Case 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 (June 29, 2015)

RESPONDENTS' COMBINED OPPOSITION TO PETITIONS FOR REHEARING EN BANC AND PETITION FOR PANEL REHEARING

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INTRODUCTION

On February 22, 2016, a panel of this Court issued a decision denying motions to dismiss these 22 consolidated petitions for review, concluding that this Court has jurisdiction to review the Clean Water Rule, a regulation promulgated more than nine months ago by the United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("Army"). Having granted a nationwide stay of the Rule in October 2015, the panel did not carry the jurisdictional motion with the merits but instead allowed for full briefing and oral argument on the motions. Dissatisfied with the panel decision, some of the parties that sought dismissal (and others that did not) now seek the extraordinary process of rehearing en banc.

The petitions for rehearing should be denied, as they fail to establish that the panel decision either "directly conflicts with Supreme Court or Sixth Circuit precedent" or is "a precedent-setting error of exceptional public importance." 6th Cir. I.O.P. 35(a). In fact, the decision is entirely consistent with the relevant precedents of the Supreme Court and this Court, as well as the text, structure, and purposes of Section 509(b)(1) of the Clean Water Act, 33 U.S.C. § 1369(b)(1). The decision also does not conflict with a decision of another circuit; the fact that *prior* Sixth Circuit precedent conflicts with the precedent of another circuit (regarding a type of regulation not at issue here) is not grounds for en banc review here. This is

especially true where the Court's prior precedent also adheres to Supreme Court precedent and the predominant view regarding the scope of Section 509(b)(1).

Various parties nevertheless contend that en banc review is necessary to avoid "a significant waste of resources," Ohio, et al. Pet. at 1; because the panel decision "all but guarantees that duplicative proceedings will continue even with the panel's jurisdictional finding," *id*. at 15; to prevent "chaos," Se. Legal Found. Pet. at 1; to avoid "nationwide confusion," Wash. Cattlemen's Ass'n Pet. at 1; to avoid an "absurd" result, *id*. at 15; to "prevent procedural morass," Nat'l Ass'n of Mfrs. Pet. at 3; and to "avoid 'the mischief of economic waste and delayed justice,'" *id*. at 15. The exact opposite is true. It is the panel's resolution of the knotty jurisdictional issue that has streamlined and centralized the litigation so that the parties and this Court can finally turn their undivided attention to the merits.

En banc review, by contrast, would undermine the stated goals of efficiency and uniformity that are asserted by the parties seeking rehearing. Either the full Court would affirm the panel decision, in which case many more months would have passed to no purpose whatsoever; or the full Court would reverse the decision, leading to multiple district court proceedings and the very "waste of resources," "chaos," "duplicative proceedings," "nationwide confusion," "absurd" results, "procedural morass," "mischief," and "delayed justice" that the petitioners for rehearing claim they are seeking to avoid.

BACKGROUND

I. The Clean Water Act and the Clean Water Rule's Definition of "Waters of the United States"

The objective of the Clean Water Act ("CWA" or "the Act") is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Central to this objective is Section 301(a)'s prohibition against the "discharge of any pollutant" by "any person" except as specifically allowed. CWA Section 301(a), 33 U.S.C. § 1311(a); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95, 102 (2004); *see also Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 298 (2009) (Ginsburg, J., dissenting) (referring to Section 301(a) as the CWA's "core command"). The Act establishes a comprehensive program for controlling water pollution, the "cornerstone" of which is the National Pollutant Discharge Elimination System ("NPDES") permit program for controlling discharges of pollutants into waters of the United States. *Nat'l Wildlife Fed'n v. Consumers Powers Co.*, 862 F.2d 580, 582 (6th Cir. 1988) (citing 33 U.S.C. § 1342 and quoting *Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 108 (D.C. Cir. 1987)).

The term "discharge of a pollutant" set out in Section 301(a), 33 U.S.C. § 1311(a), means "the addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Thus, the essential elements of the application of

the CWA's basic permitting requirement are that (1) a pollutant is (2) added (3) to navigable waters (4) from (5) a point source. *Nat'l Wildlife Fed'n*, 862 F.2d at 583. "Navigable waters" are "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) *see also* J.M. Gross & L. Dodge, *Clean Water Act* § 3.2 (2005) (stating that whether a body of water is a water of the United States is "the pivotal question" in determining whether the CWA's basic prohibition applies).

These 22 consolidated petitions for review—brought by states, environmental organizations, and industry organizations—challenge the Clean Water Rule, a regulation promulgated by EPA and the Army (collectively, "the Agencies") to clarify the scope of "waters of the United States" protected under the Act in the wake of several Supreme Court decisions. Clean Water Rule: Definition of "Waters of the United States"; Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015). The Rule specifies the types of waters that are (1) excluded from CWA jurisdiction, (2) jurisdictional in all instances, and (3) subject to case-specific analysis to determine whether they are jurisdictional. The Rule thus makes clear where a permit is not required and where an individual or entity may need to seek authorization before discharging a pollutant into a protected water. In doing so, the Rule interprets the term "discharge of a pollutant" contained in the Act's discharge prohibition in Section 301(a), 33 U.S.C. § 1311(a).

