judgment. Pet. App. 48a-69a. The court held that, by its terms, the ISGP (as relevant here, the 2015 ISGP) did not cover discharges from the Wharf. *Id.* at 65a-66a. The court accordingly did not address peti-

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[2] In recent correspondence with Ecology, the Port of Tacoma stated that the Wharf had performed "cleaning and maintenance of electric ship-to-shore cranes and crane parts that cannot be removed from the wharf for cleaning or repair." Letter from Emily Jones to Wash. Dept. of Ecology 6 (Jan. 10, 2025). The district court, however, rejected respondent's argument that "vehicle maintenance and/or equipment cleaning occur on the [W]harf because the large mechanical cranes are maintained and cleaned" there. Pet. App. 46a. Respondent did not appeal that finding, and the case accordingly comes to the Court on the understanding that no industrial activity occurs at the Wharf.

tioners' argument that, to the extent the ISGP extended such coverage to the Wharf as a matter of state law, that expanded scope of coverage could not be enforced in a CWA citizen suit. See C.A. E.R. 791-802.

3. The court of appeals reversed. Pet. App. 1a-20a.

The court of appeals held that the 2015 ISGP requires the Port to control discharges of stormwater from the entire facility, including the Wharf. Pet. App. 8a-11a. The court acknowledged that, "[i]n this respect, the ISGPs differ from the federal regulations. Under the ISGPs, coverage is triggered * * * when the facility conducts industrial activity, not when a particular discharge is 'associated with industrial activity.'" *Id.* at 8a (quoting 40 C.F.R. 122.26(a)(1)(ii)).

The court of appeals concluded that respondent could file suit under Section 1365 to enforce the ISGP's requirements. Pet. App. 11a-13a. The court held that the "plain language" of the citizen-suit provision compelled that result. *Id.* at 11a. The court observed that Section 1365 authorizes citizen suits against alleged violators of "an effluent standard or limitation under this chapter," and that "[t]he term 'effluent standard or limitation under this chapter' is defined to include 'a permit or condition of a permit issued under section 1342 of this title that is in effect under this chapter.'" *Id.* at 12a (quoting 33 U.S.C. 1365(a) and (f)(7)). Because the 2015 ISGP was "'a permit issued under section 1342'" and was "'in effect'" at the relevant times, the court held that respondent could "bring a citizen suit to challenge an alleged violation of the ISGP." *Ibid.* The court observed that this result accorded with its circuit precedent holding that "[t]he plain language of [33 U.S.C.] 1365 authorizes citizens to enforce *all* permit conditions." *Ibid.* (quoting *Northwest Envtl. Advocates* v. *City of Portland*, 56 F.3d

979, 986 (9th Cir. 1995) (*NWEA II*), cert. denied, 518 U.S. 1018 (1996)).

The Ninth Circuit acknowledged that its holding "directly conflicts" with the Second Circuit's decision in *Atlantic States Legal Foundation, Inc.* v. *Eastman Kodak Co.*, 12 F.3d 353 (1993). Pet. App. 13a (citation omitted). There, the Second Circuit held that Section 1365 did not authorize private plaintiffs to enforce a provision in a State-issued NPDES permit that was based on state law and had a "greater scope of coverage" than the CWA required. *Atlantic States*, 12 F.3d at 359 (quoting 40 C.F.R. 123.1(i)(2)). The Ninth Circuit explained, however, that "'[w]hether or not the ISGPs prescribe 'a greater scope of coverage' than the federal regulations in the sense contemplated by the Second Circuit," the court was "bound" to follow *NWEA II*. Pet. App. 13a (citation omitted).

Judge O'Scannlain specially concurred. Pet. App. 18a-20a. While recognizing that the panel opinion "faithfully follow[ed] Ninth Circuit precedent," he observed that such precedent "created a circuit split" that was a "source of ongoing confusion to parties." *Id.* at 18a-19a. Judge O'Scannlain also stated that he disagreed with that precedent because it "expand[ed] citizen standing in a way Congress never intended." *Id.* at 18a.

DISCUSSION

The CWA authorizes private persons to sue in federal court for violations of an "effluent standard or limitation under this chapter." 33 U.S.C. 1365(a)(1)(A). The "'effluent standard[s] or limitation[s] under this chapter'" that private plaintiffs may sue to enforce include "a permit or condition of a permit issued under section 1342." 33 U.S.C. 1365(f)(7).

