

No. 23-753

IN THE
Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

**On Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF ENVIRONMENTAL AND
COMMUNITY ORGANIZATIONS AS AMICI
CURIAE IN SUPPORT OF RESPONDENT**

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INTERESTS OF AMICI CURIAE

Amici curiae Columbia Riverkeeper, Conservation Law Foundation, Natural Resources Defense Council, San Francisco Baykeeper, Sierra Club, Southern Environmental Law Center, and Waterkeeper Alliance are environmental and community nonprofit organizations that rely on the Clean Water Act and its comprehensive water-quality protections to help protect public health and the environment. Amici have an interest in ensuring that the Act is interpreted consistently with Congress's stated objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). And they have a longstanding interest in the proper interpretation, and effective operation, of the Act's National Pollutant Discharge Elimination System.¹

¹ No party has authored this brief in whole or in part, and no one other than amici, their members, and their counsel have paid for the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Clean Water Act exists to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To do that, the Act prohibits the “discharge of any pollutant by any person.” *Id.* § 1311(a). This prohibition does not apply if a permit issued under the National Pollutant Discharge Elimination System program authorizes the discharge. *See id.* §§ 1311(a), 1342(a)(1).

An NPDES permit must include the limitations that will ensure that water quality standards will be met. States lead the development of these standards, which identify uses for waters, water quality criteria based on those uses, and antidegradation measures. *See PUD No. 1 of Jefferson Cnty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 704–05 (1994). Permits must include, at a minimum, technology-based effluent limitations. *See* 33 U.S.C. § 1311(b); *see also id.* § 1362(11) (defining “effluent limitation”). Permits must also include water-quality based limitations: These “more stringent limitation[s]” include “those necessary to meet water quality standards, treatment standards, or schedules of compliance” *Id.* § 1311(b)(1)(C).

In seeking certiorari, petitioner asked this Court to decide whether the Act allows NPDES permits to include what petitioner calls “generic” limitations. Pet. i. By that, petitioner appears to refer to limitations that “generically prohibit[] . . . causing or contributing to exceedances of water quality standards.” *Id.* at 3. Petitioner has now shifted its challenge to take issue with what it calls “receiving water” limitations, which it defines as limitations that “condition compliance on the quality of receiving waters.” Pet. Br. 4, 49.

Neither of petitioner's terms are statutory terms. As its own amici recognize, because Congress enacted detailed requirements for the permitting program, tinkering with that carefully calibrated regime inherently risks "negatively impact[ing]" the NPDES program. Nat'l Ass'n of Home Builders Br. 3. Petitioner's use of hazy, undefined terms to describe various categories of permit limitations, terms that are nowhere to be found in the Act, magnifies that risk.

Given that risk, amici address two features of petitioner's briefing here. The first is petitioner's use of terms that neither the Act nor practitioners use to describe permit limitations, often without defining them clearly. This brief describes the types of limitations that appear in NPDES permits and why, so that this Court can assess which would be affected by petitioner's proposed rule. The second is the criticism petitioner (echoed by its amici) levels at the enforcement of "receiving water" limitations, presumably because it hopes that this Court will work backwards to interpret the Act in line with petitioner's policy preferences. That is not how statutes are read, but even so, this brief explains that petitioner's criticisms lack a basis in the actual cases and the available data on enforcement actions.

ARGUMENT

I. NPDES Permits Must Ensure That Water Quality Standards Are Met.

Petitioner tells an incomplete story about the process for issuing NPDES permits and the content of those permits. Permits are produced through an iterative process that reflects the permitholder's input. And permitting authorities commonly include many

types of limitations to meet the relevant water quality standards.

A. NPDES permits issue through an iterative process.

To start, petitioner incorrectly paints the NPDES permitting process as one-sided. *See* Pet. Br. 15 (“EPA inserted”; “EPA included”). In reality, permits reflect a substantial back and forth between the permit holder and the permitting agency. An applicant must provide the permitting authority with information about its discharges and its facility. *See* EPA, *NPDES Permit Writers’ Manual* §§ 4.3, 4.5 (Sept. 2010).² The permitting authority then seeks any additional information it needs to determine the permit limitations, for example, through site visits and information requests. *See NPDES Permit Writers’ Manual* §§ 4.5, 4.6.2; *CSO Guidance* § 3.2.

In practice, permits are then drafted through an iterative process. The permit applicant and permitting authority typically exchange views on proposed permit limitations over multiple rounds of review. This process also produces a draft permit, which the public (including the applicant) may review and comment on.

² This brief cites the NPDES Permit Writers’ Manual that permitting authorities use on a day-to-day basis, as well as the guidance for Combined Sewer Overflow permits like the permit at issue here. *See generally* EPA, *Combined Sewer Overflows: Guidance for Permit Writers* (Aug. 1995); *see also* EPA, *Combined Sewer Overflows (CSOs)* (last visited Aug. 30, 2024) (explaining that a “combined sewer system collects rainwater runoff, domestic sewage, and industrial wastewater into one pipe” and that when flows exceed the pipe capacity, “untreated stormwater and wastewater flows into nearby waterbodies”), bit.ly/3T9yYYw. Both documents implement the NPDES regulations. *See generally* 40 C.F.R. §§ 122.1–122.64.

