ORAL ARGUMENT REQUESTED
No. 16-5038

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, STATE CHAMBER OF OKLAHOMA, TULSA REGIONAL CHAMBER, and PORTLAND CEMENT ASSOCIATION,

Plaintiffs-Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GINA MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency, UNITED STATES ARMY CORPS OF ENGINEERS, and JO-ELLEN DARCY, in her official capacity as Assistant Secretary of the Army (Civil Works),

Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Oklahoma, No. 4:15-cv-386-CVE-PJC
Judge Claire V. Eagan

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants disclose the following:

1. Appellant Chamber of Commerce of the United States of America has no parent corporation, and no publicly held corporation owns 10% or more of any common stock.

2. Appellant National Federation of Independent Business has no parent corporation, and no publicly held corporation owns 10% or more of any common stock.

3. Appellant State Chamber of Oklahoma has no parent corporation, and no publicly held corporation owns 10% or more of any common stock.

4. Appellant Tulsa Regional Chamber has no parent corporation, and no publicly held corporation owns 10% or more of any common stock.

5. Appellant Portland Cement Association has no parent corporation, and no publicly held corporation owns 10% or more of any common stock.

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INTRODUCTION

On June 29, 2015, over the objections of States, landowners, and businesses, the Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") adopted a rule that redefines and expands what constitutes "waters of the United States" under the Clean Water Act ("CWA"). Through this "definitional rule," the agencies claimed authority to regulate millions of miles of intrastate waters never before under federal control. Appellants, on behalf of their affected members, challenged the rule in the Northern District of Oklahoma.

The district court, however, never reached the merits of Appellants' claims. Instead, more than seven months after Appellants filed suit, the district court *sua sponte*—without a motion, briefing, or hearing—issued a four-page order dismissing the case for lack of jurisdiction. Relying on a fractured Sixth Circuit decision, the district court found that the courts of appeals have exclusive jurisdiction because the WOTUS Rule was an "effluent limitation or other limitation" and was, in effect, an action "issuing or denying any permit" under the CWA. 33 U.S.C. § 1369(b)(1)(E)-(F).

This Court has an obligation to determine its own jurisdiction and should reverse. The text of Section 1369(b)(1) and longstanding canons of statutory construction make plain that Appellants' suit belongs in the district court.

JURISDICTIONAL STATEMENT

On July 10, 2015, the Chamber of Commerce of the United States of America, National Federation of Independent Business, State Chamber of Oklahoma, Tulsa Regional Chamber, and Portland Cement Association ("Appellants") filed suit in the U.S. District Court for the Northern District of Oklahoma against the EPA, Gina McCarthy, in her official capacity as Administrator of the EPA, the Corps, and Jo-Ellen Darcy, in her official capacity as Assistant Secretary of the Army (collectively, the "Agencies"). Appendix ("App.") 44. The complaint asked the district court to vacate and set aside an administrative rule promulgated by the Agencies that redefines "waters of the United States" under the Clean Water Act ("WOTUS Rule"). App. 71. The district court had jurisdiction over Appellants' lawsuit under 28 U.S.C. § 1331, 5 U.S.C. §§ 701-706, and 5 U.S.C. § 611.

On February 24, 2016, the district court *sua sponte* dismissed the case for lack of jurisdiction, and entered a final judgment. App. 76, 78. Appellants timely filed a notice of appeal on April 19, 2016. App. 81. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Whether the district court incorrectly dismissed this action on the ground that the Sixth Circuit has exclusive jurisdiction over challenges to the WOTUS Rule.

STATEMENT OF THE CASE

A. The Clean Water Act

The Clean Water Act bans any "discharge of any pollutant by any person" into "navigable waters." 33 U.S.C. §§ 1311(a), 1362(12). The primary exception to this prohibition is the National Pollutant Discharge Elimination System ("NPDES") permitting system. Individuals and entities may apply for an NPDES permit to discharge effluent into navigable waters. *See* 33 U.S.C. §§ 1311(a), 1342(a), (c). Both the EPA and the States (if authorized by the EPA) may issue NPDES permits. *See id*. § 1342(c)(1); *see* 57 Fed. Reg. 43,733, 43,734-35. Under Section 1344, the Corps issues permits for discharges of "dredged or fill material," such as soil, rock, and sand. 33 U.S.C. § 1344. Permit holders must comply with various limits on the amount of pollutants they may discharge, *see, e.g.*, 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1345, as well as numerous monitoring, testing, and reporting requirements, *see, e.g.*, *id.* § 1318.

On top of this source-by-source permitting, the CWA directs States to establish and update "water quality standards." 33 U.S.C. § 1313. "These standards

supplement effluent limitations so that numerous point sources, despite compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). The States, in turn, must adopt "individual control strategies" for certain "toxic pollutants." 33 U.S.C. § 1314(l)(1)(D). If the EPA rejects a State's control strategy, then it will promulgate its own. *Id*. § 1314(l)(3).

Importantly, the CWA limits the Agencies' authority to "navigable waters," which the law defines as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). As a matter of statutory interpretation, and in order to avoid constitutional concerns, the Supreme Court has rejected the Agencies' attempts to regulate intrastate waters by broadly construing the terms "navigable waters" and "the waters of the United States." *See Rapanos v. United States*, 547 U.S. 715 (2006); *SWANCC v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001). Indeed, the CWA "continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, --- S. Ct. ---, 2016 WL 3041052, at *8 (U.S. May 31, 2016) (Kennedy, J., concurring).

B. The WOTUS Rule

On June 29, 2015, the Agencies adopted the WOTUS Rule over significant opposition from States, landowners, businesses, and others. *See, e.g.*, Comments of

Chamber of Commerce of the United States of America, National Federation of Independent Business, and 373 Other Groups, Docket No. EPA-HQ-OW-2011-0880 (Nov. 12, 2014). The WOTUS Rule purports to identify seven types of waters that are "waters of the United States" and thus subject to the Agencies' regulation of "navigable waters":

> (1) Traditional Navigable Waters. All 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* 33 C.F.R. § 328.3(a)(1).
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> (2) Interstate Waters. All waters that cross State borders, "even if they are not navigable" or "do not connect to [navigable] waters." 80 Fed. Reg. at 37,074; *see* 33 C.F.R. § 328.3(a)(2).
>
> (3) Territorial Seas. "[T]he 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." 80 Fed. Reg. at 37,075; *see* 33 C.F.R. § 328.3(a)(3).
>
> (4) Impoundments. All "impoundments of waters otherwise identified as waters of the United States." 33 C.F.R. § 328.3(a)(4).
>
> (5) Tributaries. All waters that "contribute[] flow, either directly or through another water" to a traditional navigable water, interstate water, or territorial sea and are "characterized by the presence of the physical indicators of a bed and bank and an ordinary high water mark." 33 C.F.R. § 328.3(c)(3); *see id.* § 328.3(a)(5).
>
> (6) Adjacent Waters. All waters "adjacent" to a traditional water, interstate water, territorial sea, impoundment, or tributary. 33 C.F.R. § 328.3(a)(6); *see id.* § 328.3(c)(1) (defining "adjacent" expansively to mean "bordering, contiguous, or neighboring").
>
> (7) Case-Specific, "Significant Nexus" Waters. Certain waters (*e.g.*, those located within 4,000 feet of the high tide line of a traditional water, interstate

> water, territorial sea, impoundment, or tributary) if they have a "significant nexus" to a traditional water, interstate water, or territorial sea. 33 C.F.R. § 328.3(a)(7)-(8).

The WOTUS Rule also identifies waters that are excluded from the definition of "waters of the United States," such as puddles, ornamental waters, and prior converted cropland. *See* 33 C.F.R. § 328.3(b).