The courts of appeals are divided as to whether Section 1365 authorizes suits to enforce a condition that appears in an NPDES permit but is imposed by state rather than federal law. The Second Circuit has correctly held that, where a permit condition is greater in scope than federal law requires, that additional coverage is not enforceable by citizen suit in federal court. In the decision below, the Ninth Circuit reaffirmed its contrary precedent. This Court's intervention is warranted to resolve that conflict.

A. The Decision Below Is Incorrect.

The state permit at issue here (the 2015 ISGP) includes requirements that relate to both the NPDES and "State Waste Discharge" programs. Pet. App. 27a. The court of appeals accordingly accepted that the permit's coverage is greater in scope than the NPDES program requires. *Id.* at 13a. In particular, the ISGP imposes conditions governing stormwater discharges on all portions of a facility where "industrial activity" occurs, whether or not a particular discharge is associated with such activity. *Id.* at 8a. The court of appeals nevertheless held that those state-law requirements were enforceable in federal court under 33 U.S.C. 1365, even as applied to discharges that are not regulated under the CWA. Pet. App. 11a-13a.

That holding was erroneous. Section 1365 authorizes citizens to sue to enforce the "effluent standard[s] or limitation[s] under [Chapter 26 of Title 33]," including the permit conditions that implement those statutory requirements. 33 U.S.C. 1365(a)(1)(A) and (f)(7). Section 1365 is not a backdoor mechanism for broadening the scope of the CWA's substantive requirements. To the extent the ISGP covers discharges that the CWA does not regulate, the ISGP's terms are not enforceable

in federal court, even if the state-law requirement a citizen seeks to enforce appears in an NPDES permit. The court of appeals' contrary reading contravenes the CWA's text, structure, and context. It would also produce the anomalous result of affording private plaintiffs broader enforcement authority under the CWA than the federal government possesses.

1. Section 1365, titled "Citizen suits," facilitates enforcement of the CWA's substantive requirements. Section 1365 does not establish substantive standards or limitations on the discharge of pollutants to waterways. Instead, it authorizes a private plaintiff to "commence a civil action on his own behalf" against any person who violates "an effluent standard or limitation under this chapter." 33 U.S.C. 1365(a). Those "effluent standard[s] or limitation[s]," in turn, are found in the preceding provisions of Chapter 26 (*i.e.*, 33 U.S.C. 1251-1388), including in Section 1311 ("Effluent limitations"); Section 1312 ("Water quality related effluent limitations"), Section 1316 ("National standards of performance"), Section 1317 ("Toxic and pretreatment effluent standards"); and Section 1322(p) ("Uniform national standards for discharges incidental to normal operation of vessels").

Section 1365(f) accordingly defines the term "effluent standard or limitation under this chapter" by reference to specified CWA requirements. The provision covers "an unlawful act under subsection (a) of section 1311," 33 U.S.C. 1365(f)(1); "an effluent limitation or other limitation under section 1311 or 1312," 33 U.S.C. 1365(f)(2); a "standard of performance under section 1316," 33 U.S.C. 1365(f)(3); an "effluent standard" "under section 1317," 33 U.S.C. 1365(f)(4); a "standard of performance or requirement under section 1322(p)," 33

U.S.C. 1365(f)(5); a "certification under section 1341," 33 U.S.C. 1365(f)(6); and a "regulation under section 1345(d)," 33 U.S.C. 1365(f)(8). Section 1365(f)(1)-(6) and (8) thus authorize citizen suits to enforce standards or limitations that are imposed or promulgated "under" specified CWA provisions.

Section 1365(f)(7), the definitional provision at issue in this case, defines the term "'effluent standard or limitation under this chapter'" to include the "condition[s] of a permit issued under section 1342." 33 U.S.C. 1365(f)(7). Under Section 1342, EPA or a State may issue an NPDES permit to allow discharges that would otherwise violate the Act. An NPDES permit may be issued "upon condition" that "such discharge will meet * * * all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343." 33 U.S.C. 1342(a)(1). Section 1365(f)(7) thus allows a citizen to bring suit to enforce the "standards or limitations" set forth in Chapter 26 when they are "translated into the conditions of an NPDES permit." *EPA* v. *California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 223 (1976) (emphasis omitted).