The Agencies developed the Rule after a comprehensive analysis of the relevant science and extensive public participation. 80 Fed. Reg. at 37,057. The Agencies were further guided by their decades of experience in implementing the CWA and the information provided in more than one million submitted comments on the proposed regulation. *Id.* As this Court recently observed, the Agencies "conscientiously endeavored, within their technical expertise and experience, and based on reliable peer-reviewed science, to promulgate new standards to protect water quality that conform to the Supreme Court's guidance." Doc. 49-2, Order of Stay at 6.

II. The Clean Water Act's Centralized Judicial Review Provision

To "establish a clear and orderly process for judicial review," CWA Section 509(b)(1), 33 U.S.C. § 1369(b)(1), vests federal courts of appeals with exclusive, original jurisdiction to review certain categories of EPA actions implementing the Act. H.R. Rep. No. 92-911 at 136 (1972), *reprinted in* 1 Legislative History of the Water Pollution Control Act of 1972 at 823 (Comm. Print 1973) ("Legis. Hist."); *see also* S. Rep. No. 92-414 at 85 (1971), *reprinted in* 1972 U.S.C.C.A.N. at 3751 (noting the need for "even and consistent" application of nationwide administrative actions). The enumerated actions primarily address the NPDES permitting program. As relevant here, actions originally reviewable in the courts of appeals include the EPA Administrator's actions:

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

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

Section 509(b)(1)(E), (F), 33 U.S.C. § 1369(b)(1)(E), (F). "Where that review is available, it is the exclusive means of challenging actions covered by the statute . . . ." *Decker v. NEDC*, 133 S. Ct. 1326, 1334 (2013).

Petitions for review generally must be filed within 120 days of the EPA action being challenged. 33 U.S.C. § 1369(b)(1).[1] When multiple petitions for review challenging a single EPA action are filed in more than one circuit court, those petitions are automatically consolidated before a randomly-selected court of appeals. 28 U.S.C. § 2112(a)(3). EPA actions "with respect to which review could have been obtained under [Section 1369(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2); *Decker*, 133 S. Ct. at 1334. Section 509(b), 33 U.S.C. § 1369(b), thereby promotes, *inter alia*, the ability of regulators, the regulated community, and the public to rely on the validity of EPA actions that are not promptly challenged or are upheld by a court of appeals.

In contrast, final agency action under the Act that falls outside the categories enumerated in Section 509(b)(1), 33 U.S.C. § 1369(b)(1), may generally

[1] The CWA establishes a limited exception to that requirement when a petition for review is based solely on grounds arising after the 120th day. 33 U.S.C. § 1369(b)(1).

be challenged in federal district court under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*. *See* 5 U.S.C. § 704; 28 U.S.C. § 1331. An APA suit may be brought at any time within six years from the date of the challenged agency action. 28 U.S.C. § 2401(a); *but see Herr v. U.S. Forest Serv.*, 803 F.3d 809, 819 (6th Cir. 2015) (holding that the limitations period in Section 2401(a) did not begin to run until three years after the agency action). Consequently, the validity of actions reviewable under the APA rather than under CWA Section 509(b)(1) can remain subject to judicial review for vastly longer periods of time.

III. Challenges to the Clean Water Rule in the Circuit and District Courts

The 22 petitions for review of the Clean Water Rule were initially filed in eight circuit courts of appeals and were consolidated before this Court by order of the Judicial Panel for Multidistrict Litigation pursuant to 28 U.S.C. § 2112(a). *In re Final Rule: Clean Water Rule: Definition of "Waters of the United States,"* MCP No. 135 (J.P.M.L.), Doc. 3 (July 28, 2015).

On September 9, 2015, a group of the State petitioners filed both a motion for a nationwide stay of implementation of the Rule and a motion to dismiss their petitions for lack of subject-matter jurisdiction. The motions panel granted the motion to stay the Rule on October 9, 2015, finding that a temporary nationwide stay was warranted in light of "uncertainty about the requirements of the new Rule and whether they will survive legal testing." Order of Stay at 6. The Court then set

a briefing schedule for any motions to dismiss; seven additional motions to dismiss based on a purported lack of jurisdiction were subsequently filed by other petitioner groups and intervenors. Following full briefing, the Court heard argument on the motions to dismiss on December 8, 2015, and denied the motions in an opinion dated February 22, 2016. *See infra* Section IV (summarizing opinion).