C. Judicial Review Under the Clean Water Act

Most litigation concerning the Agencies' actions under the CWA originates in federal district courts. *See, e.g.*, *City of Albuquerque v. Browner*, 865 F. Supp. 733, 736 (D.N.M. 1993), *aff'd*, 97 F.3d 415 (10th Cir. 1996); *see also Loan Syndications & Trading Ass'n v. SEC*, 818 F.3d 716, 719 (D.C. Cir. 2016) ("[T]he normal default rule is that persons seeking review of agency action go first to district court rather than to a court of appeals."). Challenges to certain EPA actions, however, must originate in the courts of appeals. These seven narrow categories are EPA actions:

> (A) in promulgating any standard of performance under section 1316 of this title,[1]

[1] The EPA must implement "standards of performance" (*i.e.*, a "standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction" achievable through the "best available demonstrated control technology") for "new sources" of pollution. 33 U.S.C. § 1316(a)(1), (b). Once a "standard of performance" takes effect, "it shall be unlawful for any owner or operator of any new source [of pollutants] to operate such source in violation of [the] standard of performance." *Id*. § 1316(e).

(B) in making any determination pursuant to section 1316(b)(1)(C) of this title,[2]

(C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title,[3]

(D) in making any determination as to a State permit program submitted under section 1342(b) of this title,[4]

(E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title,[5]

(F) in issuing or denying any permit under section 1342 of this title,[6] and

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[2] Section 1369(b)(1)(B) appears to be a drafting error because there is no Section 1316(b)(1)(C). Section 1316(b)(1)(C) would have allowed a person to seek an exemption from a standard of performance, but the provision was eliminated during the legislative process. *See* H. Rep. 92-911, at 31, 111-12 (1971); S. Conf. Rep. 92-1236, at 380 (1972).

[3] The EPA must promulgate "effluent standards," "effluent prohibitions," and "pretreatment standards" for "toxic pollutants." 33 U.S.C. § 1317(a)-(b). After any such standard takes effect, "it shall be unlawful for any owner or operator of any source [of pollutants] to operate [the] source in violation of" such standard. *Id.* § 1317(d).

[4] A State "desiring to administer its own permit program for discharges into navigable waters within its jurisdiction" may seek such authority from the EPA. 33 U.S.C. § 1342(b). If the State satisfies the statutory requirements for transferring permitting authority to the State, the EPA must approve the State's application. *Id.*

[5] Under these sections, the EPA may approve or promulgate "effluent limitations" tied to the "best available technology economically achievable," 33 U.S.C. § 1311; "effluent limitations" to maintain "water quality" in certain navigable waters, *id.* § 1312; limitations for new point sources of pollutants, *id.* § 1316; and "numerical limitations" for "sewage sludge," *id.* § 1345.

[6] The EPA can issue or deny "a permit for the discharge of any pollutant, or combination of pollutants … upon condition that such discharge will meet" certain requirements. 33 U.S.C. § 1342(a).

> (G) in promulgating any individual control strategy under section 1314(*l*) of this title.[7]

33 U.S.C. § 1369(b)(1).

D. Procedural History

On July 10, 2015, Appellants brought suit in the U.S. District Court for the Northern District of Oklahoma challenging the WOTUS Rule on statutory and constitutional grounds. Appellants alleged that the WOTUS Rule improperly extends federal regulatory authority to millions of miles of rivers, streams, and other purely intrastate waters. Appellants further alleged that many of their members (some of whom reside in the Northern District of Oklahoma) own property that will be subject to costly and burdensome federal regulations under the WOTUS Rule. Appellants asked the district court to hold the WOTUS Rule unlawful, to vacate and set it aside, and to enjoin its enforcement.

Although Appellants properly filed suit in the district court, they recognized that the Agencies would likely claim that jurisdiction over their challenge belonged in the courts of appeals. *See* 33 U.S.C. § 1369(b)(1). If Appellants had litigated this issue and lost, they would have forfeited their challenge to the WOTUS Rule

[7] If a State fails to submit an "individual control strategy" that will "produce a reduction in the discharge of toxic pollutants from point sources" through the establishment of effluent limitations and water quality standards or if the EPA does not approve the State's proposed control strategies, then the EPA must promulgate an "individual control strategy" for the State. 33 U.S.C. § 1314(*l*).

because the deadline for filing a petition for review is 120 days from the date of the EPA's action. *See* 33 U.S.C. § 1369(b)(1). Therefore, in an abundance of caution, Appellants filed a protective petition for review of the WOTUS Rule in this Court. *See Chamber of Commerce of the United States v. EPA*, No. 15-9552.

On July 29, 2015, this Court transferred Appellants' petition to the Sixth Circuit (selected by the multijurisdictional lottery), where it was consolidated with similar cases. *See* 28 U.S.C. § 2112(a)(3). Shortly thereafter, Appellants asked the Sixth Circuit to dismiss the petitions, arguing that the challenges to the WOTUS Rule belonged in the district court in the first instance because the rule did not fall under one of the seven narrow categories of actions for which original jurisdiction lies in the courts of appeals. *See* 33 U.S.C. § 1369(b)(1)(A)-(G). The Agencies contended that jurisdiction was proper under two provisions: Section 1369(b)(1)(E)—which provides for original jurisdiction in the court of appeals over an EPA action "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of [the CWA]"—and Section 1369(b)(1)(F)—which provides for original jurisdiction in the court of appeals over an EPA action "issuing or denying any permit under section 1342 of [the CWA]."

Between June 29 and July 15, 2015, various plaintiffs filed ten lawsuits challenging the WOTUS Rule in eight district courts. The Agencies filed a motion

with the Judicial Panel on Multidistrict Litigation ("JPML") to transfer and consolidate these cases in the U.S. District Court for the District of Columbia. In the Northern District of Oklahoma, the Agencies filed a motion to stay proceedings pending a JPML ruling. *See* Doc. 25. Appellants opposed the motion, *see* Doc. 28, arguing that the JPML had no power to transfer and consolidate the cases because they shared only common questions of *law* and not "one or more common questions of fact," 28 U.S.C. § 1407(a). Appellants also sought a preliminary injunction that would enjoin the Agencies from implementing the WOTUS Rule until the court ruled on the rule's legality. Doc. 27 at 1. The district court granted the Agencies' motion to stay, Doc. 32 at 9, but never ruled on Appellants' preliminary-injunction motion.

On October 9, 2015, the Sixth Circuit stayed the WOTUS Rule until it decided whether it had original jurisdiction over the petitions. *See In re Final Rule: Clean Water Rule: Definition of "Waters of the United States*," 803 F.3d 804 (6th Cir. 2015). Notably, it found that the petitioners had "demonstrated a substantial possibility of success on the merits of their claims," that "the Rule's effective redrawing of jurisdictional lines over certain of the nation's waters" would impose a heavy burden on both government and private parties, and that a stay of the WOTUS Rule was needed to "silence[] the whirlwind of confusion that springs

from uncertainty about the requirements of the new Rule and whether they will survive legal testing." *Id*. at 807-08.

On October 13, 2015, the JPML denied the Agencies' motion for transfer and consolidation. *In re Clean Water Rule: Definition of "Waters of the United States,"* 140 F. Supp. 3d 1340, 1341 (J.P.M.L. 2015). The JPML concluded that "these actions will involve only very limited pretrial proceedings," and "[d]iscovery, if any, will be minimal, as these cases will be decided on the administrative record." *Id.* Centralization thus would "not serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation" because "these actions will turn on questions of law." *Id*.