See *NPDES Permit Writers' Manual* § 11.3.2. Then, after a permit issues, it may be challenged and modified as necessary. See *id.* §§ 11.2, 11.4; see also 40 C.F.R. § 124.19. Because permits cover only a five-year period, they are also updated through the renewal process to remove limitations that prove unnecessary, update limitations in light of new technology, or add limitations needed to meet water quality standards. See 33 U.S.C. § 1342(b)(1)(B); 40 C.F.R. § 122.46(a); *NPDES Permit Writers' Manual* § 3.1. And permits can be reopened during that five-year term if circumstances change such that different limitations are warranted. See 40 C.F.R. § 122.62.

The history of petitioner's Oceanside permit at issue here illustrates this process. Over many renewal cycles—for the Oceanside facility itself and for the Richmond-Sunset and Southwest facilities that preceded it—petitioner has successfully asked the California Regional Water Quality Control Board and EPA to modify the permit in light of new circumstances and information.³ And these agencies have likewise relied on data generated from the permit's monitoring requirements to remove or revise requirements of their own accord.⁴

³ See, e.g., EPA & Cal. Reg'l Water Quality Control Bd., Waste Discharge Requirements for Westside Treatment Facility & Southwest Ocean Outfall of the City & County of San Francisco, Order No. 88-106, at 1 (July 11, 1988) (after petitioner lost anticipated construction grant funding, EPA and the California State Water Resources Control Board recommended interim projects to improve petitioner's treatment capabilities while it worked towards longer-term improvements).

⁴ Cal. Reg'l Water Quality Control Bd., Amending Waste Discharge Requirements for Westside Treatment Facility, City &

Indeed, the specific permit conditions petitioner challenges resulted from this back and forth. The Clean Water Act requires petitioner to develop and implement a long-term CSO control plan to comply with water quality standards—a requirement that Congress imposed directly by codifying EPA’s CSO Policy. *See* 33 U.S.C. § 1342(q) (requiring that permits “shall conform to the Combined Sewer Overflow Control Policy”); *see also* Combined Sewer Overflow (CSO) Control Policy, 59 Fed. Reg. 18,688 (Apr. 19, 1994). But when petitioner’s most recent permit came up for renewal, its plan was out of date. Pet. App. 421–23. And sampling for bacteria levels showed that water quality standards were not being met under prior permits. *Id.* at 445. For six years, EPA and the California Regional Water Quality Board worked with petitioner to resolve the issues with its plan, but petitioner refused to update it. *Id.* at 420–22. That led the agencies to try a different approach: They issued a new permit that specifically required petitioner to update its plan. *Id.* at 128–31, 422–23. They also included a provision prohibiting petitioner’s “discharge[s]” from “caus[ing] or contribut[ing] to a violation of any applicable water quality standard.” *Id.* at 97. That provision was intended to act as a backstop against petitioner’s existing long-term plan’s deficiencies because petitioner had not made the overdue revisions to that plan. *Id.* at 440–43, 447–48.

County of San Francisco, Order No. 89-71, at 1–2 (May 17, 1989) (eliminating a coliform bacteria concentration limit after petitioner’s testing results indicated that its discharges did not violate state bacteriological body-contact standards).

B. NPDES permits commonly include several types of limitations.

One reason for this iterative process is because the Clean Water Act requires NPDES permits to contain the mix of limitations that will ensure that a permitted discharge will meet the water quality standards that govern the waters at issue. Petitioner claims that the Act “establish[es] one mechanism for ensuring water quality standards are met . . . : effluent limitations.” Pet. Br. 23. But that does not capture the full set of limitations required by the Act and commonly found in NPDES permits.

At a minimum, every NPDES permit must contain the technology-based effluent limitations that apply to the discharge. *See* 33 U.S.C. §§ 1311(b), 1314(b), 1342(a)(1). These are often numeric and specify the rate or concentration at which a given pollutant may be discharged. Petitioner’s Oceanside permit, for example, has long included numeric technology-based effluent limitations that set average weekly and monthly limits for suspended solids and carbonaceous biochemical oxygen demand.⁵ Alternatively, these limitations are sometimes expressed as “narrative limitations, including best management practices,” *NPDES Permit Writers’ Manual* § 5.2.1, such as production modifications, inspection requirements, and other pollution control measures. For example, the policy governing combined sewer overflows like petitioner’s describes nine minimum controls as

⁵ *See, e.g.*, Pet. App. 91–92; EPA & Cal. Reg’l Water Quality Control Bd., Waste Discharge Requirements for City & County of San Francisco’s Oceanside Water Pollution Control Plant & the Westside Wet Weather Combined Sewer System, Order No. 97-44, at 14 (Apr. 9, 1997).

technology-based effluent limitations. *See* CSO Control Policy, 59 Fed. Reg. at 18,691, 18,695.

If technology-based effluent limitations are not enough to ensure that water quality standards will be met, NPDES permits must then contain additional, more stringent limitations, which are referred to as water-quality based limitations. *See* 33 U.S.C. § 1311(b)(1)(C) (requiring “any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter”). NPDES permits contain many different types of “more stringent” limitations.

