No. 15-14035-EE

In the

United States Court of Appeals

for the

Eleventh Circuit

STATE OF GEORGIA ET AL.,
Plaintiffs-Appellants,

V.

GINA MCCARTHY ET AL.,
Defendants-Appellees.

On appeal from a final judgment of the
United States District Court for the Southern District of Georgia
Case No. 2:15-cv-79

BRIEF *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL OF THE AMERICAN FARM BUREAU FEDERATION; AMERICAN FOREST & PAPER ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION; GREATER HOUSTON BUILDERS ASSOCIATION; LEADING BUILDERS OF AMERICA; NATIONAL ALLIANCE OF FOREST OWNERS; NATIONAL ASSOCIATION OF HOME BUILDERS; NATIONAL ASSOCIATION OF MANUFACTURERS; NATIONAL ASSOCIATION OF REALTORS; NATIONAL CATTLEMEN'S BEEF ASSOCIATION; NATIONAL CORN GROWERS ASSOCIATION; NATIONAL MINING ASSOCIATION; NATIONAL PORK PRODUCERS COUNCIL; NATIONAL STONE, SAND, AND GRAVEL ASSOCIATION; PUBLIC LANDS COUNCIL; TEXAS FARM BUREAU; AND U.S. POULTRY & EGG ASSOCIATION

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No. 15-14035-EE

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are a coalition of trade associations whose members are responsible for a significant proportion of American agricultural, commercial, and industrial production. They are the American Farm Bureau Federation; American Forest & Paper Association; American Petroleum Institute; American Road And Transportation Builders Association; Greater Houston Builders Association; Leading Builders of America; Matagorda County Farm Bureau; National Alliance of Forest Owners; National Association of Home Builders; National Association of Manufacturers; National Association of Realtors; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand, and Gravel Association; Public Lands Council; Texas Farm Bureau; and U.S. Poultry & Egg Association.[1]

This litigation—which is taking place not only before this Court on appeal but also before the Sixth Circuit on original petitions for review and numerous other district courts throughout the country—presents fundamental questions concerning the scope of the government's power under the Clean Water Act (CWA) and the Commerce and Due Process Clauses of the United States Constitution. At issue is EPA's and the Army Corps of

[1] No party's counsel authored this brief in whole or in part, no party, party's counsel, or other person, other than the *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief. The parties do not object to the filing of this brief.

Engineers' regulation defining the phrase "waters of the United States." *See* 80 Fed. Reg. 37,054 (June 29, 2015) (the "Rule"). The regulation is fundamental to the Clean Water Act, purporting to define the agencies' jurisdiction to regulate water throughout the Nation.

Amici's members own and work on property that includes land areas that may constitute "waters of the United States" under the new Rule. Each of their members must comply with the CWA's prohibition against unauthorized "discharges" into any such areas that are ultimately deemed jurisdictional. But because the Rule is vague in describing features that are purportedly "waters of the United States" and often requires unpredictable case-by-case determinations by the agencies, *amici*'s members do not know which features on their lands are jurisdictional and which are not. Continuing uncertainty as to which features are jurisdictional thus deprives *amici*'s members of notice of what the law requires and makes it impossible for them to make informed decisions concerning the operation, logistics, and finances of their businesses. Moreover, under the CWA, *amici*'s members may be subjected to criminal penalties and civil suits for failure to properly comply with the provisions of the Rule.

Before this or any other court can determine the legality of the rule, however, a threshold question must be resolved: Which courts have jurisdiction to entertain these challenges? *Amici* are firmly of the view that

jurisdiction is proper in the district courts under 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. § 704. They accordingly filed their own complaint in the U.S. District Court for the Southern District of Texas. *See* Compl., *American Farm Bureau Federation et al. v. EPA, et al.*, No. 3:15-cv-165 (S.D. Tex. July 2, 2015). At the same time, "[c]areful lawyers must apply for judicial review [in the court of appeals] of anything even remotely resembling" the kinds of administrative rule challenges properly brought in the court of appeals. *Am. Paper Inst. v. EPA*, 882 F.2d 287, 288 (7th Cir. 1989). Thus, *amici* also filed a protective petition for review in the Sixth Circuit under the CWA's judicial review provision. *See* Pet. for Review, *American Farm Bureau Federation et al. v. EPA, et al.*, No. 15-3850.