The Agencies then filed a second motion to stay in the Northern District of Oklahoma, asking the court to stay the litigation until the Sixth Circuit determined whether it had jurisdiction over the petitions. *See* Doc. 39. Appellants opposed, arguing that a stay was unnecessary because the district court would not be bound by the Sixth Circuit's decision and had an independent duty to determine its own jurisdiction. Doc. 45 at 5-10. Appellants asked the district court to set a briefing schedule to resolve its jurisdiction and address the merits of the case. *Id*. at 11-12. The district court never ruled on the Agencies' motion for a stay or Appellants' request for a briefing schedule. As a result, Appellants' case was subject to a *de facto* stay pending a decision from the Sixth Circuit.

On February 22, 2016, the Sixth Circuit issued a fractured 1-1-1 opinion denying Appellants' motion to dismiss and holding that it had original jurisdiction over the petitions. *See In re U.S. Dep't of Defense, U.S. E.P.A. Final Rule: Clean Water Rule: Definition of Waters of U.S. ("In re WOTUS Rule")*, 817 F.3d 261 (6th Cir. 2016). Writing only for himself, Judge McKeague concluded that the Sixth Circuit had original jurisdiction based on his reading of Supreme Court and Sixth Circuit cases. Judge McKeague recognized that "on its face, the Agencies' argument is not compelling" because it was not "facially consonant with the plain language of Section 1369(b)(1)." *Id*. at 266, 273. He nevertheless concluded that the relevant decisions "favored a 'functional' approach over a 'formalistic' one in construing these provisions." *Id*. at 264. Judge McKeague thus concluded that policy considerations counseled for centralized review of the WOTUS Rule in a single court of appeals. Judge McKeague found original jurisdiction under both subparagraphs (E) and (F) of Section 1369(b)(1) because, in his view, the *effect* of the WOTUS Rule would be to "approv[e] or promulgat[e] [an] effluent limitation or other limitation" and to "issu[e] or deny[] [a] permit under section 1342." *Id*. at 269-73 (citing 33 U.S.C. § 1369(b)(1)(E)-(F)).

Judge Griffin disagreed that original jurisdiction was proper in the court of appeals under subparagraph (E), but agreed that jurisdiction existed under subparagraph (F). He made clear that he reached this conclusion, however, only

because he was bound by incorrect Sixth Circuit precedent. *See id.* at 275-83. Judge Griffin found it "illogical and unreasonable to read the text of [Section 1369(b)(1)(E) or (F)] as creating jurisdiction in the courts of appeals for these issues." *Id.* at 275. Whether it was "desirable for us to possess jurisdiction for purposes of the efficient functioning of the judiciary, or for public policy purposes, [was] not the issue. Rather, the question [was] whether Congress in fact created jurisdiction in the courts of appeals for this case." *Id.* The answer, as a matter of first impression, was clearly "no." *Id.* Nevertheless, Judge Griffin concluded that the Sixth Circuit's decision in *National Cotton Council of America v. EPA*, 553 F.3d 927 (6th Cir. 2009), extended the court of appeals' original jurisdiction under subparagraph (F) to any "'regulation[] governing the issuance of permits under section 402'" of the CWA. 817 F.3d at 283 (quoting *National Cotton*, 553 F.3d at 933). Because the WOTUS Rule was such a regulation, Judge Griffin felt "compelled to find jurisdiction" under subparagraph (F). *Id*.

Finally, Judge Keith dissented because he "agree[d] with Judge Griffin's reasoning and conclusion that, under the plain meaning of the statute, neither subparagraph (E) nor subparagraph (F) of 33 U.S.C. § 1369(b)(1) confers original jurisdiction on the appellate courts." *Id*. Judge Keith, however, believed that "Judge Griffin's reading of [*National Cotton Council*] [was] wrong." *Id*. Reading Section 1369(b)(1) so broadly would push subparagraph (F) "to its breaking

point," allowing the courts of appeals to "exercise original subject-matter jurisdiction over all things related to the Clean Water Act." *Id*. at 284. "This could not have been the intent of the legislators who drafted seven carefully defined bases for original jurisdiction in the appellate courts—and it could not have been the intent of the *National Cotton* court itself." *Id*.

On February 24, 2016, just two days after the Sixth Circuit's decision, the Northern District of Oklahoma—without a motion, briefing, or hearing—issued an order *sua sponte* dismissing Appellants' case for lack of jurisdiction. App. 73-76. Pointing to 33 U.S.C. § 1369(b)(1)(E) and (F) and the Sixth Circuit's decision, the district court summarily concluded that the courts of appeals have original jurisdiction over challenges to the WOTUS Rule. App. 76. The court found it "unnecessary to wait for any party [to] file a motion to dismiss for lack of jurisdiction" because "the Sixth Circuit's decision speaks for itself that jurisdiction is appropriate only in the appellate courts." App. 76 n.1.

On March 23, 2016, Appellants filed a petition for rehearing en banc in the Sixth Circuit. The Sixth Circuit denied the petition on April 21, 2016.

SUMMARY OF THE ARGUMENT

This suit presents an important challenge to the scope of federal regulatory authority under the Clean Water Act. The district court erred in dismissing the case

sua sponte based, at least in part, on a questionable and non-binding decision of the Sixth Circuit that is contrary to the text of the CWA. This Court should reverse.

As an initial matter, this Court has an independent obligation to determine its jurisdiction. To the extent the district court deferred to the Sixth Circuit, it erred. The normal default rule is that, unless a statute provides otherwise, persons seeking review of agency action first go to district court rather than to a court of appeals. Because no statute places challenges to the WOTUS Rule in the courts of appeals, the district court's dismissal for lack of jurisdiction was improper.

The district court's conclusion that Section 1369(b)(1) of the CWA deprives the district court of jurisdiction was erroneous. Section 1369(b)(1) specifies seven categories of agency action for which a challenge must be initiated in the court of appeals. This is not one of those cases. Subparagraph (E) grants original jurisdiction to the courts of appeals over an EPA action "in approving or promulgating any effluent limitation or other limitation." But the WOTUS Rule does not *limit* anything; it instead operates in conjunction with other sections of the CWA to define when its restrictions apply. Similarly, subparagraph (F) provides for original appellate jurisdiction only when the EPA has "issu[ed]" or "den[ied]" a permit to discharge pollutants into a navigable water. But the WOTUS Rule obviously did not "issue" or "deny" any particular permit.

Finding original jurisdiction in the courts of appeals would contravene not only the CWA's plain text, but also longstanding canons of statutory construction. Specifically, the Agencies' interpretation of Section 1369(b)(1) fails under the doctrine of *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of the other) and the canon against surplusage. First, by giving the courts of appeals original jurisdiction over seven specific categories of EPA actions, Congress provided that those courts do not have original jurisdiction over other EPA actions, such as promulgation of the WOTUS Rule. Second, a statute should be construed to give effect to all of its provisions. But the district court's sweeping construction of subparagraphs (E) and (F) would render useless other provisions of Section 1369(b)(1).

The Agencies advocate a "practical," policy-based reading of the CWA to argue that the district court lacks jurisdiction. Such an approach, however, finds no support in Supreme Court or Tenth Circuit precedent, much less in the plain text of the CWA. Regardless, policy and practical concerns favor original jurisdiction in the district court—not in the courts of appeals. Appellants' interpretation of the CWA would ensure that litigants are able to challenge EPA actions outside of the 120-day deadline, provide certainty over where they must bring their challenges, and guarantee thorough judicial review of the WOTUS. For all these reasons, the decision of the district court should be reversed.

STANDARD OF REVIEW

This Court "review[s] de novo the district court's dismissal for lack of subject-matter jurisdiction." *Merida Delgado v. Gonzales*, 428 F.3d 916, 919 (10th Cir. 2005). In addition, "the Court owes no deference to an agency's interpretation of a statute that defines this Court's subject matter jurisdiction." *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1285 (11th Cir. 2012) (citation omitted); *Nagahi v. INS*, 219 F.3d 1166, 1170 (10th Cir. 2000) (same).