The question presented here is whether Section 1365(f)(7)'s reference to the "condition[s] of a permit issued under section 1342," 33 U.S.C. 1365(f)(7), *also* encompasses state-law requirements that are included in State-issued NPDES permits but go beyond the scope of the CWA's discharge prohibitions. Section 1365(f)(7) does not encompass such state-law requirements. Section 1342(a)(1) and (2) use the words "condition" and "conditions" to refer to NPDES permit terms that are intended to ensure compliance with enumerated CWA provisions. 33 U.S.C. 1342(a)(1) and (2). Section 1365(f)(7)'s reference to a "condition of a permit issued under section 1342," 33 U.S.C. 1365(f)(7), should be un-

derstood in the same manner. That reading is reinforced by the fact that Section 1365(f)(1)-(6) and (8) are all unambiguously limited to requirements and prohibitions that implement federal law.

That reading is also consistent with longstanding EPA regulations. Those regulations define the "scope" of a State's NPDES program. 40 C.F.R. 123.1. The regulations specify that, if a State's NPDES program includes elements with a "greater scope of coverage" than the CWA itself, the "additional coverage"—while enforceable under state law—is "not part of the Federally approved [NPDES] program" and therefore is not enforceable in federal court. *Ibid.* EPA promulgated that regulatory provision in 1980, *Consolidated Permit Regulations*, 45 Fed. Reg. 33,290 (May 19, 1980), shortly after the CWA's enactment, and the rule has remained in effect since then. That sort of "contemporaneous[]" and "consistent" interpretation is "especially useful in determining the statute's meaning." *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 394 (2024).

b. The structure of the CWA's broader enforcement scheme reinforces the agency's interpretation. Under Section 1319, the federal government may enforce a "condition or limitation" in "a permit issued under section 1342." 33 U.S.C. 1319(a)(3). That provision, however, limits the government's enforcement authority to permit "condition[s] or limitation[s] implementing" Section 1311, 1312, 1316, 1317, 1318, 1322(p), 1328, or 1345. *Ibid.* Section 1319 thus does not authorize EPA to enforce any NPDES permit conditions that are broader in scope than federal law requires.

The citizen-suit provision should be read in light of that limitation on the government's enforcement authority. Section 1365's text makes clear that "the citi-

zen suit is meant to supplement rather than supplant governmental action." *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found. Inc.*, 484 U.S. 49, 60 (1987). A private plaintiff must give EPA 60 days' notice before bringing suit, 33 U.S.C. 1365(b)(1)(A), and may not bring suit if EPA or the State "is diligently prosecuting[] an enforcement action," 33 U.S.C. 1365(b)(1)(B). The citizen-suit provision thus "address[es] situations * * * in which the traditional enforcement agency declines to act." *Ohio Valley Envtl. Coal.* v. *Fola Coal Co.*, 845 F.3d 133, 145 (4th Cir. 2017) (*OVEC*).

The court of appeals' reading of Section 1365, under which private plaintiffs may sue in federal court on a federal cause of action to enforce NPDES permit conditions implementing *state-law* standards that EPA itself may not enforce, is thus contrary to the basic structure of the statutory scheme. Such a conferral of enforcement authority on private plaintiffs would raise serious concerns under Article II. See *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring); *Department of Transp.* v. *Association of Am. R.R.s*, 575 U.S. 43, 62 (2015) (Alito, J., concurring); cf. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). It would also subvert the ability of state authorities to determine whether and how private plaintiffs should be allowed to enforce state-law restrictions on pollutant discharges. To avoid those problems, Section 1365(f)(7) should be construed to extend no more broadly than the

NPDES permit conditions that the federal government is authorized to enforce—that is, permit conditions that implement the effluent standards or limitations under the CWA.