As we explain more fully below, there is little doubt that jurisdiction to review the validity of the Rule lies exclusively in the district courts under 28 U.S.C. § 1331 and the Administrative Procedure Act. The CWA's judicial review provision simply cannot be stretched to cover the sort of fundamental, definitional rule that is at stake here.

We are mindful that the this Court has set an expedited briefing schedule to bring the jurisdictional question to an early close. We also appreciate that the plaintiffs—a coalition of eleven States—have filed a well-reasoned brief in support of their jurisdictional arguments. Our purpose here is not to pile on with duplicative argument. We address, instead, additional

and complimentary reasons for concluding that jurisdiction lies in the district courts and not before the Sixth Circuit.

ISSUE PRESENTED

Whether the district court has original jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. §§ 702 and 704 to review the final administrative rule entitled, "Clean Water Rule: Definition of 'Waters of the United States'" (80 Fed. Reg. 37,054); or if, instead, the U.S. Court of Appeals for the Sixth Circuit has original jurisdiction over these matters under 33 U.S.C. § 1369(b)(1)(E) or (F).

BACKGROUND

A. Statutory background

1. States and the federal government share responsibility for implementing the Clean Water Act. *See Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 174-176 (2000); States' Motion 2-4, No. 15-3799 (Dkt. 23). As a general matter, States have primary responsibility for determining ambient water quality standards for the waters within their borders. 33 U.S.C. § 1313(c)(1), (2)(A). These "water quality standards" must include both the "designated uses" for particular water bodies (including, for example, agricultural, recreational, or public water supply) and the numeric or narrative criteria necessary to achieve those designated uses. *Id.* § 1313(c)(2)(A).

The Act employs federal, technology-based "effluent limitations" on discharges of pollution into "navigable waters," defined as "the waters of the United States." 33 U.S.C. §§ 1311, 1314(b), 1362(7). State water quality standards function alongside (sometimes supplementing) effluent limitations. *PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994). For example, dischargers may individually comply with permit-based effluent limitations, while still collectively falling short of state water quality standards. 33 U.S.C. § 1311(b)(1)(C). In such cases, the dischargers "may be further regulated to prevent water quality from falling below acceptable levels." *PUD No. 1*, 511 U.S. at 704 (internal quotation marks omitted).

These federal limitations and state standards are implemented principally through a system of individual permits called the National Pollutant Discharge Elimination System (NPDES). Under Section 402 of the CWA, any person who wishes to "discharge" a pollutant from a "point source" into the "navigable waters" must obtain an NPDES permit. 33 U.S.C. §§ 1311(a), 1342(f), (k).[2] NPDES permits impose both technology-based effluent limitations and state ambient water quality standards on individual discharges of pollution. *Id.* § 1342(a)(3), (b)(1)(A). In short, "effluent limita-

[2] Section 404 of the CWA establishes a separate, federal permitting program, administered by the U.S. Army Corps of Engineers, for discharges of "dredged or fill materials" into navigable waters 33 U.S.C. § 1344.

tions dictate in specific and technical terms the amount of each pollutant that a point source may emit." *Am. Paper*, 890 F.2d at 876.

2. Section 509(b) of the CWA—33 U.S.C. § 1369(b)—establishes a special scheme of judicial review for permitting decisions and related rulemaking by the agencies. Congress conferred original jurisdiction on the courts of appeals to review challenges to seven categories of final agency actions—those:

> (A) in promulgating any standard of performance under section 1316 of this title,
>
> (B) in making any determination pursuant to section 1316(b)(1)-(C) of this title,
>
> (C) in promulgating any effluent standard, prohibition, or pre-treatment standard under section 1317 of this title,
>
> (D) in making any determination as to a State permit program submitted under section 1342(b) of this title,
>
> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title,
>
> (F) in issuing or denying any permit under section 1342 of this title, and
>
> (G) in promulgating any individual control strategy under section 1314(*l*) of this title.

33 U.S.C. § 1369(b)(1).

Congress additionally provided a mechanism to consolidate all petitions for review challenging the same EPA action in a single circuit (28 U.S.C.

§ 2112(a)), ensuring that regulators and the regulated alike have the benefit of a single and authoritative determination of the validity of EPA action that falls within any of these defined categories. These procedures "establish a clear and orderly process for judicial review," "ensur[ing] that administrative actions are reviewable, but that the review will not unduly impede enforcement." H.R. Rep. No. 92-911, at 136 (1972).[3]

Separately, the Administrative Procedure Act provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action" may bring suit in district court for judicial review of any "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. §§ 702, 704. Thus, when judicial review of a final agency action under the Clean Water Act is not available in the courts of appeals under 33 U.S.C. § 1369(b)(1), the APA provides a cause of action in district court under 5 U.S.C. §§ 702, 704 and 28 U.S.C. § 1331.