ARGUMENT

I. This Court Must Independently Determine Its Jurisdiction.

To the extent that the district court deferred to the Sixth Circuit, it committed legal error. "It is well settled that the decisions of one circuit court of appeals are not binding upon another circuit." *United States v. Carson*, 793 F.2d 1141, 1147 (10th Cir. 1986). "The federal courts spread across the country owe respect to each other's efforts and should strive to avoid conflicts, but each has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit." *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987). Neither the CWA nor any other federal statute gives the Sixth Circuit the authority to dictate this Court's or the district court's jurisdiction. Regardless of the Sixth Circuit's decision, the district

court and this Court "have an independent obligation to determine whether subject-matter jurisdiction exists" over this case in the Northern District of Oklahoma. *1mage Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006); *see also Maier v. EPA*, 114 F.3d 1032, 1036 (10th Cir. 1997).

II. The District Court Has Original Jurisdiction Over the WOTUS Rule.

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The APA provides a cause of action for judicial review of "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704. Consequently, "unless a statute provides otherwise, persons seeking review of agency action go first to district court rather than to a court of appeals." *IBT v. Pena*, 17 F.3d 1478, 1481 (D.C. Cir. 1994); *see also Hamilton v. Gonzales*, 485 F.3d 564, 569 (10th Cir. 2007) ("[T]he general jurisdiction statutes confer original jurisdiction over challenges to agency actions to the district courts…. By contrast, circuit court jurisdiction is generally limited to review of final district court decisions and some interlocutory appeals."). In the context of the CWA, district courts have subject-matter jurisdiction over a "final agency action" unless the action is specifically identified in Section 1369(b)(1) as belonging originally in the courts of appeals. *See, e.g.*, *Nw. Envt'l Advocates v. EPA*, 537 F.3d 1006, 1015 (9th Cir. 2008).

Appellants' lawsuit was properly before the district court because it seeks review of a "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704. The WOTUS Rule was promulgated as a final rule and thus is unquestionably a "final agency action." *See Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012). Moreover, as explained below, *see infra* 19-41, Appellants have "no other adequate remedy" because no other statute provides for judicial review of the WOTUS Rule in a forum other than the federal district courts. Because the district court below had original jurisdiction, its dismissal of Appellants' action for lack of jurisdiction was improper.

III. Challenges to the WOTUS Rule Do Not Fall Within Any of the Clean Water Act's Limited Exceptions Providing for Original Jurisdiction in the Courts of Appeals.

Section 1369(b)(1) "specifies seven categories of agency action for which a challenge must be brought as an original proceeding in a court of appeals rather than in a district court." *Nw. Envt'l Advocates*, 537 F.3d at 1015; 33 U.S.C. § 1369(b)(1)(A)-(G). The Agencies contend that two of these categories deprived the district court of jurisdiction: Section 1369(b)(1)(E)—which gives courts of appeals original jurisdiction over a challenge to an EPA action "approving or promulgating any effluent limitation or other limitation"—and Section 1369(b)(1)(F)—which gives courts of appeals original jurisdiction over a challenge

to an EPA action "issuing or denying any permit under section 1342." *See In re WOTUS Rule*, 817 F.3d at 265 (McKeague, J.).

The Agencies are incorrect. A plain reading of the statute refutes the notion that the WOTUS Rule is an "effluent limitation or other limitation" or an action "issuing or denying" a permit. Finding original jurisdiction in the courts of appeals would contravene not only the CWA's plain text, but also longstanding canons of statutory construction. The Agencies' "practical," policy-based reading of the statute, by contrast, finds no precedential support. If anything, policy and practical concerns weigh in *favor* of original jurisdiction in the district court.

A. Section 1369(b) Makes Plain That the Courts of Appeals Lack Original Jurisdiction Over Challenges to the WOTUS Rule.

The Supreme Court has admonished "time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296 (2006). "When the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Id*. "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning." *Caminetti v. United States*, 242 U.S. 470, 490 (1917). The role of the Court is to "apply the statute as it is written—even if [it] think[s] some other approach might accord with good policy." *Burrage v. United*

States, 134 S. Ct. 881, 892 (2014). Here, the text of subparagraphs (E) and (F) of Section 1369(b)(1) make plain that the courts of appeals lack original jurisdiction over challenges to the WOTUS Rule.

Section 1369(b)(1)(E). Subparagraph (E) grants original jurisdiction to the courts of appeals over an EPA action "in approving or promulgating any effluent limitation or other limitation." 33 U.S.C. § 1369(b)(1)(E). The CWA defines an "effluent limitation" as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." *Id*. § 1362(11). The CWA does not define "other limitation."

As the Agencies have conceded, the WOTUS Rule is not an "effluent limitation." *See In re WOTUS Rule*, 817 F.3d at 266 (McKeague, J.). It does not "restrict" the "quantities, rates, and concentrations" of pollutants discharged "from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11).

Instead, the Agencies contend that the WOTUS Rule is an "other limitation under section 1311" because it "has the effect of restricting the actions of property owners who discharge pollutants from a point source into covered waters," and "it has the effect of imposing limitations or restrictions on regulatory bodies charged

with responsibility for issuing permits under the [NPDES] System to those who discharge pollutants into covered waters." *In re WOTUS Rule*, 817 F.3d at 266 (McKeague, J.). True enough: the WOTUS rule will have those *effects*. But the Rule *itself* is not an "other limitation" within the meaning of subparagraph (E) for the simple reason that the Rule standing alone does not *limit* anything. *See Friends of the Everglades*, 699 F.3d at 1286 (defining "limitation" as a "restriction") (quoting Black's Law Dictionary 1012 (9th ed. 2009)). Instead, the WOTUS Rule "operates in conjunction with other sections scattered throughout the Act to define when its restrictions even apply." *In re WOTUS Rule*, 817 F.3d at 276 (Griffin, J.).

Even if the phrase "other limitation" could be read to encompass a rule that is not itself a limitation, subparagraph (E) still would not encompass the WOTUS Rule because the rule is not an "other limitation *under Section 1311*." 33 U.S.C. § 1369(b)(1)(E) (emphasis added). "[T]he plain text of [subparagraph] (E) clearly delineates what the limitations are, and what they are not: the 'limitations' set forth in §§ 1311, 1312, 1316, and 1345 provide the boundaries for what constitutes an effluent or other limitation." *In re WOTUS Rule*, 817 F.3d at 276 (Griffin, J.). The definitional section the WOTUS Rule modifies—*viz.*, "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas," 33 U.S.C. § 1362(12)—does not arise from these sections. "It is a phrase used in the [CWA's] definitional section, § 1362, and no more." *In re WOTUS Rule*, 817 F.3d

at 276 (Griffin, J.). Accordingly, "the lack of any reference to § 1362 in [subparagraph] (E) counsels heavily against a finding of [original] jurisdiction" in the court of appeals. *Id.*; *see Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992) ("It would be an odd use of language to say 'any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title' in § 1369(b)(1)(E) if the references to particular sections were not meant to exclude others.").

Indeed, the WOTUS Rule "appl[ies] to all provisions of the [CWA]," including those within the Corps' domain. 80 Fed. Reg. at 37,104. Yet Section 1369(b)(1) limits jurisdiction only to *EPA* actions, not actions of both Agencies. The "joint nature of the rulemaking" indicates that this is not an EPA-specific effluent or other limitation. *Loan Syndications & Trading Ass'n*, 818 F.3d at 722.

