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

CORRECTED PETITION FOR REHEARING EN BANC BY PETITIONERS WASHINGTON CATTLEMEN'S ASSOCIATION, ET AL (15-4188), AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL (15-3823)

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Sixth Circuit Case Number: 15-3751 and related cases

Case Name: *In Re: Environmental Protection Agency*

Name of Counsel: M. Reed Hopper

Pursuant to 6th Cir. R. 26.1, Petitioners makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on March 3, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/ M. Reed Hopper

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

Petitioners Washington Cattlemen's Association, et al.,[1] and Chamber of Commerce of the United States of America, et al.,[2] hereby petition this Court, under Federal Rule of Appellate Procedure 35 and Sixth Circuit Rule 35, to rehear this case en banc. This proceeding involves a question of exceptional importance, on which the decision of the panel creates nationwide confusion, and lack of uniformity within the Sixth Circuit. It also conflicts with an authoritative decision on the same issue in the Eleventh Circuit Court of Appeals.

QUESTION PRESENTED

Should the Sixth Circuit rehear this case en banc to decide (1) whether the panel decision erred, and (2) whether *National Cotton Council v. EPA*, 553 F. 3d 927 (6th Cir. 2009), should be overruled?

STATEMENT OF THE CASE

These cases challenge the validity of regulations, published at 80 Fed. Reg. 37053 (June 29, 2015), titled *Clean Water Rule: Definition of "Waters of the United*

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[1] The petitioners in case no. 15-4188 are Washington Cattlemen's Association, California Cattlemen's Association, Oregon Cattlemen's Association, New Mexico Cattle Growers Association, New Mexico Wool Growers, Inc., New Mexico Federal Lands Council, Coalition of Arizona/New Mexico Counties for Stable Economic Growth, Duarte Nursery, Inc., Pierce Investment Company, LPE Properties, LLC, and Hawkes Company, Inc.

[2] The petitioners in case no. 15-3823 are Chamber of Commerce of the United States of America, National Federation of Independent Business, and Portland Cement Association.

States" (the "Water Definition"), jointly adopted by the United States Environmental Protection Agency and United States Army Corps of Engineers. The Water Definition purports to define the geographic extent of those agencies' regulatory jurisdiction under the Clean Water Act.

These cases are among several such challenges which have been consolidated in this Court. If this Court has jurisdiction of these cases, it is only under 33 U.S.C. § 1369(b)(1)(F), which provides for direct review in the circuit courts of decisions of the Administrator of the EPA "in issuing or denying any permit under [33 U.S.C.] section 1342."

Petitioners are also plaintiffs in two separate actions filed in the District Court for the District of Minnesota and the District Court for the Northern District of Oklahoma challenging the same regulations, under the Administrative Procedure Act, 5 U.S.C. §§ 702 and 704. *Washington Cattlemen's Association, et al., v. EPA*, Case No. 0:15-cv-03058 (D. Minn.); *Chamber of Commerce, et al., v. EPA*, No 15-cv-386 (N.D. Okla.). Petitioners contend that jurisdiction over their challenges to the Water Definition is proper in the District Courts, and not in this Court, but filed these actions protectively in the event that jurisdiction is ultimately determined to be proper in this Court.

PROCEDURAL HISTORY

Petitioners Washington Cattlemen's Association, et al, filed their action on October 26, 2015, in the Eighth Circuit Court of Appeals, and Petitioners Chamber of Commerce of the United States of America, et al, filed their action in the Tenth Circuit Court of Appeals on July 23, 2015. Both cases were transferred to this Court on October 29, 2015, pursuant to the order of the Judicial Panel on Multidistrict Litigation dated July 28, 2015, and consolidated with twenty other petitions challenging the Water Definition.

This Court stayed the Water Definition nationwide by order dated October 9, 2015. On and following October 1, 2015, parties to other cases in this consolidated proceeding moved to dismiss all twenty-two petitions, on the ground that this Court lacks jurisdiction over them. The Court heard oral argument on December 8, 2015, and issued its decision denying the motions on February 22, 2016. This petition for rehearing addresses that decision.