B. The Rule

On June 29, 2015, the Agencies published the Rule, which purports to "clarif[y]" the Agencies' definition of "waters of the United States" within the meaning of the CWA—*i.e.*, the scope of the agencies' jurisdiction under the

[3] Congress also conferred on the district courts jurisdiction over citizen enforcement actions seeking "to enforce an obligation imposed by the Act or [EPA's implementing] regulations" upon either EPA or a regulated entity. *See* 33 U.S.C. § 1365(a)(1). There is no question that the CWA's citizen suit provision does not confer jurisdiction to challenge the agencies' final action in this case.

CWA. The Rule separates waters into three jurisdictional groups under the CWA: waters that are categorically jurisdictional, waters "that require a case-specific significant nexus evaluation" to determine if they are jurisdictional, and waters that are categorically excluded from jurisdiction.

In the first group are waters that are categorically jurisdictional. Six types of waters qualify under the Rule: (1) traditional navigable waters, (2) interstate waters, (3) territorial seas, (4) impoundments of any water deemed to be a "water of the United States," (5) certain tributaries, and (6) certain waters that are "adjacent" to the foregoing five categories of waters. 33 C.F.R. § 328.3(a).

- "Traditional navigable waters" are "waters that are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." 80 Fed. Reg. at 37,074; *see The Daniel Ball*, 10 Wall. 557, 563 (1871).

- "Interstate waters" are waters that cross state borders, "even if they are not navigable" and "do not connect to [navigable] waters." 80 Fed. Reg. at 37,074.

- "Territorial seas" are "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles." 33 U.S.C. § 1362(8).

- A covered "tributary" is defined in the Rule as any water that flows "directly or through another water or waters to a traditional navigable water, interstate water, or territorial sea." 33 C.F.R. § 328.3(c)(3). To count as a jurisdictional water, the tributary (A) must "contribute flow" directly or through any other water—such

as ditches or wetlands—to a traditional navigable water, interstate water, or territorial sea, and (B) must be "characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark." *Id.*

- An "adjacent water" is defined as any water bordering, contiguous to, or "neighboring" the first four kinds of jurisdictional waters. 33 C.F.R. § 328.3(c)(1). A water is "neighboring" another water when any part of it is: (A) within 100 feet of the ordinary high water mark of the water, (B) within the 100-year floodplain of the water but not more than 1,500 feet from the ordinary high water mark, or (C) within 1,500 feet of the high tide line of a traditional navigable water, interstate water, or territorial sea or the ordinary high water mark of the Great Lakes. *Id.* § 328.3(c)(2).

In the second group are waters "that require a case-specific significant nexus evaluation" to determine if they are jurisdictional. 80 Fed. Reg. at 37,073. As a general matter, waters that are subject to jurisdiction based on a case-specific significant nexus determination include: (A) waters, any part of which are within the 100-year floodplain of a traditional navigable water, interstate water, or territorial sea, or (B) waters, any part of which are within 4,000 feet of the high tide line or ordinary high water mark of any of those jurisdictional waters, any impoundment of those jurisdictional waters, or any covered tributary. *Id.* § 328.3(a)(8). The methods and standards for conducting significant nexus analyses are vague and unclear.

In the third group are waters always excluded from jurisdiction. These include swimming pools; puddles; ornamental waters; prior converted cropland; waste treatment systems; certain kinds of drainage ditches; farm and stock watering ponds; settling basins; water-filled depressions incidental

to mining or construction activity; subsurface drainage systems; and certain wastewater recycling structures. 33 C.F.R. § 328.3(b).

C. Procedural background

Following promulgation of the Rule, public and private parties filed APA challenges in federal district courts throughout the country, including in Arizona, California, the District of Columbia, Georgia, North Dakota, Texas, Washington, and West Virginia.[4] Motions for preliminary injunctions against enforcement of the Rule were filed in three of those lawsuits, including this one. The district courts in this case and in *Murray Energy Corp v. EPA*, No. 1:15-cv-110 (N.D. W. Va.), dismissed the actions for want of jurisdiction, reasoning that exclusive original jurisdiction lies in the courts of appeals under Section 1369(b)(1). The district court in the North Dakota action held contrariwise and entered a preliminary injunction ((Order, No. 3:15-cv-59 (D.N.D. Aug. 27, 2015) (Dkt. 70)); it later but held that the injunction is