First, these limitations are sometimes expressed as a numeric or narrative limit on the amount of a pollutant that the permit holder can discharge. A permit might set a numeric limit where, for example, a pollutant has a homogenous concentration in water that can be measured, for example in concentrations such as milligrams per liter. Petitioner’s Oceanside permit, for example, sets maximum concentrations for mercury discharges.⁶ A permit might include a narrative limitation for other pollutants that are not measured in that way. For example, permits often include

⁶ *See, e.g.*, Order No. 97-44, at 15 (setting 6-month median, daily maximum, and instantaneous maximum concentrations of mercury); *see also* EPA & Cal. Reg’l Water Quality Control Bd., NPDES Permit for City & County of San Francisco Oceanside Treatment Plant, Southwest Ocean Outfall & Westside Wet Weather Facilities, Order No. R2-2003-73, at 25–26 (Aug. 20, 2003) (similar for toxicity).

narrative prohibitions on the discharge of undesirable materials, like “distinctly visible solids, scum, or foam of a persistent nature,” such as toilet paper or other waste.⁷

Second, water-quality based limitations are also sometimes expressed as numeric restrictions on parameters in the waters that the discharge enters. Permits for petitioner’s Oceanside and predecessor facilities, for example, require that concentrations of coliform organisms at sampling stations downstream not exceed “1,000 per 100 ml.”⁸ This type of limitation can implement a water quality standard that identifies a mixing zone, which EPA treats as a zone “where initial dilution of a discharge takes place,” and where compliance with the water quality standard is required outside of that zone.⁹ Other numeric limitations that refer to a receiving water restrict how much a condition can change in the waters that the discharge enters, for example, to address unique risks that changes in water condition may pose.¹⁰ The

⁷ See, e.g., Ark. Dep’t of Env’t Quality, Draft Permit No. AR0039268, at 2 (2005), bit.ly/4762sMv.

⁸ Cal. Reg’l Water Quality Control Bd., Waste Discharge Requirements for City & County of San Francisco Richmond-Sunset Plant, Order No. 79-129, at 4 (Oct. 16, 1979); Order No. 88-106, at 12–13 (setting detailed coliform criteria for receiving waters “upon completion of ‘initial dilution’” for “Body-Contact Standards” and “‘Shellfish’ Harvesting Standards”).

⁹ EPA, *Water Quality Standards Handbook, Chapter 5: General Policies 2* (2014).

¹⁰ Order No. 79-129, at 4 (prohibiting alterations of ocean pH of “more than 0.2 units from that which occurs naturally”); Cal. Reg’l Water Quality Control Bd., Reissuing Waste Discharge Requirements for Richmond-Sunset Water Pollution Control Plant, City & County of San Francisco, Order No. 84-45, at 6–7 (July 18, 1984) (similar).

permit that covers car washes and laundry facilities in Virginia, for example, states that in “natural trout waters, the temperature of the effluent shall not cause an increase of 1°C above natural water temperature” and “the hourly temperature change shall not exceed 0.5°C.”¹¹

Third, water-quality based limitations are also sometimes expressed as prohibitions on specified, observable narrative conditions in the receiving water. For example, California’s water quality standards require that discharges “not cause aesthetically undesirable discoloration of the ocean surface.”¹² Petitioner’s permits incorporate this standard as a narrative limitation that prohibits “discharge of ‘waste’” that causes “aesthetically undesirable discoloration of the ocean surface.”¹³

Fourth, permits sometimes include what petitioner refers to as a “generic” water-quality based limitation, one that incorporates all of the applicable water quality standards as a backstop. Here, for example, petitioner’s Oceanside permit prohibits a discharge that will “cause or contribute to a violation of any applicable water quality standard . . . for receiving waters,” subject to certain exceptions. App. 97.

These limitations often appear in general permits, which address categories of sources within a specified geographic location, where the facilities, discharges,

¹¹ General Permit No.: VAG75 For Vehicle Wash Facilities and Laundry Facilities, 9 Va. Admin. Code § 25-194-70, pt. I.A.3(4), 4(4).

¹² See Cal. Env’t Prot. Agency, State Water Res. Control Bd., *California Ocean Plan 7* (2019), bit.ly/ca19plan.

¹³ Order No. 88-106, at 13; see also, e.g., Order No. 84-45, at 6–7; Order No. 79-129, at 4.

or limitations are similar enough to be addressed together. *See County of Maui v. Haw. Wildlife Fund*, 590 U.S. 165, 185–86 (2020) (noting that general permits simplify Clean Water Act compliance by covering “recurring situations”). General permits—like individual permits—must contain the limitations that will ensure that water quality standards are met.¹⁴ Because general permits cover different sources that discharge different pollutants into different waters, general permits often add what petitioner calls “generic” limitations as a backstop that requires water quality standards to be met. *See, e.g.*, General Permit No.: VAG84 For Nonmetallic Mineral Mining, 9 Va. Admin. Code § 25-190-70, pt. I.B.13 (special condition in general permit for nonmetallic mineral mining, stating that “discharges . . . shall be controlled as necessary to meet applicable water quality standards”); W. Va. Dep’t of Env’t Prot., Permit No. WV0116645: Pesticide General Permit for Point Source Discharges,