Section 1369(b)(1)(F). Subparagraph (F) grants original jurisdiction to the courts of appeals over an EPA action "in issuing or denying any permit under section 1342 of this title." Naturally read, subparagraph (F) applies only when the EPA has "issu[ed]" or "den[ied]" a particular permit to discharge pollutants into a navigable water under 33 U.S.C. § 1342. *See, e.g.*, *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1161-62 (9th Cir. 1999) (finding original jurisdiction under subparagraph (F) to review an EPA decision "to issue [NPDES] permits to five municipalities").

The WOTUS Rule did not "issue" or "deny" any permit and is "definitional" only. 80 Fed. Reg. at 37,054. It made no individualized permitting decisions of any kind. *See Friends of the Everglades*, 699 F.3d at 1288 (finding no jurisdiction under subparagraph (F) over "a general rule, as opposed to a decision about the activities of a specific entity"). As such, subparagraph (F) does not grant the courts of appeals original jurisdiction over this challenge.

B. Longstanding Canons of Statutory Construction Confirm That the Courts of Appeals Do Not Have Original Jurisdiction Over Challenges to the WOTUS Rule.

The Agencies' interpretation of Section 1369(b)(1) also fails under two important canons of statutory construction.

Expressio Unius Est Exclusio Alterius. Under this doctrine, "to 'express or include one thing implies the exclusion of the other, or of the alternative.'" *Youren v. Tintic Sch. Dist.*, 343 F.3d 1296, 1308 (10th Cir. 2003) (quoting Black's Law Dictionary (7th ed. 1999)). *Expressio unius* is a doctrine of "negative implication: the enumeration of certain things in a statute suggests that the legislature had no intent of including things not listed or embraced." *Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1034 (10th Cir. 2003). "For instance, if the statute in question enumerates the matters over which a court has jurisdiction, no other matters may be included." Sutherland, Stat. Const. § 195 (4th ed.); *see, e.g.*, *Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286, 293 (2d Cir.

2006). "The more specific the enumeration, the greater the force of the [*expressio unius*] canon." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 108 (2012).

The Agencies' interpretation of Section 1369(b)(1) contradicts the doctrine of *expressio unius* by expanding the CWA's jurisdictional reach to include EPA actions that are not enumerated in Section 1369(b)(1). Congress gave the courts of appeals original jurisdiction over seven categories of EPA actions. 33 U.S.C. § 1369(b)(1)(A)-(G). By doing so, it made clear that those courts do not have original jurisdiction over any other EPA actions taken under the CWA. *See Friends of the Earth v. EPA*, 333 F.3d 184, 189 (D.C. Cir. 2003). Indeed, the courts of appeals "do not lightly hold that [they] have jurisdiction under section 1369(b)(1)" because "the specificity and precision of Section 1369, and the sense of it" demonstrate that the statute is "designed to exclude EPA actions that Congress did not specify." *Nw. Envt'l Advocates*, 537 F.3d at 1015.

Here, Congress specified seven categories of EPA actions that belong in the courts of appeals—none of which can reasonably be construed to cover an administrative rule defining the term "waters of the United States" under the CWA. The courts should respect this legislative choice. *See Five Flags Pipe Line Co. v. Dep't of Transp.*, 854 F.2d 1438, 1441 (D.C. Cir. 1988) ("[T]his court simply is not at liberty to displace, or to improve upon, the jurisdictional choices of

Congress—even when it legislates by potpourri—no matter how compelling the policy reasons for doing so.").

The Agencies' "flexible" interpretation of Section 1369(b)(1) would embrace EPA actions not included within the CWA's enumerated categories. "If the exceptionally expansive view advocated by the government is adopted, it would encompass virtually all EPA actions under the [CWA]." *North Dakota v. EPA*, No. 15-59, 2015 WL 5060744, at *1 (D.N.D. Aug. 27, 2015). This is not what Congress intended. If "Congress wanted to grant original appellate review of more fundamental decisions," it easily "could have done so." *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 266 F. Supp. 2d 1101, 1116 (N.D. Cal. 2003); *Longview Fibre Co.*, 980 F.2d at 1313 (same).[8]

Canon Against Surplusage. All else being equal, "a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009); *see, e.g.*, *In re Dawes*, 652 F.3d 1236, 1242 (10th Cir. 2011) (rejecting a reading of the bankruptcy code that would leave a provision "loitering

[8] Congress knows precisely how to grant the courts of appeals original jurisdiction over all final orders of a particular agency. *See, e.g.*, 28 U.S.C. § 2342(1) (all final orders of the FCC are reviewed directly in the courts of appeals); 49 U.S.C. § 46110 (all final orders of the FAA are reviewed directly in the courts of appeals); 15 U.S.C. § 78y(a) (all final orders of the SEC are reviewed directly in the courts of appeals).

around the U.S. Code with no apparent purpose"). This interpretive canon "encourages courts to give meaning to every word used in a statute to realize congressional intent" because "Congress would not have included superfluous language." *Nutraceutical Corp. v. Von Eschenbach*, 459 F.3d 1033, 1039 (10th Cir. 2006).

But under the Agencies' sweeping interpretation of Section 1369(b)(1), the reach of subparagraphs (E) and (F) would be so broad as to make meaningless other provisions of Section 1369. For example, subparagraph (A) specifically grants courts of appeals original jurisdiction over an EPA action "promulgating any standard of performance under section 1316" for new point sources of pollutants. 33 U.S.C. § 1369(b)(1)(A). But if subparagraph (E) were construed so that "other limitation" means any rule or final agency action "whose practical effect will be to *indirectly* produce various limitations on point-source operators and permit issuing authorities," *In re WOTUS Rule*, 817 F.3d at 270 (McKeague, J.), then subparagraph (A) would serve no function—Congress would have had no need to include it because a standard of performance under Section 1316 will always limit (directly or indirectly) the discharge of pollutants from new point sources. *See* 33 U.S.C. § 1316(a)(1) (authorizing standards of performance "for the *control* of the discharge of pollutants"); 40 C.F.R. § 401.11(k) (defining standard of performance as a "restriction" on discharges). The Court should not interpret the

CWA in a way that produces such a result. *See Am. Paper Inst., Inc. v. EPA*, 890 F.2d 869, 876-77 (7th Cir. 1989); *Friends of the Earth*, 333 F.3d at 190-91 & n.14.

Similarly, subparagraph (C) grants courts of appeals original jurisdiction over an EPA action "promulgating any effluent standard, prohibition, or pretreatment standard under section 1317." 33 U.S.C. § 1369(b)(1)(C). Section 1342, in turn, authorizes the EPA to "issue a permit for the discharge of any pollutant … upon condition that such discharge will meet … all applicable requirements under sections 1311, 1312, 1316, *1317*, 1318, and 1343 of this title." 33 U.S.C. § 1342(a)(1) (emphasis added). If subparagraph (F) is construed so that "issuing or denying any permit" means all "regulations governing the issuance of permits," *In re WOTUS Rule*, 817 F.3d at 271 (McKeague, J.), then subparagraph (C) likewise would be superfluous—Congress would have had no need to enact it because *every* promulgation under Section 1317 will necessarily affect the permitting process. Congress could not have intended this result.

C. There Is No Basis for Invoking Policy or Practical Considerations to Conclude That the District Court Lacked Jurisdiction Over Appellants' Challenge.

The Agencies argue that the Court should consider "policy" implications and take a "practical" approach to interpreting Section 1369(b)(1). *In re WOTUS Rule*, 817 F.3d at 268 (McKeague, J.). Employing this approach, the Agencies contend,

would avoid "a waste of judicial and party resources, delays, and possibly even different results." *In re WOTUS Rule*, 817 F.3d at 277 (Griffin, J.).