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[4] Those actions, in order of their filings, are *North Dakota v. EPA*, No. 3:15-cv-59 (D.N.D.); *Murray Energy Corp v. EPA*, No. 1:15-cv-110 (N.D. W. Va.); *Ohio v. EPA*, 2:15-cv-2467 (S.D. Ohio); *Texas v. EPA*, No. 3:15-cv-162 (S.D. Tex.); *Georgia v. McCarthy*, No. 2:15-cv-79 (S.D. Ga.); *American Farm Bureau Federation v. EPA*, No. 3:15-cv-165 (S.D. Tex.); *Oklahoma ex rel. Pruitt v. EPA*, No. 4:15-cv-381 (N.D. Okla.); *Chamber of Commerce v. EPA*, No. 4:15-cv-386 (N.D. Okla.); *Southeastern Legal Foundation v. EPA*, No. 1:15-cv-2488-TCB (N.D. Ga.); *Washington Cattlemen's Association v. EPA*, No. 0:15-cv-3058 (D. Minn.); *Puget Soundkeeper Alliance v. McCarthy*, No. 2:15-cv-1342 (W.D. Wash.); *Waterkeeper Alliance, Inc. v. EPA*, No. 3:15-cv-3927 (N.D. Cal.); *Natural Resources Defnse Council v. EPA*, No. 1:15-cv-1324 (D.D.C.); *Az. Mining Ass'n v. EPA*, No. 2:15-cv-1752 (D. Az.).

effective only within the borders of the thirteen moving States (Order, No. 3:15-cv-59 (D.N.D. Sept. 9, 2015) (Dkt. 79)).

Meanwhile, various parties (including the plaintiffs and *amici* here) filed petitions for review in the courts of appeals under Section 1369(b)(1). Those petitions were later transferred to and consolidated by the U.S. Court of Appeals for the Sixth Circuit. *See In re: Murray Energy Corporation v. EPA*, No. 15-3751. Eighteen State petitioners (including the plaintiffs here) moved to dismiss the Sixth Circuit petitions on September 9, 2015, raising the same arguments now before this Court, that jurisdiction is proper in the district courts. The Sixth Circuit has since set an accelerated briefing schedule for any additional motions to dismiss that may be filed in the petitions for review. *See* Docket Entry, *In re: Murray Energy Corporation v. EPA*, No. 15-3751 (6th Cir. Sept. 16, 2015).

SUMMARY OF THE ARGUMENT

The States explain in detail why the Rule is not covered by Section 1369(b)(1). Simply put, it is not the promulgation of a standard of performance, a determination of a category of sources, the promulgation of an effluent standard or prohibition, a determination as to a State permit program under Section 1342(b), an approval of an effluent limitation, an issuance or denial of a permit, or the promulgation of an individual control strategy. The States' arguments on that score—particularly their reasoning under the rule

against superfluities and in favor of clear jurisdictional rules—are powerful ones that require reversal all on their own. But there is more.

First, no matter how broadly the words "other limitation" might be read, the Rule simply is not a "limitation" in the ordinary sense of the word. It cannot be understood as an "other limitation" on *regulators* because the phrase that it defines, "waters of the United States," is a *grant* of jurisdiction. It makes no sense to say words conferring authority are at the same time a limitation on authority. For similar reasons, the Rule cannot be understood as an "other limitation" on *regulated parties* because—quite apart from being a limitation in its own right—the Rule simply describes the waters to which *other* limitations may apply.

The government's insistence that the Rule imposes an "other limitation" within the meaning of paragraph (E) furthermore violates the *ejusdem generis* canon, which states that when a general term ("other limitation") follows a specific one ("effluent limitation"), the more general term must be understood to embrace objects similar in nature to those embraced by the specific term. The applicability of that canon here is made express by the words that follow, as well—the "other limitation" must be one imposed "under section 1311, 1312, 1316, or 1345 of [the Act]," which the Rule here is not.

Second, the Rule is not the functional equivalent of a decision to grant or deny a permit under paragraph (F). Indeed, this Court rejected a very

similar argument in *Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012), where it explained that paragraph (F) cannot be stretched to cover regulations merely *relating to* permitting.