¹⁴ General permits can contain the same suite of water-quality based limitations as individual NPDES permits described above. *See, e.g.*, Conn. Dep’t of Energy & Env’t Prot., General Permit No. CTGPL000 § 4.5.2.2 (Jul. 22, 2024) (covering the discharge of swimming pool wastewater from public pools and stating that “[n]o discharge shall contain, or cause in the receiving stream, a visible oil sheen or floating solids, or cause visible discoloration or foaming in the receiving stream”), bit.ly/3Ayonjn; W. Va. Dep’t of Env’t Prot., Permit No. WV0078743: Industrial Wastes, Vehicle Washing Establishments, App. A § I.12 (June 13, 2022) (“This discharge shall not cause or materially contribute to distinctly visible floating or settleable solids, suspended solids, scum, foam or oily slicks; deposits or sludge bank on the bottom; odors in the vicinity of the waters; taste or odor that would adversely affect the designated uses of the affected waters; distinctly visible color which may impair or interfere with the designated uses of the affected waters; and shall not cause a fish or mussel kill.”), bit.ly/3XqLdSY.

at 6 (Dec. 4, 2017) (requiring effluent “to be of such quality so as not to cause violations of applicable numeric and narrative water quality standards”), [bit.ly/3Mmgoss](https://www.fda.gov/oc/foia/2017-0001).¹⁵

NPDES permits also commonly include other limitations, prohibitions, and requirements beyond those already discussed. These include additional best management practices, which, again, are “actions or procedures to prevent or reduce the discharge of pollution.” *NPDES Permit Writers’ Manual* § 9.1.2. For example, a permit might require the use of maintenance procedures to ensure that pollution control measures function as intended. *See id.* NPDES permits also require permittees to monitor their facilities, require sampling and testing at specified intervals and at specified locations in receiving waters, and require public reporting of the results. *See* 33 U.S.C. §§ 1318(a)-(b), 1342(a)(1), (b)(2). Petitioner’s Oceanside permit, for example, requires it to test for oil and grease and suspended solids and to conduct benthic monitoring.¹⁶ These requirements allow permitting agencies to determine compliance and also to

¹⁵ As discussed, *see supra* at 2, the petition for certiorari was trained on these “generic” limitations and alleged a split between the decision below and *Natural Resources Defense Council v. EPA*, 808 F.3d 556 (2d Cir. 2015), which found that those limitations alone were insufficient to ensure compliance with the Act with respect to the discharges at issue. *See* Pet. 23. Petitioner has now abandoned its permit-specific arguments based on the appropriateness of the specific “generic” limitation here. Gov’t Br. 47–49.

¹⁶ *See, e.g.*, Order No. 97-44, pt. B at 2–6 (whole effluent toxicity testing requirements); *id.* at 6–7 (shoreline and surf zone sampling requirements); *id.* at 7–8 (overflow monitoring requirements); *id.* at 9–12 (benthic zone sampling and trawling requirements); *id.* at 12–13 (reporting requirements).

determine whether additional or adjusted permit limitations are needed to meet water quality standards. See *NPDES Permit Writers' Manual* § 8.1.1. Permits also commonly include compliance schedules. *Id.* § 9.1.3.

Even this discussion does not capture the variation in permit language in NPDES permits across the country, but it does reveal two problems.

The first is that petitioner's use of novel, undefined terms makes the scope of its argument unclear. For example, when it refers to "limitations that make permit holders responsible for the overall quality of receiving waters," Pet. Br. 4, is it referring to the second category of limitations discussed above—those that set numeric restrictions on a condition in the receiving waters? Or to the third category—those that prohibit specified narrative conditions in the receiving water? Or to both, or to yet more types of limitations? Petitioner's challenge to what it calls "generic" limitations is similarly unclear. Because "generic" limitations incorporate all applicable water quality standards, the underlying applicable water quality standards might map onto any of the types of water-quality based limitations described above. When petitioner criticizes "generic" limitations, it is not clear whether its claim is that no permit may contain a "generic" limitation, or whether its claim is that any such limitation is invalid only as to the underlying incorporated water quality standards that would, if written as permit limitations, meet petitioner's (unspecified) definition of "receiving water" limitations.

The second problem is that the terms petitioner uses (and implicitly asks this Court to use) are not easily administrable. Working through a few water-quality

based limitations that commonly appear in wastewater facilities' permits shows why.

- Consider a permit limitation that requires effluent to be free of substances “[i]n amounts that will settle to form putrescent, or otherwise objectionable, sludge deposits.”¹⁷ Does this provision make a permit holder “responsible for the overall quality of receiving waters” merely because it refers to the effluent’s effect on the receiving waters (“settling” in them or forming “deposits” in them)?
- Or consider a permit limitation that requires effluent to be free of “substances” “[o]f an oily, greasy, or surface-active nature, and of other floating debris, in amounts that will form noticeable accumulations of scum, foam or sheen.”¹⁸ Same question. And would the answer change if the final clause is deleted?
- What about a limitation that requires effluent to be free of substances “[i]n amounts that are conducive to the growth of aquatic weeds or algae to the extent that such growths become inimical to more desirable forms of aquatic life”?¹⁹ Does this make a permit holder “responsible for the overall quality of receiving waters” merely because a permit holder must know something about the aquatic life in receiving waters to

¹⁷ Ohio Env’t. Prot. Agency, Application No. OH0026018, at 40 (July 17, 2014) (permit for municipal wastewater discharge to Lake Erie), bit.ly/3ABbWTT.