PANEL DECISION

The panel decision denies the motions to dismiss, and holds, in a split decision, that this Court has jurisdiction over the case under 33 U.S.C. § 1369(b)(1)(F) (Subsection F) and this Court's decision in *National Cotton Council v. U.S. E.P.A*. However, the decision is fractured into three separate opinions, which leave future litigants and judges of this Court with no uniform rule of law to apply in determining

this Court's jurisdiction in future challenges to regulations adopted under the Clean Water Act.

Judge McKeague wrote that jurisdiction is proper under Subsection F and *National Cotton* (using a broad interpretation of the statute), and the Supreme Court's decision in *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980). Slip op. at 11-16 (McKeague, J.). Under this reading, Subsection F confers jurisdiction over any action challenging a Clean Water Act regulation "so long as it affects permitting requirements." Slip op. 13 (McKeague, J.) (footnote omitted). Without expressly stating it, the lead opinion implicitly concludes that the Water Definition "affects permitting requirements." Slip op. at 16 (McKeague, J.).

The lead opinion reads *National Cotton* to be consistent with a wide swath of Supreme Court authority adopting a functional, rather than textual, approach to grants of circuit court jurisdiction generally. Slip op. at 14-16 (McKeague, J.).

Concurring only in the judgment, Judge Griffin concluded that the court has jurisdiction under Subsection F, based exclusively on the precedential nature of *National Cotton*. Slip op. at 19 (Griffin, J., concurring in judgment only). *See also* slip op. at 27 (Griffin, J., concurring in judgment) ("[w]hile I agree that *National Cotton* controls this Court's conclusion, I disagree that it was correctly decided. But for *National Cotton*, I would find jurisdiction lacking."). The concurrence also disagreed with Judge Mckeague's broad reading of *Crown Simpson*, and insisted that a textual,

rather than functional, method of interpreting Subsection F is proper. Slip op. at 19-20, 27-28 (Griffin, J., concurring in judgment). The concurrence read *National Cotton* as limitlessly extending jurisdiction in the circuit court under Subsection F. Slip op. at 29 (Griffin, J., concurring in judgment) ("*National Cotton*'s jurisdictional reach, in my view, has no end.").

Finally, in dissent, Judge Keith read *National Cotton* as expanding jurisdiction under Subsection F only to rules that "regulate[] the permitting procedures." Slip op. at 32 (Keith, J., dissenting). The dissent rejected the lead opinion's and the concurrence's reading of *National Cotton* as extending to anything "relating" to permit procedures. *Id*. On this basis, the dissent concluded that the Water Definition, although it may "relate" to permitting, does not "regulate" the permitting procedure under the Act. Slip op. at 32-33 (Keith, J., dissenting).

The result of this fractured opinion is a prism through which subsequent panels of this Court, and litigants before them, will have to discern the meaning of *National Cotton* in determining jurisdiction in al future challenges to any Clean Water Act regulation.

REASONS FOR REHEARING EN BANC

The panel decision delivers no clear justification for its assertion of jurisdiction over this case. By the thinnest thread of concurrence, two panel judges ruled that the Sixth Circuit has original jurisdiction over the combined challenges to the Water

Definition under 33 U.S.C. § 1369(b)(1)(F). But that judgment is held together only by a prior decision that two panel judges stated *should not* support a finding of jurisdiction.

That case, *National Cotton Council v. U.S. E.P.A.*, 553 F.3d 927 (6th Cir. 2009), broadens the scope of the Clean Water Act's grant of original circuit court jurisdiction over permit grants or denials by the Administrator of the EPA. Just how far it broadens that jurisdiction, however, no two judges of the panel agreed. To the extent that it exceeds the plain text and patent will of Congress that such jurisdiction be limited, *National Cotton*'s jurisdictional holding must be overruled by this Court sitting en banc. If a narrowing reading of the ruling can save it from that fate, it nevertheless falls on the en banc Sixth Circuit to provide one.

The panel's fractured and reluctant holding should not be left to support jurisdiction in a case of such national significance—nor should future courts and litigants be subjected to deciphering and disputing its meaning. To ensure that the Sixth Circuit speaks with a uniform, intelligible voice on a proceeding of national significance, the Court should rehear this motion en banc, and overrule the jurisdictional holding of *National Cotton*.

