No. 15-3751 and related cases

In the

United States Court of Appeals

for the

Sixth Circuit

IN RE: ENVIRONMENTAL PROTECTION AGENCY
AND DEPARTMENT OF DEFENSE,
FINAL RULE: CLEAN WATER RULE:
DEFINITION OF "WATERS OF THE UNITED STATES,"
80 Fed. Reg. 37,054, Published on June 29, 2015 (MCP No. 135)

On Petitions for Review of a Final Rule
of the U.S. Environmental Protection Agency and the
United States Army Corps of Engineers

JOINT REPLY OF
THE NATIONAL ASSOCIATION OF MANUFACTURERS
(in Nos. 15-3751, 15-3799, 15-3817, 15-3820, 15-3822,
15-3823, 15-3831, 15-3837, 15-3839, 15-3850, 15-3853)
AND AMERICAN FARM BUREAU FEDERATION, ET AL.
(in Nos. 15-3817, 15-3820, 15-3837, 15-3839)
TO RESPONDENTS' COMBINED OPPOSITION TO MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

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ARGUMENT

The Agencies would like to rewrite the plain language that Congress used in Section 509(b) based on considerations that are either irrelevant or actually cut the other way. This Court should apply the statute's plain text, which requires dismissal of all the petitions for review.

1. This Court should reject out of hand the Agencies' argument that paragraph (F), which covers actions "issuing or denying [a section 402] permit," applies to a rule that does *not* issue or deny a permit but instead purports to define jurisdictional waters governed by the Clean Water Act. As the Eleventh Circuit held in *Friends of the Everglades v. EPA*, the government's argument that all regulations *relating to* permitting fit within paragraph (F) is "contrary to the statutory text." 699 F.3d 1280, 1288 (11th Cir. 2012).

National Cotton Council v. EPA, 553 F.3d 927 (6th Cir. 2009), is not to the contrary. It involved regulations that could conceivably be said to "gover[n] the issuance of permits," by providing that certain pesticide residue is not a "discharge" requiring an NPDES permit. *Id.* at 933. The WOTUS Rule, by contrast, addresses the scope of Clean Water Act jurisdiction generally. Assuming that *National Cotton Council* was correctly decided, it stands at the very furthest reaches of Section 509(b) jurisdiction. This Court should be guided by the language of Paragraph (F) and the Supreme Court's

holding in *Crown Simpson Pulp v. Costle* that Section 509(b) covers agency actions that are the functional equivalent, and have the "precise effect," of a permit grant or denial—for example, "EPA's veto of a state-issued permit" at issue in *Crown Simpson*. 445 U.S. 193, 196 (1980). Certainly, there is no warrant to *expand* the holding in *National Cotton Council*—which concerned a rule defining circumstances when no permit is required, and thus could be construed as a blanket grant of a permit—to a rule that simply defines Clean Water Act jurisdiction. By no stretch of the statute's language does the WOTUS Rule "issu[e] or den[y] a permit."

2. Nor is the WOTUS Rule an "other limitation" within paragraph (E). It is nothing like an "effluent limitation"—the preceding statutory phrase with which "other limitation" must be read *ejusdem generis*. Still more basically, the Rule is not a "limitation" at all, under any common sense meaning of that term. The Rule purports to *define* the Clean Water Act's jurisdictional phrases "navigable waters" and "waters of the United States," which are then incorporated in *other* provisions of the statute and rules: not only in permitting schemes like the Section 402 NPDES program and Section 404 fill-permit program, but also in non-regulatory programs like State management planning to achieve State water quality standards. See, *e.g.*, 33 U.S.C. §§ 1329(a)(1), (b)(1) (State planning for "the navigable waters" to address both point source and nonpoint source pollutants); § 1313(e)(3)

(requiring "plans for all navigable waters within [the] State"). The WOTUS Rule thus underlies obligations imposed throughout the statute and cannot plausibly be labeled a limitation by itself.

The Agencies may have it right when they argue that paragraph (E) "provides for judicial review of EPA's actions that implement the NPDES program" (Resp. Br. 41), but that is not what the WOTUS Rule does. It is a rule (mis)defining jurisdictional terms that underlie the entire statutory scheme and does not itself "implement" any permitting program. Administrator Gina McCarthy has said exactly that: "It is important to remember that the Clean Water Rule is a jurisdictional rule. It doesn't result in automatic permit decisions." *The Fiscal Year 2016 EPA Budget: Joint Hearing Before the Subcomm. on Energy & Power and the Subcomm. on Env't & Econ. of the H. Comm. on Energy & Commerce*, 114th Cong. 70 (Feb. 25, 2015), http://www.gpo.gov/fdsys/pkg/CHRG-114hhrg95492/pdf/CHRG-114hhrg95492.pdf.