Third, the agencies' interpretations of paragraphs (E) and (F) run afoul the *expressio unius* canon. Section 1369(b)(1) carefully lists seven limited categories of agency actions subject to original review in the courts of appeals and does not include an express grant of court-of-appeals jurisdiction over all agency rulemaking. The careful selection of those seven, spare categories justifies the inference that the exclusion was deliberate. That is especially so because the sort of language that the agencies propose to read into Section 1369(b)(1) *does* appear in the Clean Air Act—indicating that Congress knows how to provide for general court-of-appeals jurisdiction when it wants to.

Finally, important practical considerations weigh in favor of reversal. As the agencies describe it, this case will involve substantial motions practice and discovery. There can be no dispute that the district courts are better equipped to handle such proceedings, including managing discovery. In addition, the federal judicial system depends upon the consideration of difficult legal issues by multiple courts to ensure well-informed and efficient development of the law. Funneling these challenges through a single court of appeals (here, the Sixth Circuit) without the benefit of the views of the district courts or other courts of appeals would thwart that goal.

ARGUMENT

Congress conferred limited original jurisdiction on the courts of appeals over seven narrow categories of agency actions under the Clean Water Act. None of those categories comes close to covering the agencies' promulgation of the Rule. Determined to pound a square peg into round holes, the government nevertheless insists that the Rule is an "other limitation" under paragraph (E) or the functional equivalent of "issuing or denying any permit" under paragraph (F). Taking those assertions to their logical conclusions would mean that Section 1369(b)(1) has no limits at all. At bottom, the government's approach is out of step with the statutory text and settled canons of construction, thwarts the Act's purposes, and disregards this Court's precedents. The lower court should be reversed.

A. Paragraphs (E) and (F) are inapplicable here

The States' motion to dismiss before the Sixth Circuit and their opening before this Court carefully analyze the language of paragraphs (E) and (F). In demonstrating why the Rule does not fit within either of them, the States show that several canons of construction—especially the maxims that disfavor superfluities and favor clear jurisdictional rules—point convincingly toward dismissal. We agree with those arguments but do not repeat them here; instead, we offer additional textual arguments in favor of dismissal.

1. The Rule is not an "other limitation" under paragraph (E)

In its opposition to the States' motion for a preliminary injunction, the government asserted that the Rule is an "other limitation" under paragraph (E). Gov't Opp. to Mot. for PI, at 7, *Georgia et al. v. McCarthy et al.*, No. 2:15-cv-79 (S.D. Ga. July 31, 2015). That is so, according to the government, because it "results in restrictions on" *both* "dischargers of pollutants" *and* "permit issuers." Gov't Opp. to Mot. for PI, at 7, *Murray Energy Corp. v. EPA*, No. 1:15-cv-110 (N.D. W. Va. Aug. 20, 2015). That is plainly mistaken; in fact, the Rule is not a "limitation" in any ordinary sense of that word.

The Rule cannot be an "other limitation" on *permit issuers* because the phrase that it defines, "waters of the United States," *grants* jurisdiction to the agencies over the Nation's waters. It gets matters backwards to call the agencies' definition of a phrase that confers jurisdiction a "limit" on officials' authority. It would not make sense to think of 28 U.S.C. § 1291—which confers jurisdiction on this Court over "final decisions of the district courts of the United States"—as a "limitation" on the Court's power to hear other kinds of appeals. The Court has no such power unless it is separately granted.

Just so here. The government's contrary view—its position that by "defining" the agencies' jurisdiction, the Rule is necessarily a "limitation" on the authority of agency officials—presupposes that the agencies have a broad baseline of authority that the Rule can cut back. But that is not how our

federal system works. *Cf. Bond v. United States*, 134 S. Ct. 2077, 2086 (2014) ("In our federal system, the National Government possesses only limited powers," not plenary police power).

Nor is the Rule the approval or promulgation of an "other limitation" on *regulated parties*. The Rule here purports only to define the phrase "waters of the United States." That definition is not the promulgation of an independent limitation in its own right; it simply describes the waters to which *other* limitations may apply. The agencies say so themselves in the preamble to the Rule: Their definition of "waters of the United States" "imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments." 80 Fed. Reg. 37,102. That admission is consistent with this Court's reasoning in *Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012), where it held that the water-transfer rule at issue there—which exempted certain activities from EPA's permit program—"impose[d] no restrictions on [regulated] entities." *Id.* at 1286.

The government has now done an about face. This litigation-motivated change of position—that the Rule does, after all, impose duties (which is to say, limitations) on state and local governments and the private sector—assumes that *any* regulation defining *any* statutory term in *any* way affecting the reach of the CWA qualifies as an "other limitation" within the meaning of

paragraph (E). It is hard to imagine, according to that logic, what wouldn't qualify as an "other limitation."