Nearly all of the parties that have filed petitions for review of the Rule have also filed 18 complaints challenging the Rule in 13 federal district courts across the country. While the majority of the district court cases have been stayed pending the outcome of the motions to dismiss filed in this Court, three district courts have addressed the jurisdictional question presented here. Two courts held that jurisdiction lies exclusively in this Court under Section 509(b)(1). *Murray Energy Corp. v. EPA*, No. 1:15-cv-110, 2015 WL 5062506 (N.D. W.Va. Aug. 26, 2015); *Georgia v. McCarthy*, No. 2:15-cv-79, 2015 WL 5092568 (S.D. Ga. Aug. 27, 2015) (appeal pending).[2] A third district court held that it has jurisdiction to review the Clean Water Rule and entered a preliminary injunction limited to the States that

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[2] The Eleventh Circuit appeal raises the same jurisdictional issue raised before this Court. Noting that the same parties are involved in both that appeal and the petitions for review in this Court, and that the jurisdictional issues were briefed and argued in the Sixth Circuit, the court assigned to hear all petitions for review pursuant to 28 U.S.C. § 2112(a)(3), the Eleventh Circuit cancelled the scheduled oral argument and held the appeal in abeyance pending a decision by this Court. *Georgia v. McCarthy*, No. 15-3887 (11th Cir.) (Order of February 18, 2016 at 3).

are plaintiffs in that case. *North Dakota v. EPA*, No. 3:15-cv-59, 2015 WL 5060744 (D.N.D. Aug. 27, 2015).

IV. The Panel's February 22, 2016 Opinion

In the lead opinion, Judge McKeague concluded that the Clean Water Rule is an action fitting within both subsection (E) (other limitation under CWA Section 301, 33 U.S.C. § 1311) and subsection (F) (action in the issuance or denial of a permit) of Section 509(b)(1) of the Clean Water Act, 33 U.S.C. § 1369(b)(1). Doc. 72-2, Opinion at 11, 16.

First, Judge McKeague found that the Rule is an "other limitation" under Section 301, 33 U.S.C. § 1311, even though it is not "self-executing," as the Rule "alter[s] permit issuers' authority to restrict point-source operators' discharges into covered waters" and acts as a "restriction on the activities of some property owners," Opinion at 7, 10.[3] Indeed, Judge McKeague recognized "these restrictions" as "presumably the reason for petitioners' challenges to the Rule." *Id.* Judge McKeague further noted that the Rule was promulgated under Section 301, among other CWA authority. *Id.* at 11 n.4 (citing 80 Fed. Reg. at 37,055). Judge

[3] The Rule is not unique in that regard. In fact, a number of the actions reviewable under Section 509(b)(1) are not self-executing, as they must be incorporated into NPDES permits or they apply to the permitting process itself. Judge McKeague's opinion describes some of those actions. Opinion at 7-8 (describing effluent limitation guidelines and permitting regulations that dictate requirements for cooling water intake structures). Other examples of actions reviewable under Section 509(b)(1) that are not self-executing include effluent limitations and secondary treatment requirements promulgated under CWA Section 301, 33 U.S.C. § 1311.

McKeague's opinion carefully analyzed the Clean Water Rule against the backdrop of the statutory text and purpose, and of the Supreme Court and circuit court decisions that have considered whether an action is an "other limitation" under Section 509(b)(1)(E). Opinion at 7-11. Finding the movants' position "devoid of substantial case law support," Judge McKeague discerned no reason to depart from *E.I. du Pont de Nemours Co. v. Train*, 430 U.S. 112, 136 (1977), in which the Supreme Court found that effluent limitations guidelines were reviewable exclusively in the courts of appeals under Section 509(b)(1)(E). As Judge McKeague explained, "[t]o rule that Congress intended to provide direct circuit court review of [] individual actions [granting or denying permits] but intended to exclude from such review the definitional Rule on which the process is based, would produce, per *E.I. du Pont*, a 'truly perverse situation.'" Opinion at 7, 11.

Second, Judge McKeague concluded that the Clean Water Rule is independently reviewable under Section 509(b)(1)(F), which authorizes review of EPA actions in the issuance or denial of NPDES permits. Opinion at 16. As with his analysis of subsection (b)(1)(E), Judge McKeague considered the decisions of the Supreme Court, the Sixth Circuit, and other circuit courts that have construed subsection (b)(1)(F), focusing primarily on this Court's decision in *National Cotton Council v. EPA*, 553 F.3d 927 (6th Cir. 2009). In *National Cotton*, a

unanimous panel asserted its jurisdiction under Section 509(b)(1)(F) to hear consolidated petitions for review of a definitional rule issued by EPA. That rule provided that pesticides applied to waters of the United States in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act did not constitute "pollutants" as that term is used in CWA Section 301(a) and were thus exempt from NPDES permitting requirements. 553 F.3d at 932. This Court held that Section 509(b)(1)(F), "at a minimum," vests the federal courts of appeals with exclusive jurisdiction "to review the regulations governing the issuance of permits under [S]ection 402 [33 U.S.C. § 1342] . . . as well as the issuance or denial of a particular permit."[4] *Id.* at 933. Judge McKeague found that the Clean Water Rule governs NDPES permitting and is thus reviewable under Section 509(b)(1)(F), in accord with *National Cotton*.