¹⁸ *Id.*

¹⁹ *Id.*

determine whether its effluent will create harmful algae blooms?

Because of petitioner’s loose phrasing, adopting its terms may have “broad reaching effects” that could “negatively impact[]” the NPDES permitting program that Congress carefully calibrated in the Act. Nat’l Ass’n of Home Builders Br. 3. That, in turn, could have consequences for countless permittees and the communities affected by their discharges. Amici raise this concern here to ensure this Court’s decision resolving this case does not inject uncertainty into the NPDES permitting process.

II. Enforcement Proceedings Are Rare But Provide Important Protections.

Petitioner claims that past enforcement of the permit limitations that it calls “receiving water” limitations shows that they are inherently unfair. *See* Pet. Br. 48–49. Its amici do too. *See, e.g.,* Nat’l Mining Ass’n Br. 17. Their “thinly disguised policy appeal,” *Pulsifer v. United States*, 601 U.S. 124, 180 (2024) (Gorsuch, J., dissenting), rests on inaccurate generalizations. First, enforcement actions that turn on these permit limitations are rare.²⁰ The examples that exist (including those that petitioner highlights) show that petitioner’s objection—that it simply cannot know if it has violated a water quality standard—does not hold up. What these examples do show is that these violations inflict real harm on real people.

²⁰ As explained, *supra* at 13–15, it is unclear what petitioner means by “receiving water” limitations, which makes both its doctrinal position and policy arguments indeterminate. To address those policy arguments, amici have assumed that petitioner refers to any permit limitation that refers to a discharge’s impact on the receiving water and any “generic” limitation.

A. Receiving water limitation enforcement actions are rare, but violations are clear, and clearly knowable.

Enforcement actions alleging violations of receiving water limitations are not common. EPA’s database includes compliance data for nearly 300,000 facilities covered by active individual permits or general NPDES permits.²¹ Since 2020, the United States has filed 52 cases in federal court asserting NPDES Permit Violations.²² Of those, just 10 included a claim that the polluter violated a limit that references receiving water conditions.²³ And of those, not one

²¹ See EPA, *Facility Search Results – Enforcement and Compliance Data* (last visited Aug. 2, 2024) (search including facilities that are flagged as having a “NPDES Individual Permit” or “General Permit Covered Facility” and with a permit status of “Effective” or “Administratively Continued”), bit.ly/3YZG1H0; see also U.S. Gov’t Accountability Off., GAO-21-290, *Clean Water Act: EPA Needs to Better Assess and Disclose Quality of Compliance and Enforcement Data 2* (July 2021) (noting that in 2020, there were 335,000 facilities with active NPDES permits), bit.ly/3YTqrfW.

²² EPA maintains a database that tracks its enforcement actions. EPA, *Enforcement Case Search Results* (last visited Aug. 2, 2024), bit.ly/3WV57E7. To produce these statistics, the database was searched for all civil cases EPA brought under the Clean Water Act. Those results were narrowed to include only those cases involving “301/402 - NPDES Permit Violations,” which identified 9,195 actions. Those results were further narrowed to isolate cases brought in 2020 through August 2, 2024 and flagged in the database as “Judicial.” Finally, those complaints were reviewed to determine if they asserted a violation of a receiving water limitation.

²³ Six of these enforcement actions involve harmful sewage, reinforcing the need to control discharges from sources like petitioner’s. They include the United States’s pending action against petitioner. See Compl. ¶¶ 53–57, 100, *United States v. City &*

claimed a violation of only receiving water limitations; they also identified other violations of those permits. The numbers for administrative proceedings—which, at 1,387 actions since 2020, make up the bulk of EPA enforcement actions—are similarly low. So far this year, EPA has brought 153 administrative cases

County of San Francisco, No. 3:24-cv-2594 (N.D. Cal. May 1, 2024), ECF No. 1 (describing the health effects, including cholera, dysentery, and infectious hepatitis, that the City’s annual discharge of 1.8 billion gallons of sewage could cause); Pet. Br. 50–51. The other examples are no less vivid. See Compl. ¶¶ 39, 46, 50, 73–76, 97, *United States v. City of Lowell*, No. 1:24-cv-10290 (D. Mass. Feb. 5, 2024), ECF No. 1 (Lowell discharged sewage containing bacteria and phosphorus in violation of “federal or state water quality standards” incorporated into “the City’s NPDES Permit”); Compl. ¶¶ 47, 63–65, *United States v. City of Elyria*, No. 1:22-cv-2026 (N.D. Ohio Nov. 9, 2022), ECF No. 1 (discharge of “untreated sewage” into the Black River violated narrative “general effluent limits” in its permit that prohibited discharges that “adversely affect[] aquatic life or water fowl,” that “are toxic to human, animal, or aquatic life,” or that “are in amounts that will impair designated instream or downstream water uses”); Compl. ¶¶ 48, 50, 55–59, *United States v. City of Lakewood*, No. 1:22-cv-1964 (N.D. Ohio Oct. 31, 2022), ECF No. 1 (similar, with respect to Lake Erie and Rocky River); Compl. ¶¶ 62–63, *United States v. Berkeley Cnty. Pub. Serv. Sewer Dist.*, No. 3:21-cv-179 (N.D. W. Va. Nov. 17, 2021), ECF No. 1 (discharges violated permit prohibition against “discharges that caused certain specified [narrative] objectionable characteristics in waters of the State”); Compl. ¶¶ 1, 45, 50, 60, *United States v. City of Peoria*, No. 1:20-cv-1444 (C.D. Ill. Dec. 23, 2020), ECF No. 1 (Peoria discharged untreated sewage—which “can carry bacteria, viruses, parasitic organisms, [and] intestinal worms” that can cause “diarrhea” and “cholera, dysentery, infectious hepatitis, and severe gastroenteritis”—into the Illinois River and Peoria Lake in violation of “applicable water quality standards” incorporated into its permit).