But a court is "not at liberty to rewrite the statute because [it] might deem its effects susceptible of improvement." *C.I.R. v. Lundy*, 516 U.S. 235, 252-53 (1996); *see Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2169 (2015) ("Our job is to follow the text even if doing so will supposedly 'undercut a basic objective of the statute.'"); Scalia & Garner, *supra*, at 343-46. Here, "Congress could have declared" all EPA actions—or even this particular definitional determination—reviewable in the courts of appeals; but "[f]or better or worse, it used the narrower word[s]" contained in Section 1369(b)(1). *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 878 (2014). This Court is bound by Congress's decision. In the end, "these always-fascinating policy discussions are beside the point. The role of this Court is to apply the statute as it is written—even if [it] think[s] some other approach might accord with good policy." *Burrage*, 134 S. Ct. at 892 (citation omitted).

The Agencies rely on *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), and *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980), to support their assertion that the Supreme Court has employed a "practical" approach to reviewing the CWA's jurisdictional provisions. *In re WOTUS Rule*, 817 F.3d at 266-73 (McKeague, J.). Neither case, however, supports this proposition.

In *E.I. du Pont*, the Supreme Court determined that the Fourth Circuit had original jurisdiction under subparagraph (E) to review "industrywide regulations limiting discharges by existing [inorganic chemical manufacturing] plants." 430 U.S. at 115. That was because subparagraph (E) "unambiguously authoriz[es] court of appeals review of EPA action promulgating an effluent limitation for existing point sources under [section 1301]," and the relevant EPA actions were indeed effluent limitations under Section 1301. *Id.* at 136. The Court rejected the argument that subparagraph (E) provided for review only of "[a] grant or denial of an individual variance" under Section 1301 (and not for classes and categories of effluent limitations). *Id.* Beyond conflicting with the text, "petitioners' construction would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to [Section 1342] but would have no power of direct review of the basic regulations governing those individual actions." *Id.*

The Agencies seize on the Court's "perverse situation" wording to argue that the Supreme Court requires a "practical" interpretation of subparagraph (E). *In re WOTUS Rule*, 817 F.3d at 267 (McKeague, J.). Just as the Supreme Court in *E.I. du Pont* was concerned with bifurcating judicial review, the Agencies contend, this Court should interpret subparagraph (E) to encompass the WOTUS Rule because it would be "truly perverse" if the courts of appeals had the authority to review

numerous individual actions in which EPA issued or denied NPDES permits but not "the basic regulations governing" those permitting decisions (*i.e.*, the WOTUS Rule). *In re WOTUS Rule*, 817 F.3d at 267 (McKeague, J.) (quoting *E.I. du Pont*, 430 U.S. at 136).

But *E.I. du Pont* cannot be stretched this far. The Supreme Court's "policy reason came *after* a plain textual rejection of the industry's position." *In re WOTUS Rule*, 817 F.3d at 278 (Griffin, J.). The Court's bifurcation concerns did not drive the jurisdictional analysis in the first instance. "It is, therefore, a far stretch to take this dicta and expand it … to find jurisdiction proper when a regulation's 'practical effect' only sets forth 'indirect' limits." *Id*. Moreover, the regulations at issue in *E.I. du Pont* actually involved effluent limitations, whereas "the Agencies here admit they have not promulgated an effluent limitation." *Id*. Thus, the Supreme Court's concern that it would be bizarre if a court of appeals could review permit decisions but not the effluent limitations underlying them is not present here. In sum, nothing in *E.I. du Pont* licenses this Court to overlook Section 1369(b)(1)'s text. *Id.*; *see id.* at 283 (Keith, J., dissenting).

Crown Simpson likewise does not authorize the Court to override the text. There, the Supreme Court reviewed whether subparagraph (F) gave the courts of appeals original jurisdiction to review an EPA action "denying a variance and disapproving effluent restrictions contained in a permit issued by an authorized

state agency." 445 U.S. at 194. The Ninth Circuit had held that it lacked original jurisdiction because the EPA "did no more than *veto* an NPDES permit proposed by the state authority," and therefore, did not actually "issue or deny" a permit. *Id.* at 196. The Supreme Court disagreed, holding that when the EPA "objects to effluent limitations contained in a state-issued permit, *the precise effect* of its action is to 'den[y]' a permit within the meaning of [subparagraph (F)]." *Id*. (emphasis added). Otherwise, the Supreme Court explained, "denials of NPDES permits would be reviewable at different levels of the federal-court system depending on the fortuitous circumstance of whether the State in which the case arose was or was not authorized to issue permits." *Id*. at 196-97. "Absent a far clearer expression of congressional intent," the Supreme Court was "unwilling to read the [CWA] as creating such a seemingly irrational bifurcated system" over "functionally similar" actions. *Id*. at 197.

As with *E.I. du Pont*, the Agencies read *Crown Simpson* to require a broad, "practical" interpretation of subparagraph (F). *In re WOTUS Rule*, 817 F.3d at 273 (McKeague, J.). The Agencies contend that *Crown Simpson* grants courts of appeals original jurisdiction not only over EPA actions "issuing or denying a permit," 33 U.S.C. § 1369(b)(1)(F), but also "regulations governing the issuance of permits," *In re WOTUS Rule*, 817 F.3d at 283 (McKeague, J.) (quoting *Nat'l Cotton Council v. EPA*, 553 F.3d 927, 933 (6th Cir. 2009)). Because the WOTUS

Rule is a regulation related to permits, the Agencies contend, the courts of appeals have original jurisdiction to review the rule.

But *Crown Simpson*, too, cannot be stretched this far. "The facts of [*Crown Simpson*] make clear that the Court understood functional similarity in a narrow sense." *Nw. Envt'l Advocates*, 537 F.3d at 1016. Had the EPA not given California the authority to designate NPDES permits, the EPA would have retained the power to grant or deny permits directly. The Court thus concluded "that the fortuitous circumstance that this case arose in a State with permit-granting authority should not produce a different jurisdictional result from a case involving a state without such authority." *Id*. "With this factual overlay, the Court's 'precise effect' exception makes sense." *In re WOTUS Rule*, 817 F.3d at 281 (Griffin, J., concurring). It would have been "perverse" there to read those "functionally similar" situations differently.

But that concern has no application here. "It stretches the plain text of [subparagraph] (F) to its breaking point to hold that a definition setting the [CWA's] boundaries has, under *Crown Simpson*, the 'precise effect' of or is 'functionally similar' to, approving or denying an NPDES permit." *Id*. At most, the WOTUS Rule "informs whether the [CWA] requires a permit in the first place, not whether the Agencies can (or will) issue or deny a permit." *Id*.; *id.* at 283 (Keith, J., dissenting). The mere fact that the WOTUS Rule "relates to" the issuance of

Section 402 permits does not amount to an *issuance or denial* of a Section 402 permit. *Friends of the Everglades*, 699 F.3d at 1288. Therefore, nothing in *Crown Simpson* authorizes the Court to disregard the statutory text.[9]

D. To the Extent That Policy and Practical Concerns Are Relevant Considerations, They Support a Finding of Original Jurisdiction in the District Court.

The Court need go no further than the plain text of Section 1369(b)(1) to reverse. *In re Taylor*, 737 F.3d 670, 678 (10th Cir. 2013) ("Supreme Court precedents make clear that the starting point for the analysis is the statutory text. And where, as here, the words of the statute are unambiguous, the judicial inquiry is complete."). To the extent that the Court finds policy and practical concerns to be relevant, however, they *support* finding jurisdiction in the district court. Appellants' interpretation of the Section 1369(b)(1) ensures that: (1) litigants are not unduly deprived of their ability to challenge EPA actions outside of the 120-day deadline; (2) litigants have certainty over where they must bring their

[9] *Maier v. EPA* also is not to the contrary. In *Maier*, the petitioner challenged the EPA's refusal to revise its regulations that set effluent limitations for publicly owned treatment works based on secondary treatment. *See* 114 F.3d at 1035-37. The court found original appellate jurisdiction because the petitioner's challenge, although styled as a "refusal to promulgate a new rule," was in reality "more akin to a challenge to the existing rule." *Id*. at 1038. The court would not allow "exclusive jurisdiction in the court of appeals [to] be evaded merely by styling the claim as one for failure to revise." *Id*. As explained above, no similar concerns exist here.

challenge to an EPA action; and (3) the WOTUS Rule and other EPA actions with nationwide implications receive thorough judicial review.