A. The Court Should Grant En Banc Rehearing To Overrule the Jurisdictional Holding of *National Cotton*

But for *National Cotton*, the panel would have held that the Sixth Circuit lacks jurisdiction over the Water Definition Rule challenges, and granted the motions to dismiss. In dissent, Judge Keith stated:

> If this Court construes [*National Cotton*'s] holding to be so broad as to cover the facts of this case, that construction brings subsection (F) to its breaking point: a foreseeable consequence of the concurrence's reasoning is that this Court would exercise original subject-matter jurisdiction over all things related to the Clean Water Act.

Slip op. at 33 (Keith, J., dissenting).

Concurring in the judgment only, Judge Griffin stated: "[W]hile I agree that *National Cotton* controls this Court's conclusion, I disagree that it was correctly decided. But for *National Cotton*, I would find jurisdiction lacking." Slip op. at 27 (Griffin, J., concurring in the judgment).

Even Judge McKeague, despite embracing *National Cotton*, conceded that "perhaps" its holding was "unduly broad" in its extension of the "functional" approach to § 1369(b)(1)(F) which *National Cotton* attributes to the Supreme Court's decision in *Crown Simpson*. Slip op. at 14.

All three panel judges' reluctance to rest jurisdiction on *National Cotton* is well-founded. Its jurisdictional holding is a judicial foray beyond the text of § 1369(b)(1)(F), and the Supreme Court's interpretation of that statute, and should be overruled by the en banc Circuit.

The text of § 1369(b)(1)(A)-(G) specifies seven types of action by the EPA Administrator for which jurisdiction over legal challenges is exclusive to the circuit courts. Subsection (F) grants jurisdiction for review of EPA actions "in issuing or denying any permit under section 1342 of this title." Section 1342 refers to the Clean Water Act's National Pollution Discharge Elimination System (NPDES) permits. But the Water Definition merely redefines the geographic scope of the Clean Water Act. It does not grant or deny NPDES permits—either directly or indirectly. Under a plain reading of the statutory text, subsection (F) does not grant original circuit court jurisdiction over challenges to the Water Definition.[3]

As the concurring opinion notes, "[w]hen the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not

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[3] The concurring and dissenting opinions agree: "In my view, it is illogical and unreasonable to read the text of either subsection (E) or (F) as creating jurisdiction in the courts of appeals for these issues." Slip op. at 20 (Griffin, J., concurring in the judgment): "I agree . . . that, under the plain meaning of the statute, neither subsection (E) nor subsection (F) of 33 U.S.C § 1369(b)(1) confers original jurisdiction on the appellate courts." Slip op. 32 (Keith, J., dissenting). *Cf. Lockhart v. United States*, 577 U.S. ____ (2016), 2016 WL 782862, slip op. at 3 ("Consider the text.") (Sotomayor, J.).

absurd—is to enforce it according to its terms." Slip op. at 19 (quoting *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296 (2006)) (Griffin, J., concurring in the judgment). The language of subsection (F) is plain. So long as absurdity does not result from applying the law as Congress wrote it, modern textual interpretation does not search for ways to improve upon the written law. Even where divergence from the plain language is deemed necessary, such deviation is justified only to the extent that it aims to alleviate some absurdity that would arise from a faithful application.[4]

In *Crown Simpson Pulp Co. v. Costle*, the Supreme Court interpreted subsection (F) to extend circuit court reviewability to agency actions having the "precise effect" of a grant or denial of a NPDES permit. 445 U.S. 193, 196 (1980). The issue in the case was whether EPA's effective veto of a state-issued permit—which would have the same practical effect as a denial had EPA not delegated permitting authority—could be reviewed in the circuit court despite EPA not having technically denied the permit. *Id.* The Court's interpretation of the plain language of the statute is no broader than necessary to avoid what it determined would be the "irrational" outcome of having "denials of NPDES permits . . . reviewable at different levels of

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[4] This rule of construction has roots in British law: "[I]n construing . . . all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, *but no farther*." *Grey v. Pearson* (1857) 10 Eng. Rep. 1216, 1234; 6 H.L. Cas. 61, 106 (emphasis added).