involving NPDES permit violations.²⁴ None appear to involve an assertion of a violation of a receiving water limitation.

Petitioner cherry-picks examples of such enforcement actions from over the years (as do its amici) to try to back up its claim that a permitholder cannot know *ex ante* whether it is at risk of violating these kinds of permit limits. *See* Pet. Br. 49 n.38; Nat’l Mining Ass’n Br. 18. But those examples refute its claim. The government and citizens sue where the harm is pressing and provable. The permitholders in these cases would have had to actively ignore their discharges to not know that they were in violation.

Take petitioner’s lead-off case: *Natural Resources Defense Council v. Metropolitan Water Reclamation District (MWRD)*, 175 F. Supp. 3d 1041 (N.D. Ill. 2016). *See* Pet. Br. 49. There, three water reclamation plants contributed an estimated “70% of the flow in” the Chicago Area Waterway System, a series of canals and rivers that guide water from the region into the Des Plaines River, and ultimately the Mississippi. *MWRD*, 175 F. Supp. 3d at 1045. The plants discharged phosphorus—from sources including human excrement, industry, animal waste, detergents, and more—which caused substantial algae blooms. *See id.*; *see also id.* (explaining that high phosphorus levels give algae “an unlimited food supply”). These blooms are both unpleasant and unhealthy. They cause “a foul smell that you notice right away,” “kind

²⁴ To isolate these results, the database was filtered to include only those “Administrative – Formal” cases brought in 2024 (through August 2). Those database entries and the related administrative dockets (if available) were reviewed to assess whether a receiving water limitation was asserted.

of . . . like a bad latrine.” Pls.’ L.R. 56.1 Statement of Material Facts 4, *MWRD*, No. 1:11-cv-2937 (Apr. 3, 2014), ECF No. 130. And as Illinois has warned those who use its lakes and rivers, “rapidly growing algae . . . can cause illness and other health problems,” such as “vomiting, rashes, coughing and wheezing in people and pets.”²⁵

These blooms also violated the plants’ permits. Those permits included what petitioner calls a generic limitation on discharges that “cause a violation of any applicable water quality standards,” and Illinois’s standards required waters to “be free from . . . unnatural plant or algal growth.” *MWRD*, 175 F. Supp. 3d at 1046. No reasonable operator of the plants—which contributed the vast majority of water to waterways suddenly choked with algae blooms—could be surprised to learn that they violated their permit requirements. Indeed, the violations were clear enough that, when people harmed by the blooms sued, the plants agreed to new limitations on their phosphorus discharges. Order of Dismissal 2–4, *MWRD*, No. 1:11-cv-2937 (Aug. 30, 2017), ECF No. 190.

Petitioner’s other case does not support its claim either. There, a coal mining company acknowledged during the permitting process that its mine would discharge sulfates and other ions into a waterway. *Ohio Valley Env’t Coal. v. Fola Coal Co.*, 845 F.3d 133, 136

²⁵ *State warns of toxic algae forming on Illinois lakes, rivers*, Chicago Sun-Times (May 28, 2016), bit.ly/3WTNNPS.

D.C. and Northern Virginia residents experienced these harms firsthand recently: D.C. Water issued a Boil Water Advisory because of algae blooms in the Potomac River. U.S. Army Corps of Engineers, *Washington Aqueduct advises Boil Water Advisory for District of Columbia and parts of Northern VA* (July 3, 2024), bit.ly/4dCHCXO.

(4th Cir. 2017). These discharges would, in turn, raise the water’s conductivity, a measure of ionic toxicity that is harmful to aquatic ecosystems. *See id.* at 136–38. Its permit contained a limitation that “incorporate[d] [state] narrative water quality standards prohibiting discharges” that “cause . . . or materially contribute” to “[m]aterials in concentrations which are harmful” to species. *Id.* at 137–38, 143 & n.8 (quotation omitted). Yet the company’s discharges under the permit impaired the waterway for years, decreasing species diversity. *Id.* at 138. Its responsibility was never seriously in doubt: “Conductivity and sulfates notably increased after [the company] began mining”; the company’s own real-time sampling showed as much. *Ohio Valley Env’t Coal. v. Fola Coal Co.*, 82 F. Supp. 3d 673, 696–97 (S.D. W. Va. 2015). And there was “simply no evidence of another land use activity . . . that could account for the significantly altered state of” the waters. *Id.* at 697. “Even [the company’s] expert . . . agreed that [its] mining operations caused” water quality standard violations. *Id.* The trial court found a “lack of any meaningful counter-evidence.” *Id.* at 698. Unsurprisingly, on appeal, the company did not claim it could not have known that it had violated the relevant water quality standards, or even that it did not violate them. *See Ohio Valley Env’t Coal.*, 845 F.3d at 143–44 & n.8. Instead, it argued (unsuccessfully) that its permit did not incorporate those limits at all. *See id.* at 144.