2. Respondent's contrary arguments lack merit.

a. Like the court of appeals (see Pet. App. 12a), respondent emphasizes that the ISGP is a "permit issued under section 1342." Br. in Opp. 23 (citing 33 U.S.C. 1365(f)(7)). In respondent's view, every term included within an NPDES permit therefore is a "condition" of that permit within the meaning of Section 1365(f)(7). *Ibid.*

That is wrong. As a matter of administrative convenience, EPA allows a state permitting agency to include separate state-law requirements within the same NPDES permit that is crafted to ensure a discharger's compliance with the CWA. As explained above, however, Section 1342 uses the terms "condition" and "conditions" to refer specifically to NPDES permit terms that are intended to ensure compliance with enumerated CWA provisions. See pp. 12-13, *supra*. Section 1365(f)(7)'s reference to a "permit or condition of a permit issued under section 1342" should be read in the same manner. 33 U.S.C. 1365(f)(7).

Respondent's interpretation of Section 1365 would also have the untoward practical effect of treating substantive state-law requirements as though they were part of the CWA. The Ninth Circuit did not hold that any CWA provision *other than* Section 1365 requires petitioners to control stormwater discharges from the Wharf. Yet under respondent's view, petitioners' failure to control those discharges to the extent the ISGP requires would subject petitioners to suit in federal court on a federal cause of action, and potentially to the

remedies authorized by the CWA. See 33 U.S.C. 1319(d), 1365(a).

b. Respondent's reliance on EPA's regulations is misplaced. Respondent highlights (Br. in Opp. 24) a regulatory provision stating that a "permittee must comply with all conditions of [a] permit," and that "[a]ny permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement." 40 C.F.R. 122.41(a). The regulation they cite, however, addresses NPDES permits generally, including permits issued by EPA. It accordingly focuses on the types of conditions that all NPDES permits must contain, *i.e.*, conditions designed to ensure compliance with federal law. See, *e.g.*, 40 C.F.R. 122.41(a)(2) (referring to penalties available against "any person who violates section 301, 302, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any such sections").

The regulations that specifically apply to State-issued NPDES permits are found at 40 C.F.R. Pt. 123. Those regulations do not suggest that every term of a State-issued permit is a "condition" with which federal law requires compliance. On the contrary, as explained, Section 123.1 states that "[i]f an approved State program has greater scope of coverage than required by Federal law[,] the additional coverage is not part of the Federally approved program." 40 C.F.R. 123.1(i)(2). Thus, whatever inference might otherwise be drawn from the more general language of Section 122.41(a), Section 123.1(i)(2) makes clear that not every term of a State-issued NPDES permit imposes a federal-law obligation.

c. Finally, respondent emphasizes (Br. in Opp. 17) that citizens may bring suit to enforce "more stringent standards and limitations" established by a State. *Cal-*

ifornia, 426 U.S. at 224. Respondent argues that, if citizens may bring suit to enforce State-imposed requirements that are "more stringent" than federal law requires, they must also be able to enforce requirements that fall entirely outside the CWA's scope. Br. in Opp. 24-25 (citation omitted).

That contention lacks merit. When a State regulates the same discharges that the CWA regulates, but the State's substantive permit conditions are "more stringent" than federal law requires, those conditions become part of the federally approved NPDES permit, 40 C.F.R. 123.1(i)(1), consistent with the CWA's requirement that dischargers comply with "any more stringent limitation * * * established pursuant to any State law," 33 U.S.C. 1311(b)(1)(C). Thus, a more stringent state-law standard included in the permit is effectively treated as part of the federal conditions, including for citizen-suit purposes. But "[i]f an approved State program has greater scope of coverage than required by Federal law[,] the additional coverage is not part of the Federally approved program." 40 C.F.R. 123.1(i)(2). That regulatory language describes the situation presented here, where petitioners' alleged ISGP violations involved discharges that the Ninth Circuit assumed that the CWA does not regulate.

Contrary to respondent's contention (Br. in Opp. 18), the difference between state-law conditions that are "'more stringent'" than the corresponding federal-law restrictions, and those that are "greater in scope," is not "elusive." Consider two examples: Consistent with its authority under 33 U.S.C. 1311, EPA might impose a discharge limit of eight parts per billion of lead. If a State set a lower discharge limit (say, five parts per billion), that requirement would be more stringent than

the CWA but not broader in scope. By contrast, in revising its permit regulations for concentrated animal feeding operations, EPA observed that, although agricultural stormwater discharges are "not subject to permitting requirements under the CWA," such discharges "could be subject to additional State requirements, including additional requirements related to water quality." 73 Fed. Reg. 70,418, 70,458 (Nov. 20, 2008). EPA explained that any restrictions on such discharges that State-issued NPDES permits might impose "would go beyond the scope of the federal NPDES program" and would not "be federally enforceable." *Ibid.* (citing 40 C.F.R. 123.1(i)(2)).