3. The Agencies cite many court of appeals cases from other circuits in support of their extraordinarily expansive construction of paragraph (E), while downplaying other cases like *Friends of the Everglades* and *Northwest Environmental Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008), that found no jurisdiction. But not one of EPA's cases is on point—each involves rules that more closely regulate permitting, and none involves a baseline

jurisdictional rule. And no fair observer could deny that the existing case law on Section 509(b) is an inconsistent morass, not the coherent body of precedent the Agencies pretend to see. After all, a unanimous Eleventh Circuit in *Friends of the Everglades* (a case the Supreme Court declined to review, despite the United States urging it to do so) flatly rejected this Court's decision in *National Cotton Council*. See 699 F.3d at 1288. Rather than wade into this quagmire of conflicting circuit court decisions, this Court should look to the plain statutory language and the two relevant Supreme Court decisions: *Crown Simpson Pulp*, which limits paragraph (F) to agency action that is functionally equivalent to the grant or denial of a permit, and *E.I. du Pont de Nemours & Co. v. Train*, which limits paragraph (E) to regulations governing permitting, like the regulations setting effluent limitations for classes of sources at issue there. 430 U.S. 112, 136 (1977). Applying those guidelines, this Court lacks jurisdiction.

4. The narrow scope of the specific terms used in CWA Section 509(b) contrasts starkly with the judicial review provision of the Clean Air Act—a contrast we previously pointed out (Jt. Mot. 19) and to which the Agencies have made no response. Congress in the Clean Air Act gave the D.C. Circuit original jurisdiction over "any * * * nationally applicable regulations promulgated, or final action taken, by the Administrator." 42 U.S.C. § 7607(b)(1). Congress thus knew very well how to grant courts of appeals the

expansive jurisdiction over challenges to "nationwide rules" that the Agencies seek. Resp. Br. 48. In the Clean Water Act, however, Congress narrowly confined original court of appeals review to the seven very specific categories set out in Section 509(b).

5. Lacking any support in the statute, the Agencies resort to "policy considerations" (Resp. Br. 48), claiming that review in the district court would be "inefficient and impractical" (Resp. Br. 4) and that any ambiguities in Section 509(b) should be construed in favor of this Court's jurisdiction. But the Supreme Court has been quite clear that courts are not to go hunting for ambiguity where none exists: subject-matter jurisdiction "must of course be governed by the intent of Congress and not by any views [courts] may have about sound policy." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 746 (1985); see also *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593 (1980) ("It is not our task to determine which would be the ideal forum for judicial review of the Administrator's decision in this case"). As EPA has been told before, it may not "avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy." *Friends of the Earth v. EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006).

6. That would be true however good EPA's policy reasons for preferring circuit court review of the WOTUS Rule. But in fact, EPA gets the policy considerations exactly backwards. It simply is not the case that the risk of

"conflicting judicial decisions" in the district courts and on appeal points in favor of original circuit court review. Resp. Br. 48. This Court should reject that argument, just as the JPML court rejected it as a reason to consolidate the various district court proceedings in a single court. Careful consideration of the legality of a national rule by different judges in different courts is a positive, not a negative. When issues percolate through several courts, that "allow[s] difficult issues to mature through full consideration," "eliminate[s]" subsidiary arguments before appeal, and "vastly simplifie[s]" the task of the appellate courts and Supreme Court. *E.I. du Pont de Nemours*, 430 U.S. at 135 n.26; see, *e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (observing that percolation through a plethora of cases addressing the constitutionality of same-sex marriage bans had helped the Supreme Court "explain and formulate the underlying principles this Court now must consider"). The circuit splits that the Agencies fear may arise from initial consideration in multiple district courts actually would "increase the probability of a correct disposition" (*Atchison, Topeka & Santa Fe R.R. Co.* v. *Pena*, 44 F.3d 437, 447 (7th Cir. 1994) (Easterbrook, J., concurring)), if and when the WOTUS Rule challenges reach the Supreme Court, as the Agencies' aggressive claims of jurisdiction did in both *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006).

The Agencies' contention that "prolonged uncertainty" would result from district court review and would disserve "regulated parties and the public" (Resp. Br. 48) is likewise unavailing. The rule challenge will be promptly decided by district courts, appealed to courts of appeals, and likely reviewed by the Supreme Court—the logical progression designed to produce a definitive ruling binding on all parties. That produces no more uncertainty than most litigation, and no more uncertainty than routine as-applied challenges, which are just as capable of upsetting EPA's view of the world. See, *e.g.*, *Sackett v. EPA*, 132 S. Ct. 1367 (2012); *Hawkes Co. v. U.S. Army Corps of Engineers*, 782 F.3d 994 (8th Cir. 2015), petition for cert. filed (No. 15-290) (U.S. Sept. 8, 2015); *Belle Co., LLC v. U.S. Army Corps of Engineers*, 761 F.3d 383 (5th Cir. 2014), cert. denied, 135 S. Ct. 1548 (2015), rh'g petition pending (No. 14-493) (U.S. Apr. 16, 2015). Any uncertainty brought about by challenges to the highly contested WOTUS Rule—challenges that come from every sector of society affected by the Rule—is not the evil the Agencies make it out to be, but the natural result of the Agencies' defective rulemaking process and vast overreaching.

The "policy" the Agencies are really concerned about is their own convenience in litigation and desire to suppress the full airing of the issues that will come with multi-court review. The JPML did not let agency convenience override the plain language of the transfer and consolidation

statute, and this Court should not rewrite the Clean Water Act to make life easier for EPA's and the Corps' lawyers.

CONCLUSION

This Court should dismiss all the petitions for review.

Dated: November 3, 2015

Respectfully submitted,

/s/ *Timothy Bishop*

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing motion with the Clerk of the Court using the appellate CM/ECF system on November 3, 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*