In other enforcement actions that asserted violations of receiving water limitations, no permitholder could raise petitioner’s claim here: that it is impossible to know if one has violated these conditions.

In one, a steel mill discharged effluent with elevated levels of cyanide and ammonia into the Little Calumet

River, which flows into Lake Michigan. See Compl. ¶¶ 56, 62, 208, *United States v. Cleveland-Cliffs Burns Harbor LLC*, No. 22-cv-26 (N.D. Ind. Feb. 14, 2022), ECF No. 1. The discharges killed 3,000 fish and forced the National Park Service to close the Indiana Dunes National Park.²⁶ Was it simply impossible for the mill’s operators to assess whether its discharges “contain[ed] pollutants in the amounts sufficient to be acutely toxic to, or otherwise severely injure or kill aquatic life”? Compl. ¶¶ 97–98, 208.²⁷

In another, the Metropolitan St. Louis Sewer District discharged “raw sewage to homes, yards, parks, playgrounds, and streets” and ultimately the Mississippi River and other waterways. Compl. ¶¶ 1, 25, *United States v. Metro. St. Louis Sewer Dist.*, No. 4:07-cv-1120 (E.D. Mo. June 11, 2007), ECF No. 1. Was there no way the sewer district could assess whether discharging raw sewage violated a permit term that incorporated the general “water quality criteria” that receiving waters not contain “putrescent, unsightly or harmful bottom deposits,” “oil, scum and floating debris,” and “substances resulting in unsightly color, turbidity, and offensive odor”? *Id.* ¶¶ 80–82. Or to

²⁶ Sanya Mansoor, *Indiana Cyanide Leak Kills 3,000 Fish and Shut Down Beaches at America’s Newest National Park*, TIME (Aug. 20, 2019), [bit.ly/3WYypSr](https://www.time.com/time/health/article/0,9171,1381612,00_0_0_0_0_0); Morgan Krakow, *Cyanide from a steel plant trickled into Lake Michigan for days before the public was notified*, Wash. Post (Aug. 19, 2019), [bit.ly/3WSQMbf](https://www.washingtonpost.com/news/energy-environment/wp/2019/08/19/cyanide-leak-lake-michigan/).

²⁷ The mill entered into a consent decree that required it to, among other things, upgrade its equipment to prevent future cyanide and ammonia discharges. Consent Decree 5–6, 8, *Cleveland-Cliffs*, No. 2:22-cv-26 (May 6, 2022), ECF No. 13; see also EPA, *Cleveland-Cliffs Steel LLC and Cleveland-Cliffs Burns Harbor LLC Settlement* (last updated Feb. 6, 2024), [bit.ly/4dT1lfZ](https://www.epa.gov/region-04/cleveland-cliffs-steel-llc-and-cleveland-cliffs-burns-harbor-llc-settlement).

know, in the face of discharges that “contain organic matter, bacteria and potential pathogens” known to “cause . . . diseases in humans such as gastroenteritis, dysentery, and cholera,” that it violated a standard requiring that those waters not contain substances that could “result in toxicity to human, animal or aquatic life”? *Id.*²⁸

B. Petitioner’s criticisms of the people who use the Clean Water Act to protect themselves lack merit.

Petitioner and its amici also offer generic criticisms of “private plaintiffs” (that is, people) who sue under the Clean Water Act’s citizen suit provision, but these criticisms also lack merit.

For one, Clean Water Act citizen suits are not “commonplace.” Nat’l Mining Ass’n Br. 16. A recent study disproved this common “misperception[.]” David E. Adelman & Jori Reilly-Diakun, *Environmental Citizen Suits & The Inequities of Races to the Top*, 92 U. Colo. L. Rev. 377, 382–83, 407–11 (2021). Over the sixteen-year period from 2001-2016, people sued under the Act’s citizen-suit provision in approximately 100 cases per year, with a “decline after 2011.” *Id.* at 409–10 & fig. 2. But most of those suits were against the government, not a permitholder. *See id.* at 382,

²⁸ The sewer district entered into a consent decree that required it to upgrade its infrastructure. Consent Decree 3, 25–29, *Metro. St. Louis Sewer Dist.* (Apr. 27, 2012), ECF No. 159. In the ten years after the settlement, the sewer district “[e]liminated 76 . . . areas in the sewer system designed to discharge combined sewer and stormwater during high rain events,” reduced 35.77 million gallons of discharges into the Mississippi River watershed, and mitigated basement backups and overland flooding. EPA Region 7, *Changes to St. Louis Sewer Overhaul Project Recognize Underserved Community* (Aug. 17, 2022), bit.ly/3MfAoN3.

411–12; *see also* 33 U.S.C. § 1365(a)(2) (authorizing suit against the EPA Administrator). There is no reason to think that all, or even many, of the suits against permit holders were based on violations of permit limits that refer to receiving waters.