And that is precisely the problem: The government's boundless reading of the words "other limitation" is squarely at odds with "the *ejusdem generis* rule of statutory construction," which provides that a "general term"—and particularly one using the word "other"—"should be 'understood in light of the specific terms that surround it.'" *Woods v. Simpson*, 46 F.3d 21, 23 (6th Cir. 1995) (quoting *Kurinsky v. United States*, 33 F.3d 594, 596–97 (6th Cir. 1994)). Put another way, the rule requires reading the general term as "embrac[ing] only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001) (internal quotation marks omitted).[5]

Here, that means reading the words "other limitation" as embracing an object similar in nature to an "effluent limitation." *See Circuit City*, 532 U.S. at 114. As we have explained, effluent limitations have a highly technical role under the Clean Water Act. They are not just *any* limitation—no, they

[5] *Cf. Iowa League of Cities v. EPA*, 711 F.3d 844, 866 (8th Cir. 2013) (holding that the court had jurisdiction under (F) because the regulation at issue imposed "new restrictions on [regulated entities'] discretion with respect to discharges"); *Virginia Elec. & Power Co. v. Costle*, 566 F.2d 446, 450 (4th Cir. 1977) (approving jurisdiction under (F) to hear a challenge to agency regulations "closely related to the effluent limitations").

"dictate in specific and technical terms the amount of each pollutant that a point source may emit." *Am. Paper Inst.*, 890 F.2d at 876.

The conclusion that paragraph (E) must be read narrowly finds powerful support not only in the words that immediately precede "other limitation," but also in the words that immediately *follow*: "under section 1311, 1312, 1316, or 1345 of [the Act]." 33 U.S.C. § 1369(b)(1)(E). Each of these sections provides for the issuance of effluent limitations or effluent limitation-like rules. Sections 1311 and 1312 govern "effluent limitations" and "water quality related effluent limitations," respectively. The latter are additional effluent limitations that may be imposed where ordinary effluent limitations fail to achieve state water quality standards. Section 1316 provides for effluent limitation-like reductions on new dischargers. And Section 1345, added in the 1987, provides for restrictions on the discharge of sewage sludge. Thus, "even if the [Rule] could be classified as a limitation, it was not promulgated under section 1311, 1312, 1316, or 1345." *Friends of the Everglades*, 699 F.3d at 1286.

As we already have demonstrated, it would be a mistake to think of the agencies' definition of "waters of the United States" as a limitation at all; it would be downright absurd to say that, *as* a limitation, it has a purpose "similar in nature" to an effluent limitation describing the technical measures of pollutants allowed under a permit—much less that it was promulgated

under any of the specifically identified statutory provisions. The government's contrary proposal reads "other limitation" as covering every agency rule that might, in any conceivable respect, be understood as a "limitation" on any stakeholder's conduct, without regard for the limiting text both preceding and following. That is not what Congress had in mind.

2. There is no basis for finding jurisdiction under paragraph (F)

The government fares no better under paragraph (F), which grants the courts of appeals original jurisdiction in cases involving the "issuing or denying [of] any permit under section 1342 of this title." 33 U.S.C. § 1369(b)(1)(F). In *Crown Simpson Pulp v. Costle Co.*, 445 U.S. 193 (1980), the Supreme Court held that paragraph (F) covers not only technical grants and denials of permits by the agencies, but also other agency actions that have the "precise effect" of accomplishing those ends. *Id*. at 196. At issue in that case was "EPA's veto of a state-issued permit," which the Court held to be "functionally similar" to a permit denial and thus sufficient to support original appellate jurisdiction under paragraph (F). *Id*.

None of that is any help to EPA here: The agencies' definition of "waters of the United States" bears no plausible resemblance to a decision to grant or deny a permit to discharge.

In its opposition to the States' motion for a preliminary injunction, the government asserted that the Rule nevertheless falls within paragraph (F)

because "it identifies what water bodies *will* require CWA permits when pollutants are discharged into them." Gov't Opp. 7.