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. The Supreme Court applied the plain meaning of the text to extend review only to actions that do *precisely the same thing* as the actions Congress chose to be reviewable.[5]

The Ninth Circuit later converted *Crown Simpson's* narrowly tailored "precise" equivalence, between EPA permit denials and EPA vetoes of state issued permits, into a broad and extra-textual approach to circuit court jurisdiction. *See NRDC v. EPA*, 966 F.2d 1292, 1296-97 (9th Cir. 1992); *Am. Mining Cong. v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992). This is the pair of Ninth Circuit cases upon which *National Cotton* would later exclusively rely. *See Nat'l Cotton*, 553 F. 3d at 933 (citing *NRDC v. U.S. E.P.A.*, 966 F.2d at 1296-97, and *Am. Mining Cong. v. EPA*, 965 F.2d at 763). The Ninth Circuit broadly extended Subsection F's grant of jurisdiction to the review of "regulations governing the issuance of permits under section 402, 33 U.S.C. § 1342,

[5] The Supreme Court did say in *Crown Simpson* that it was applying a functional approach to interpreting the scope of jurisdiction under Section 1369(b)(1)(F), and this statement can support the view that, at least as to circuit court jurisdiction under the Clean Water Act, the Court has eschewed the textual approach. However, the Court's holding in *Crown Simpson* is very narrow—subsection (F) applies to permit grants and denials, and those EPA actions have the "precise effect" of grants or denials. One can, and petitioners argue that this Court should, read *Crown Simpson* within, and consistently so far as possible with, the Court's predominantly textual jurisprudence. One could just as easily, and perhaps more reasonably, read *Crown Simpson* as merely holding that EPA's veto power over state-issued permits is a denial under the statute. Under this view, *Crown Simpson* does not stand for a broadly non-textual approach to the interpretation of the Clean Water Act.

as well as the issuance or denial of a particular permit." *Nat. Res. Def. Council, Inc. v. EPA*, at 1296-97 (quoting *Am. Mining Cong. v. EPA*, 965 F.2d at 763).

But even before this Court decided *National Cotton* based on the Ninth Circuit's decisions in *NRDC v. EPA* and *Am. Mining Cong v. EPA*, the Ninth Circuit had made clear in *Northwest Environmental Advocates v. EPA*, "[t]he facts of [*Crown Simpson*] make clear that the Court understood functional similarity in a narrow sense." 537 F.3d 1006, 1016 (9th Cir. 2008). While a narrow reading of functional similarity preserves the integrity of the text and the intent of Congress, the broad reading adopted in *National Cotton* inevitably negates Congress's choice to limit the circuit courts' exclusive jurisdiction to only seven specific types of action.

A narrowing principle like the *Crown Simpson* "precise effect" test would restrain jurisdiction under Subsection F from being extended to all regulations under the Clean Water Act. *National Cotton*, in cribbing its jurisdictional holding from the later-cabined holdings of *NRDC* and *Am. Mining Cong.*, erroneously dispenses with the statutory text, with no limiting principle to guide or restrain such departures. It is precisely that lack of a limiting principle in *National Cotton*'s holding that gives rise to the fractured opinion of the panel. Rather than staying within *Crown Simpson*'s "precise effects" limit, *National Cotton*'s limitless holding departs into a boundless region in which the specific enumeration of seven discrete types of cases for which jurisdiction lies, gives way to jurisdiction over any case under the Clean Water Act.

As such, there is little to commend *National Cotton* as an interpretation of statutory text except as a negation of it. It should be overruled.

B. Alternatively, the En Banc Circuit Should Grant Rehearing To Establish a Definitive, Narrowing Interpretation of *National Cotton*

Each panel Judge expressed a different understanding of the relation to permitting that triggers original circuit court jurisdiction.[6]

Such varying readings of a single decision are not remarkable, given the absence of guiding analysis in *National Cotton*. If *National Cotton* is not overruled, the en banc Circuit should at least, for the sake of clarity and uniformity, provide the limiting principle it lacks.