Petitioner’s amici see these suits as moneymaking schemes that do not “benefit the environment.” Loc. Gov’t Legal Ctr. Br. 23–24. Here too, the data—rather than invective—says the opposite. For one thing, fee awards are a rarity. *See* Adelman & Reilly-Diakun, *supra*, at 424–25. For another, even the government has acknowledged that “a large portion of citizen notices addressed violations that either were worthy of agency action but had escaped EPA attention or . . . were appropriate subjects of enforcement action.” *Id.* at 398 (citation omitted). And because “virtually all” suits “settled under consent decrees,” the reasonable conclusion to draw is that these plaintiffs are “selective,” tending to bring only important, meritorious cases. *See id.* at 402–03.²⁹

The cases petitioner and its amici reference show that in the rare cases where people sue to enforce permit limitations that turn on conditions in receiving waters, they do so to stop real harm. *See supra* at 18–20 (discussing cases involving discharges from a Chicago reclamation plant and a coal mine).

Raw sewage was the threat in *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979 (9th Cir. 1995) (cited in Loc. Gov’t Legal Ctr. Br. 23; Nat’l Mining Ass’n Br. 16 n.6). There, Portland discharged

²⁹ The Clean Water Act also includes mechanisms that may eliminate the need for any suit. Dischargers and regulators must be given notice sixty days before a suit, which allows dischargers to address the alleged violations. *See* 33 U.S.C. § 1365(b).

“untreated sewage” into waterways its residents use for recreation. *Id.* at 981. “Even the lightest drizzle could . . . send excrement shooting through outfall pipes and into the Willamette” River.³⁰ These discharges violated a permit provision incorporating state “water quality standards,” which, in turn, included narrative prohibitions that could not “be expressed quantitatively, such as . . . bacterial pollution, aesthetic conditions, and objectionable matter (scum, oily sleek, foul odors, and floating solids).” *Id.* at 985–86, 989. Because of this suit and other efforts, Portland completed a “sewer overflow control system,” and the State reports that “very few water samples contain[] unhealthy bacteria levels.”³¹

The other cases petitioner and its amici cite similarly involve ordinary people trying to protect their communities or property. In some, people sought to stop damage to the lands or waters they own. *See New Manchester Resort & Golf, LLC v. Douglasville Dev., LLC*, 734 F. Supp. 2d 1326, 1330, 1336–37 (N.D. Ga. 2010) (suit by plaintiff “intend[ing] to build a golf course, resort, and conference center” brought to stop neighbor from discharging “sediment-laden storm water” in violation of generic permit provision incorporating “Georgia’s in-stream water quality standards” relating to turbidity); *Swartz v. Beach*, 229 F. Supp. 2d 1239, 1247–48, 1270–71 (D. Wyo. 2002) (suit by rancher to stop discharges by a coal bed methane producer that “destroy[ed] the soil and limit[ed] the

³⁰ Brent Walth, *Someone finally has enough of all that crap in the Willamette*, Willamette Week (Nov. 4, 2014), bit.ly/4drEEoK.

³¹ Oregon Dep’t of Env’t Quality, *Fact Sheet: Is it Safe to Swim in the Willamette River in Portland?* (last updated June 2022), bit.ly/3WWXahB.

amount of irrigation water available” for crop production in violation of state standards “incorporated into a NPDES permit”); *Gill v. LDI*, 19 F. Supp. 2d 1188, 1194–95 (W.D. Wash. 1998) (suit to stop a neighboring quarry from polluting a landowner’s pond in violation of state water quality standards “incorporated into the permit by reference”). In others, the plaintiffs sought to protect public waters. *See Cal. Sportfishing Prot. All. v. Chico Scrap Metal, Inc.*, 728 F.3d 868, 872 (9th Cir. 2013) (suit to stop discharges of copper, lead, and zinc into the Sacramento River); *Nat. Res. Def. Council v. County of Los Angeles*, 725 F.3d 1194, 1199–1200 (9th Cir. 2013) (suit to stop discharges of “excessive levels of aluminum, copper, cyanide, zinc, and fecal coliform bacteria in both the Los Angeles and San Gabriel Rivers” in violation of water quality standards incorporated into permit); *see also Nw. Env’t Advocs. v. City of Medford*, 2021 WL 2673126, at *3, 7–9 (D. Or. June 9, 2021) (suit to stop discharges of phosphorus and nitrogen that caused, among other things, algae blooms in violation of state water quality standards incorporated into the permit); *San Francisco Baykeeper v. City of Sunnyvale*, 2020 WL 7696078, at *3–4, *8 (N.D. Cal. Dec. 28, 2020) (suit to stop discharges of raw sewage containing bacteria that “poses a serious risk to fisheries, wildlife habitat and human health” into South San Francisco Bay and other local creeks in violation of narrative receiving water permit limitations).³²

³² The remaining cases petitioner’s amici cite, *see* Loc. Gov’t Legal Ctr. Br. 23 n.8; Nat’l Mining Ass’n Br. 16 n.6, do not appear to involve attempts to enforce receiving water limitations incorporated into a permit, nor do they support the generalized criticisms of citizen suits.

In sum, neither the available enforcement data nor the examples that petitioner and its amici highlight support their criticisms of these enforcement actions.

CONCLUSION

This Court should affirm.

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