B. The Acknowledged Circuit Conflict Warrants This Court's Review.

1. The court of appeals acknowledged that its holding "directly conflicts with the Second Circuit's decision" in *Atlantic States Legal Foundation, Inc.* v. *Eastman Kodak Co.*, 12 F.3d 353 (1993). Pet. App. 13a (citation omitted). In *Atlantic States*, the Second Circuit relied in part on 40 C.F.R. 123.1(i)(2) in holding that Section 1365 did not authorize the plaintiff's suit to enforce an NPDES permit issued by the State of New York. 12 F.3d at 359-360. The court concluded that, if the permit was construed to prohibit the discharges at issue in that case, "the action would fail because New York would be implementing a regulatory scheme broader than the CWA, and such broader state-law schemes are unenforceable through Section [1365] citizen suits." *Ibid.* (citation omitted).[3]

[3] The Second Circuit was incorrect to the extent it suggested that the federal government might enforce permit provisions that have "a greater scope of coverage than that required" by the CWA. *Atlantic States*, 12 F.3d at 359 (citation omitted). As explained, federal

That conflict in authority is likely to persist unless this Court intervenes. Respondent suggests (Br. in Opp. 10) that, because "the Second Circuit decided *Atlantic States* in the heyday of the *Chevron* era," that court might now give less weight to EPA's regulation and might accordingly reach a different outcome. But the *Atlantic States* court invoked *Chevron Manufacturers Ass'n* v. *Natural Resources Defense Council*, 470 U.S. 116 (1985), only in rejecting the plaintiff's separate argument that the defendant's discharges violated the CWA's substantive prohibitions, 12 F.3d at 358, not in clarifying the application of the citizen-suit provision to State-issued NPDES permits. Cf. *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649-650 (1990) (declining to defer under *Chevron* to an agency regulation that addressed the scope of a private right of action). And, for the reasons stated above, the proper reading of the citizen-suit provision compels that result under ordinary principles of interpretation.

The circuit conflict warrants this Court's review. For decades, EPA regulations have reflected the agency's view that, while States may issue NPDES permits with a greater scope of coverage than federal law requires, "the additional coverage" will not be treated as "part of the Federally approved program." 40 C.F.R. 123.1(i)(2). The Ninth Circuit's interpretation of the CWA's citizen-suit provision upends that scheme. The court's approach disappoints the expectations of both regulated parties (who may be sued in federal court and

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enforcement authority is limited to permit conditions that "implement[]" the CWA's requirements. 33 U.S.C. 1319; see pp. 13-15, *supra*. The regulation on which the Second Circuit relied applies equally to any attempt by the federal government to enforce a condition of a State-issued NPDES permit. See 40 C.F.R. 123.1.

are potentially subject to CWA remedies for discharges that the CWA does not regulate) and the permitting States themselves (who are unable to control whether and how private enforcement of state-law discharge restrictions will occur). See Iowa et al. Amici Br. 15-21. In the Second Circuit, by contrast, States may continue to include within a single program all requirements for all dischargers, without concern that terms outside the "Federally approved program" will be enforceable in federal court. 40 C.F.R. 123.1(i)(2).

2. Two other courts of appeals—the Eleventh and Fourth Circuits—have suggested that they might adopt the Ninth Circuit's expansive interpretation of Section 1365. In *Parker* v. *Scrap Metal Processors, Inc.*, 386 F.3d 993 (2004), the Eleventh Circuit considered the question whether State-issued discharge permits could be enforced through CWA citizen suits *at all*. *Id.* at 1004-1008. In answering that question in the affirmative, the court rejected the Second Circuit's understanding of Section 1365's scope. *Id.* at 1006 n.15. The Eleventh Circuit approvingly cited the Ninth Circuit's decision in *NWEA II*, and then suggested that "[t]he CWA authorizes citizen suits for the enforcement of all conditions of NPDES permits." *Id.* at 1008 (citation omitted).