The panel's three disparate opinions highlight the problem of *National Cotton*'s jurisdictional holding. In dissent, Judge Keith stated:

> [I]t cannot be that any rule that merely "relates" to permitting procedures—however tenuous, minimal, or tangential that relation may be—confers original jurisdiction upon this Court under subsection (F). This could not have been the intent of the legislators who drafted seven carefully defined bases for original jurisdiction in the appellate

[6] Judge McKeague appears to permit circuit court review of any action that merely "impacts the granting and denying of permits," slip op. at 14; Judge Griffin reads the case to extend jurisdiction to "no end," slip op. at 29; and Judge Keith would extend review only to those actions that "regulate permitting procedures" in a narrow sense, slip op. at 32-33.

> courts—and it could not have been the intent of the *National Cotton* court itself.

Slip op. at 32-33 (Keith, J., dissenting).

While Judge Keith believes *National Cotton* is best read narrowly as covering only those EPA actions directly "regulat[ing] the permitting procedures," he concedes that "the *National Cotton* court could have provided an explanation of what it meant by 'regulations governing the issuance of permits.'" Slip op. at 33. (Keith, J., dissenting) (internal citations omitted). "By not explaining this phrase," he adds, "[*National Cotton*] invited much speculation about the scope of subsection (F)." *Id*.

The narrow judgment and fractured panel decision are a result of that speculation, and do little to clarify the matter. Without guidance from the en banc Court, future litigants and courts will be hopelessly divided as to the scope of subsection (F). If *National Cotton* is not overruled, the Court must cabin its holding to provide clarity in future litigation as well as to put this proceeding of national scope on more solid jurisdictional footing.

It must also be noted: the application of nearly any principled limitation on the broad jurisdictional holding of *National Cotton* is likely to decide the issue of jurisdiction in this case in favor of petitioners. Only the broadest possible interpretation can call the Water Definition an action "issuing or denying a permit." 33 U.S.C. § 1369(b)(1)(F). Even a characterization of the Water Definition as an

action "governing the issuance of permits" takes too much liberty with the plain meaning of the text. *See* slip op. at 28 ("At best, the Clean Water Rule is one step removed from the permitting process.") (Griffin, J., concurring in the judgment). Whether *National Cotton* is overruled outright or limited by this Court, it is clear, as a majority of the panel judges stated, that it should not result in circuit court jurisdiction in this case. The en banc Sixth Circuit should grant a rehearing to say so.

C. Rehearing Should Be Granted To Avoid Conflict with the Eleventh Circuit

The panel's decision to follow *National Cotton* forces the Sixth and Eleventh Circuits into an awkward split. In *Friends of the Everglades v. EPA*, the government similarly argued that § 1369(b)(1)(E) and (F) grant original circuit court jurisdiction over challenges to the definitional Water Transfers Rule. 699 F.3d 1280 (11th Cir. 2012). The Eleventh Circuit rejected this broad interpretation, finding that the rule, which exempts a category of activities from permitting generally, "neither issues nor denies a permit," nor has the "precise effect" of such an action. *Id*. at 1287. Further, the Eleventh Circuit specifically noted *National Cotton*'s adoption of the broad interpretation and rejected it as unpersuasive due to its reliance on previously distinguished case law in lieu of undertaking its own analysis. *Id*. at 1288.

The resulting circuit split is a troublesome one. While the Sixth Circuit conceives the jurisdiction of subsection (F) broadly per its ruling in *National Cotton*,

the Eleventh refuses to depart so far from the text. Thus, for future challenges to regulations under the Clean Water Act, the question of whether original jurisdiction is correctly in the district or circuit courts is to be answered by the luck of the draw among circuits. That result would be more absurd than any that would arise from a textual reading of § 1369(b)(1)(F).

To avoid this result, the Court should convene en banc and overrule or limit *National Cotton*.

CONCLUSION

The petition for rehearing should be granted.

DATED: March 23, 2016.

Respectfully submitted,

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DATED: March 23, 2016.

/s/ M. Reed Hopper
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CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number(s): 15-3823 and related cases

I certify that I electronically filed the foregoing petition with the Clerk of the Court using the appellate CM/ECF system on March 23, 2016. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

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