First, construing Section 1369(b)(1) in accordance with its plain meaning ensures that litigants do not lose their ability to challenge EPA actions outside of the 120-day deadline. When Section 1369(b)(1) requires initial review in the courts of appeals, the action must be challenged within 120 days of its promulgation. *See* 33 U.S.C. § 1369(b)(2). After this time period has expired, Section 1369(b)(2) bars "judicial review" in *any* future "civil or criminal proceeding for enforcement." *Id*.; *see Decker v. Nw. Envtl. Defense Ctr*., 133 S. Ct. 1326, 1334 (2013). This "120-day time limit is well-established, and … strictly enforced." *Nat'l Pork Producers v. EPA*, 635 F.3d 738, 754 (5th Cir. 2011). Thus, if the Agencies are right that Section 1369(b)(1)(E) or (F) applies here, then Section 1369(b)(2) purports to bar a defendant in an enforcement action, even in a criminal prosecution, from raising constitutional or statutory challenges to the WOTUS rule as applied.

Because of the draconian nature of Section 1369(b)(2), the Court should be exceptionally wary of extending its reach too broadly and thereby endangering the ability of ordinary individuals and small businesses—particularly as defendants—to challenge the legality of agency action. The APA "creates a 'presumption favoring judicial review of administrative action." *Sackett*, 132 S. Ct. at 1373. When a law restricts APA review, therefore, courts construe the limitation

narrowly: "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

"A special hazard arises when review is available directly to the court of appeals, because availability of direct review forecloses review in certain enforcement proceedings." *Longview Fibre Co.*, 980 F.2d at 1309. "Reviewability under Section 1369 carries a peculiar sting," which "cuts against [any] argument that a grant of appellate review should be construed liberally." *Id*. at 1313; *see also Am. Paper Inst., Inc. v. E.P.A.*, 882 F.2d 287, 289 (7th Cir. 1989) ("The review-preclusion proviso in [Section 1369(b)(2)] dissuades us from reading [Section 1369(b)(1)] broadly; the more we pull within Section 1369(b)(1), the more arguments will get knocked out by inadvertence later on."). For example, if original review in the court of appeals is required for all rules with some relation to the permitting process, then ordinary landowners—or future landowners, who might be entirely unaware of this rule—might be barred from later challenging any part of it in future actions.

The WOTUS Rule is a perfect example of this danger. An ordinary homeowner with an intermittent stream in his backyard likely assumes that his *local* land is not subject to a federal law regulating *navigable* waters. But if the decision below stands, a landowner in this Circuit may be barred from challenging

the WOTUS Rule when the federal government comes a-calling. Indeed, the CWA's "reach is 'notoriously unclear' and the consequences to landowners even for inadvertent violations can be crushing." *Hawkes*, 2016 WL 3041052, at *8 (Kennedy, J., concurring) (quoting *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring)). Given these potential harms, Section 1369(b)(1) should not be read to bar judicial review, and certainly not without a clear indication from Congress that the 120-day limitations period has broad applicability. *See Tennessee Valley Auth. v. Whitman*, 336 F.3d 1236, 1258 (11th Cir. 2003); *see also U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999) ("When faced with a statutory interpretation that would raise serious constitutional problems, the courts will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

Second, Appellants' interpretation reflects the Supreme Court's instructions for simple, straightforward interpretations of jurisdictional rules. The Court has long instructed that "vague boundaries" are "to be avoided in the area of subject-matter jurisdiction wherever possible.'" *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (citation omitted). "'[A]dministrative simplicity is a major virtue in a jurisdictional statute'" because "'[c]omplex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims.'" *Hydro Resources, Inc. v.*

EPA, 608 F.3d 1131, 1160 n.23 (10th Cir. 2010) (quoting *Hertz Corp.*, 559 U.S. at 94). Indeed, uncertainty as to when and where agency action may be challenged could raise due-process concerns. *Cf. Grayned v. Rockford,* 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."). For these reasons, courts should employ "straightforward rules under which they can readily assure themselves of their power to hear a case." *Hertz Corp*., 559 U.S. at 94.

The litigation over the WOTUS Rule illustrates these concerns. Appellants filed their district court lawsuit and their protective petition for review in July 2015. Yet almost a year later, Appellants have yet to brief the merits of their claims. Instead of following the plain words of the text, the parties have been fighting over whether the WOTUS Rule must be challenged in the court of appeals for "practical," "flexible," and "pragmatic" reasons. This uncertainty has caused the parties—and the taxpayers—to "eat[] up time and money" not over the merits, but over where to bring the challenge. *Hydro Resources, Inc*., 608 F.3d at 1160 n.23; *Longview Fibre Co.*, 980 F.2d at 1314 (lamenting the "tremendous resources in time and money" invested in determining proper forum). Appellants' plain reading of Section 1369(b)(1) is the best protection against those risks.

Finally, Appellants' interpretation ensures that the WOTUS Rule and other EPA actions with national implications receive "full consideration by the courts of

appeals." *E.I. du Pont*, 430 U.S. at 135 n.26. The Supreme Court has long emphasized "the benefit it receives from permitting several courts of appeals to explore a difficult question before [it] grants certiorari." *United States v. Mendoza*, 464 U.S. 154, 160 (1984). When multiple courts examine a difficult question, it promotes the "thorough development of legal doctrine by allowing litigation in multiple forums." *Id*. at 163. Indeed, the Supreme Court recently stressed the importance of such robust review. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

Here, the possibility of conflicting judicial decisions, *In re WOTUS Rule*, 817 F.3d at 277 (McKeague, J.), is not a problem to be solved—it is a *benefit* of our federal judicial system. If the district courts properly recognize their jurisdiction, the WOTUS Rule will be examined by "thorough, scholarly opinions written by some of our finest judges." *E.I. du Pont*, 430 U.S. at 135. Courts considering the validity of the WOTUS Rule may reach differing conclusions about its validity. But even a circuit split would assist in the ultimate administration of justice by distilling the case for Supreme Court review. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2581 (2012). Whatever the result, the litigation of these cases in different courts ensures that the WOTUS Rule will receive rigorous federal review, and thus an "increase[d] probability of a correct disposition," than if the rule is reviewed exclusively in the Sixth Circuit.

Atchison, Topeka & Santa Fe R.R. Co. v. Pena, 44 F.3d 437, 447 (7th Cir. 1994) (Easterbrook, J., concurring).

By seeking to expand Section 1369(b)(1) to centralize review in the Sixth Circuit, the Agencies are attempting to short-circuit the usual process. Although it might be an effective litigation strategy to "squelch the circuit disagreements that can lead to Supreme Court review," *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 815 (D.C. Cir. 2002), dismissing Appellants' case would "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue," *Mendoza*, 464 U.S. at 160.