The Fourth Circuit has similarly signaled that it would allow federal enforcement of all conditions imposed by State-issued NPDES permits. See *OVEC*, 845 F.3d at 143. The court held that a "permit holder must comply with *all* the terms of its permit to be shielded from liability" under Section 1342(k). *Ibid.* Thus, if the Ninth Circuit's decision stands, other courts of appeals may follow the same approach, treating *all* conditions in State-issued NPDES permits as federally enforceable.

C. This Case Is A Suitable Vehicle For This Court To Address The Question Presented.

This case cleanly presents an important and recurring question of law: whether Section 1365 authorizes private enforcement in federal court of provisions that are contained within a State-issued NPDES permit but have a "greater scope of coverage" than the CWA requires. Pet. i.

1. The question presented was squarely raised and decided below. Petitioners argued that, by extending stormwater discharge requirements to the Wharf, the relevant ISGP provision "exceed[s] the requirements of the federal regulations" that define covered transportation facilities, 40 C.F.R. 122.26(b)(14)(viii), and therefore is not enforceable through a CWA citizen suit. Pet. App. 11a-13a. The court of appeals rejected that argument, finding it to be "foreclosed by the plain language of the Clean Water Act's citizen-suit provision." *Id.* at 11a. The court held that, because "the ISGP is 'a permit issued under section 1342,'" respondent could bring a CWA citizen suit to enforce *any* of the ISGP's terms. *Id.* at 12a (quoting 33 U.S.C. 1365(f)(7)). That ruling was consistent with circuit precedent, which holds that "[t]he plain language of [S]ection 1365 authorizes citizens to enforce *all* permit conditions." *Ibid.* (citation omitted).

2. Respondent offers two arguments that this case is a poor vehicle for review. Neither should dissuade this Court from correcting the Ninth Circuit's erroneous interpretation of the citizen-suit provision.

a. Respondent argues (Br. in Opp. 15-16) that petitioners cannot ultimately prevail in this suit even if the Court decides the question presented in their favor. In particular, respondent contends (*id.* at 13-15) that

Washington regulated the Wharf pursuant to its residual designation authority over stormwater discharges under 33 U.S.C. 1342(p)(2)(E), which allows the State to regulate any stormwater discharge that it determines "is a significant contributor of pollutants to waters of the United States." If that is so, the permit at issue here would not have a "greater scope of coverage" than federal law requires, since a condition that implements a requirement of Section 1342(p)(2)(E) would be a necessary condition of an NPDES permit.

Neither the court of appeals nor the district court has addressed that question. Indeed, respondent urged the lower courts to avoid the question of residual designation and instead hold that *all* NPDES permit conditions are enforceable regardless of the source of law. See Pet. Reply Br. at 8-9. The court of appeals agreed, finding it irrelevant "[w]hether or not the ISGP prescribes 'a greater scope of coverage' than the federal regulations" because "'[t]he plain language of [33 U.S.C.] 1365 authorizes citizens to enforce *all* permit conditions.'" Pet. App. 12a (citation omitted). If the Court grants certiorari and rejects the Ninth Circuit's categorical rule, it can remand for further proceedings consistent with its opinion, including for a determination whether Washington exercised its residual designation authority. See, *e.g.*, *County of Maui* v. *Hawaii Wildlife Fund*, 590 U.S. 165, 186 (2020).

Respondent contends (Br. in Opp. 15-16) that, because petitioners cannot collaterally attack the validity of the process used by Washington to expand the scope of covered transportation facilities in the 2010 and 2015 ISGPs, "the die is already cast." That contention is incorrect. Petitioners argue that the ISGP provision extending permit coverage to the Wharf is not an "effluent

standard or limitation" within the meaning of 33 U.S.C. 1365(a)(1)(A) and (f)(7), and therefore is not enforceable in a CWA citizen suit, because it encompasses discharges that are not regulated by the CWA. That argument does not collaterally attack the permit's validity, since Washington could continue to enforce the provision as a matter of state law even if petitioners ultimately prevail.

b. Respondent argues (Br. in Opp. 16-17) that this Court's review would be premature because challenges to the 2020 ISGP permit are pending in Washington state court. But only the 2015 version of the ISGP remains at issue here, Pet. 8; see Br. in Opp. 7, and the court of appeals declined to address any question related to the 2020 permit, Pet. App. 18a. The resolution of the pending state-court proceedings accordingly will not affect this Court's ability to resolve the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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