The government's approach thus might have some force if Congress had written a different statute—if it had drafted paragraph (F) to apply to EPA actions "impacting a decision to grant or deny a permit" or "affecting when permits are or are not required." But the government's approach cannot be squared with the statute that Congress *actually* wrote, which applies to agency actions that *themselves* amount to "issuing or denying any permit under section 1342 of this title." It is again difficult to imagine any case in which the government's expansive redrafting of paragraph (F) would not confer jurisdiction. It was for precisely that reason that this Court rejected the same argument in *Friends of the Everglades*, that paragraph (F) applies "to any 'regulations *relating to* permitting.'" 699 F.3d at 1288 (emphasis added). This, the Court explained, "is contrary to the statutory text." *Id.*

Although the government may point to the Sixth Circuit's decision in *National Cotton Council of America v. EPA*, 553 F.3d 927 (6th Cir. 2009), as it did in the district court (Gov't Opp. 6), it would not do it much good. As an initial matter, the court there did not undertake any real analysis of jurisdiction in that case. Indeed, the Sixth Circuit's treatment of jurisdiction comprised a single, short paragraph, at the end of which the court summarily concluded that the rule at issue "regulates the permitting procedures," and

"therefore . . . jurisdiction is proper under § 1369(b)(1)(F)." *Cotton Council*, 553 F.3d at 933; *see Friends of the Everglades*, 699 F.3d at 1288 ("*Cotton Council* . . . provided no analysis of [paragraph (F)]."). Such "drive-by jurisdictional rulings" with "'less than meticulous'" analysis "should not be accorded precedential effect." *Emswiler v. CSX Transp.*, 691 F. 3d 782, 788-789 (6th Cir. 2012) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006)).

Of course, even were its jurisdictional holding accorded any weight, *Cotton Council* would not support review in this case. At issue in that case was EPA's rule exempting pesticide applications from the permitting requirements of the CWA. 553 F.3d at 932-933. The rule provided, in particular, that pesticide "residues" (what is left over after a pesticide has worked its intended purpose of killing off pests) were not "discharges" under the Act. *Id.* In holding that it had paragraph (F) jurisdiction to consider the pesticide rule, the Sixth Circuit reasoned that, by expressly "exempting" a discrete category of discharges from the CWA's "permitting regulations," the rule functioned effectively as a blanket permit for those discharges. *Id.* at 933 (citing *NRDC v. EPA*, 966 F.2d 1292, 1296-1297 (9th Cir. 1992)). The Rule here has no such effect.

3. The government's interpretations of paragraphs (E) and (F) violate the expressio unius canon

There is an even more fundamental reason to reject the government's interpretation of paragraphs (E) and (F) as effectively limitless grants of

original jurisdiction on the courts of appeals over all agency rulemaking: the *expressio unius est exclusio alterius* canon, which provides that the expression of one thing implies the exclusion of another.

Section 1369(b)(1) meticulously catalogues seven narrow categories of agency actions subject to original review in the courts of appeals. Under the *expressio unius* maxim, the careful selection of those seven, spare categories "justif[ies] the inference" that a general grant of court-of-appeals jurisdiction over all agency decisionmaking was "excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (citing *United States v. Vonn*, 535 U.S. 55, 65 (2002)).

That conclusion takes on special force when considered alongside other statutes demonstrating that, when Congress wishes to confer broad jurisdiction on the courts of appeals to hear petitions for review challenging general agency rulemaking, it does so expressly. Congress took that approach, for example, when it drafted the CWA's cousin statute, the Clean Air Act. There, it provided for original jurisdiction in the courts of appeals over challenges not only to particular agency actions, but to "any other nationally applicable regulations promulgated, or final action taken, by the Administrator" under the act. 42 U.S.C. § 7607(b)(1).

That is compelling evidence that Congress knows how to "ma[ke] express provisions" for expansive original jurisdiction in the courts of appeals

when it wants to, and that its "omission of the same [language]" from Section 1369(b)(1) "was purposeful." *Zadvydas v. Davis*, 533 U.S. 678, 708 (2001). In circumstances like these, "it is fair to suppose that Congress considered the unnamed possibility" of conferring jurisdiction on the courts of appeals to consider general agency decisionmaking under the Clean Water Act "and meant to say no to it." *Barnhart*, 537 U.S. at 168 (citing *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 836 (2001)). *See Am. Paper Inst.*, 890 F.2d at 877 ("Congress could easily have provided . . . a general jurisdiction provision in the Act" but instead "specified [a limited range of] EPA activities that were directly reviewable by the court of appeals.").