Under the Agencies' reasoning, all federal challenges to the same agency actions should be transferred and consolidated into one court of appeals if there is a non-frivolous interpretation for doing so. But this is not what Congress has commanded. Unlike other statutes that place *all* agency actions in the courts of appeals, *see supra* 26 n.9, Congress did so for only seven specific categories of EPA actions under the CWA. That strongly suggests that Congress intended for the traditional, multi-level review to apply in most cases. *See, e.g.*, *McFarland v. Scott*, 512 U.S. 849, 861-62 (1994); *see also In re Clean Water Rule: Definition of "Waters of the United States,"* 140 F. Supp. 3d at 1341 (denying transfer and centralization of all district court challenges to the WOTUS Rule). The Court should not depart from this usual process. "It is Congress's job, not [the Court's],

to determine the court in which judicial review of agency decisions may occur." *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1337 (D.C. Cir. 2013).

CONCLUSION

The Court should reverse the district court's judgment and remand for further proceedings.

Dated: July 1, 2016

Respectfully submitted,

By: */s/ William S. Consovoy*

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STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the important issues presented, counsel believes oral argument may be helpful to the Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) and this Court's Order of June 13, 2016 because it contains 9,830 words, including footnotes; and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

a. all required privacy redactions have been made;

b. the hard copies submitted to the clerk are exact copies of the ECF submission; and

c. the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, McAfee VirusScan Enterprise, and according to the program is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July 2016, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Tenth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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ADDENDUM

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA ex rel. E. Scott Pruitt, in his official capacity as Attorney General of Oklahoma,	)	
Plaintiff,	)	
v.	)	**Case No. 15-CV-0381-CVE-FHM**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES ARMY CORPS OF ENGINEERS, GINA MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency, and JO-ELLEN DARCY, in her official capacity as Assistant Secretary of the Army for Civil Works,	)	
Defendants.	)	
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, TULSA REGIONAL CHAMBER, PORTLAND CEMENT ASSOCIATION, and STATE CHAMBER OF OKLAHOMA,	)	
Plaintiffs,	)	**Case No. 15-CV-0386-CVE-PJC**
v.	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GINA MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency, UNITED STATES ARMY CORPS OF ENGINEERS, and JO-ELLEN DARCY, in her official capacity as Assistant Secretary of the Army (Civil Works),	)	
Defendants.	)	

OPINION AND ORDER

On July 8, 2015, the State of Oklahoma filed a case challenging the validity of a new rule adopted by the United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers. State of Oklahoma ex rel. E. Scott Pruitt v. United States Environmental Protection Agency et al., 15-CV-381-CVE-FHM (N.D. Okla.). The rule is known as the "Clean Water Rule." Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054 (June 29, 2015). A separate case challenging the Clean Water Rule was filed by the Chamber of Commerce of the United States of America and other plaintiffs. Chamber of Commerce of the United States of America et al. v. United States Environmental Protection Agency et al, 15-CV-386-CVE-PJC (N.D. Okla.). The plaintiffs in both cases asked the Court to declare the Clean Water Rule invalid and to permanently enjoin the EPA from enforcing the Clean Water Rule. The plaintiffs also filed motions for preliminary injunction seeking to prevent the defendants from enforcing the Clean Water Rule while the cases are pending. Case No. 15-CV-381-CVE-FHM, Dkt. # 17 (July 24, 2015); Case No. 15-CV-386-CVE-PJC, Dkt. # 27 (N.D. Okla, July 24, 2015).

The plaintiffs in both cases have argued that this Court has subject matter jurisdiction over the cases, but the plaintiffs also filed petitions for review with the United States Court of Appeals for the Tenth Circuit of Appeals. Under the Clean Water Act, 33 U.S.C. § 1251 et seq. (CWA), certain types of cases are subject to direct review in the courts of appeals and cannot be brought in federal district courts. Numerous cases were filed in federal district courts across the country and, in addition, at least 21 petitions for review were filed in the federal courts of appeal. Pursuant to 28 U.S.C. § 2112(a)(3), the Judicial Panel on Multidistrict Litigation (JPML) transferred all pending petitions for review to the United States Court of Appeals for the Sixth Circuit and the petitions were

consolidated before a single panel. The Sixth Circuit stayed enforcement of the Clean Water Rule nationwide pending a determination of whether it could exercise jurisdiction over the case. In re EPA, 308 F.3d 804 (6th Cir. 2015). On February 22, 2016, the Sixth Circuit ruled that it had jurisdiction over the consolidated petitions for review and it has retained jurisdiction over the consolidated petitions for review. The petitions of review filed by plaintiffs were transferred to the Sixth Circuit by the JPML and those petitions for review will be heard by the Sixth Circuit.

Federal courts are courts of limited jurisdiction, and there is a presumption against the exercise of federal jurisdiction. Merida Delgado v. Gonzales, 428 F.3d 916, 919 (10th Cir. 2005); Penteco Corp. Ltd. Partnership--1985A v. Union Gas System, Inc., 929 F.2d 1519, 1521 (10th Cir. 1991). The party invoking federal jurisdiction has the burden to allege jurisdictional facts demonstrating the presence of federal subject matter jurisdiction. McNutt v. General Motors Acceptance Corp. of Indiana, Inc., 298 U.S. 178, 182 (1936) ("It is incumbent upon the plaintiff properly to allege the jurisdictional facts, according to the nature of the case."); Montoya v. Chao, 296 F.3d 952, 955 (10th Cir. 2002) ("The burden of establishing subject-matter jurisdiction is on the party asserting jurisdiction."). The Court has an obligation to consider whether subject matter jurisdiction exists, even if the parties have not raised the issue. The Tenth Circuit has stated that "[f]ederal courts 'have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party,' and thus a court may *sua sponte* raise the question of whether there is subject matter jurisdiction 'at any stage in the litigation.'" 1mage Software, Inc. v. Reynolds & Reynolds Co., 459 F.3d 1044, 1048 (10th Cir. 2006).

In light of the Sixth Circuit's ruling, the Court finds that it lacks jurisdiction over these cases and plaintiffs' claims should be dismissed.[1] Under 33 U.S.C. § 1369(b)(1), review of an EPA action "(E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316 or 1345 of the title [or] (F) in issuing or denying any permit under section 1342 of this title . . . may be had by an interested person in the Circuit Court of Appeals of the United States for the federal judicial district in which such person resides . . . ." The Tenth Circuit has determined that appellate jurisdiction under 33 U.S.C. § 1369(b)(1) is exclusive, and a finding of appellate jurisdiction divests this Court of jurisdiction to hear a challenge to a final agency action. Maier v. EPA, 114 F.3d 1032, 1036-37 (10th Cir. 1997). At least two federal district courts have already dismissed challenges to the Clean Water Rule due to the exclusive jurisdiction of the Sixth Circuit to hear the consolidated petitions for review. North Dakota v. EPA, 2015 WL5060744 (D.N.D. Aug. 27, 2015); Murray Energy Corporation v. EPA, 2015 WL 5062506 (Aug. 26, 2015). The Court has reviewed the complaints in both pending cases and all of the claims challenge the validity of the Clean Water Rule. These claims are within the scope of the petitions for review that are pending before the Sixth Circuit, and this Court is without jurisdiction to hear the plaintiffs' claims.

IT IS THEREFORE ORDERED that Case No. 15-CV-381-CVE-FHM and Case No. 15-CV-386-CVE-PJC are **dismissed without prejudice** due to lack of subject matter jurisdiction. A separate judgment of dismissal in each case is entered herewith.

DATED this 24th day of February, 2016.

Claire V Eagan
CLAIRE V. EAGAN
UNITED STATES DISTRICT JUDGE

[1] Defendants have filed notices in both pending cases that they intend to file motions to dismiss based on the Sixth Circuit's ruling. 15-CV-381-CVE-FHM, Dkt. # 35; 15-CV-386-CVE-PJC, Dkt. # 48. However, the Sixth Circuit's decision speaks for itself that jurisdiction is appropriate only in the appellate courts, and the Court finds that it is unnecessary to wait for any party for file a motion to dismiss for lack of jurisdiction.