For just these reasons, other circuits have rejected the government's limitless approach to Section 1369(b)(1): "[S]ince some but not all of the actions that the EPA can take under the CWA are listed with considerable specificity in [S]ection 1369(b)," it follows that "not all EPA actions taken under the CWA are directly reviewable in the courts of appeals." *Narragansett Elec. Co. v. EPA*, 407 F.3d 1, 5 (1st Cir. 2005). And "the complexity and specificity of [33 U.S.C. § 1369(b)(1)] in identifying what actions of EPA under the [CWA] would be reviewable in the courts of appeals suggests that not all such actions are so reviewable." *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 517 (2d Cir. 1976). If those cases were rightly decided—and we submit that they were—then the judgment below must be reversed.

B. Important practical considerations support dismissal

Finally, the government's position is inconsistent both with the institutional competencies of the courts of appeals and district courts and with the proper operation of the federal judicial system.

It goes without saying that a district court "is in a far better position than a court of appeals to supervise and control discovery," which is a matter "peculiarly within its discretion and competency." *ACF Indus., Inc. v. EEOC*, 439 U.S. 1081, 1087-1088 (1979) (Powell, J., dissenting from denial of certiorari). In this case, "the superiority of the fact-finding apparatus of a district court" (*PBW Stock Exch., Inc. v. SEC*, 485 F.2d 718, 750 (3d Cir. 1973) (Adams, J., dissenting)) should—at least according to the government—weigh in favor of district court review.

Although the *amici* do not believe that substantial fact finding will be necessary here, the government *does*. In its view, "numerous factual issues are likely to arise," and consideration of the petitions will require "the reviewing court examine the factual, scientific, and technical information contained in a voluminous administrative record to determine whether the rationale provided by EPA and the Army, and the Rule itself, are reasonable based on the evidence contained in the record." Br. ISO Mot. to Transfer, at 5, *In re Clean Water Rule: Definition of "Waters of the United States*," MDL 2663 (J.P.M.L. July 27, 2015). Thus, according to the government, "there is a

substantial likelihood" that this case will entail "motion practice regarding the administrative record for review and possible attempts by the plaintiffs to use extra-record evidence." Reply ISO Mot. for Transfer, at 8, *In re Clean Water Rule: Definition of "Waters of the United States*," MDL 2663 (Aug. 26, 2015). And, indeed, certain "plaintiffs moving for preliminary injunctions have already relied on documents that are not part of the administrative record for the Rule"; thus, the government asserts, "it is very likely that there will be motion practice going forward regarding supplementation of the record and/or consideration of extra-record evidence." *Id.* at 9.

It is beyond cavil that "district courts are better equipped . . . than courts of appeals" to manage cases in which "[e]vidence will have to be taken." *Indiana & Michigan Elec. Co. v. EPA*, 733 F.2d 489, 490 (7th Cir. 1984). It is therefore difficult to square the government's view that the petitions for review will require discovery and motions practice with its view that the court of appeals is the proper forum for litigating these challenges.

The government's position here also would deprive the courts of appeals and the Supreme Court of the benefit of multilateral consideration of the questions presented on the merits. The federal judicial system depends upon the treatment of complex legal issues by multiple courts to ensure well informed and efficient development of the law. "To identify rules that will endure, [the appellate courts] must rely on the . . . lower federal courts to

debate and evaluate the different approaches to difficult and unresolved questions." *California v. Carney*, 471 U.S. 386, 400 (1985) (Stevens, J., dissenting). As the Ninth Circuit has put it, the "ability to develop different interpretations of the law among the circuits is considered a strength of our system" because "[i]t allows experimentation with different approaches to the same legal problem." *Hart v. Massanari*, 266 F.3d 1155, 1173 (9th Cir. 2001). *Accord McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J. respecting denial of petitions for writs of certiorari) ("[I]t is a sound exercise of discretion for the Court to allow [lower courts] to serve as laboratories in which the issue receives further study before it is addressed by this Court."). It is thus commonplace for important regulations to receive the attention of several district courts and courts of appeals in parallel lawsuits all at once. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2581 (2012).

The government's approach to Section 1369(b)(1) would mean funneling the important legal questions presented here through a single court of appeals, without the benefit of either a district court's initial consideration or the opinions of the other federal courts of appeals on the same issues. If that were what Congress had in mind, surely it would have said so expressly. Thus, not only is the government's position inconsistent with the statutory

language, but it makes no practical sense. Against this backdrop, the district court's jurisdictional ruling should be reversed.

CONCLUSION

The decision of the district court should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 6,371 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word and set in Century Schoolbook with an actual typeface size of 14 points or larger.

/s/ *Timothy Bishop*

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system on September 21, 2015. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

/s/ *Timothy Bishop*