Judge Griffin concurred in the judgment. Judge Griffin did not consider the limitations of the Clean Water Rule to fall under Section 301—because he understood the term "waters of the United States" to be used in the Act's definitional section "and no more"—and thus did not recognize the Rule as an "other limitation under Section 301" that is reviewable under Section 509(b)(1)(E). Opinion at 21-22. But Judge Griffin agreed with Judge McKeague that this Court's

[4] In *National Cotton*, the Court did not directly address the argument made by EPA and industry petitioners that the rule at issue was also an "other limitation" under Section 301 reviewable under Section 509(b)(1)(E). *See* Attachment 1 (Industry Petitioners' Brief) at 18-25.

decision in *National Cotton* was controlling with respect to subsection (b)(1)(F). *Id.* at 27, 30. Although Judge Griffin personally disagreed with the holding in *National Cotton*, he stated: "I cannot conclude that it is unique and diverges from the predominant view of the other circuits." *Id.* at 30 n.2.

Judge Keith dissented, concluding that the Rule did not fall within either Section 509(b)(1)(E) or (F), and that *National Cotton* was not controlling. *Id.* at 33.

ARGUMENT

"A petition for rehearing en banc is an extraordinary procedure intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion that directly conflicts with Supreme Court or Sixth Circuit precedent." 6th Cir. I.O.P. 35(a). The grant of a petition for rehearing en banc is "not favored" and "should be made only in the most compelling" or "rarest of circumstances." *Mitts v. Bagley*, 626 F.3d 366, 370 (6th Cir. 2010) (Sutton, J., concurring in the denial of rehearing en banc) (citations omitted).

The rehearing petitions do not meet either standard, as the panel decision presents neither a conflict with Supreme Court or Sixth Circuit precedent nor a precedent-setting error of exceptional public importance. While there is no denying the importance of the Clean Water Rule itself, the panel decision confirming this Court's jurisdiction over the petitions merely resolves the question of what court should hear the challenges to the Rule, while adhering to precedent from both the

Supreme Court and this Court interpreting the CWA's jurisdictional provision. The litany of arguments made by the parties seeking rehearing represents nothing more than disagreement with the panel's decision, which is an insufficient ground on which to grant rehearing en banc. Moreover, en banc review would not advance the timely and efficient resolution of the merits of the petitions.

I. The Panel Decision Does Not Conflict With a Decision of the Supreme Court or of the Sixth Circuit.

Notably, no party seeks rehearing on the basis that the panel decision is in conflict with a decision of this Court. Rather, some petitioners assert a purported conflict with Supreme Court precedent.

One group of petitioners asserts that the decision conflicts with the decisions of the Supreme Court regarding Section 509(b)(1), claiming that the motions panel "elevated isolated rhetoric" from those decisions. Se. Legal Found. Pet. at 2. Another petitioner contends that the decision is inconsistent with the "functional approach" taken by the Supreme Court in those cases. Util. Water Act Grp. Pet. at 5-8. But there is no such conflict or inconsistency. The panel carefully considered the entire body of case law interpreting Section 509(b)(1) before deciding that jurisdiction lies in this Court.

The Supreme Court has twice considered the scope of Section 509(b)(1), and in both cases it made clear that the judicial review provision should be applied practically, consistent with its text and purpose.

First, in *E.I. du Pont*, 430 U.S. at 136, the Court considered whether Section 509(b)(1) applied to the review of EPA's promulgation of nationally applicable effluent limitation guidelines, by regulation, for classes of sources, or whether it applied only to source-specific effluent limitations and variances that dictate the limits of individual conduct. The effluent limitation guidelines were issued pursuant to both Section 301 and Section 304(b) of the CWA, 33 U.S.C. §§ 1311, 1314(b). 39 Fed. Reg. 9612 (Mar. 12, 1974).

Contrary to the Southeastern Legal Foundation's portrayal of the jurisdictional issue, Se. Legal Found. Pet. at 3, in *E.I. du Pont* the parties challenging the guidelines asserted that EPA could only promulgate the guidelines under Section 304, which is not referenced in Section 509(b)(1)'s judicial review provision, and that review should therefore be in the district courts. *E.I. du Pont*, 430 U.S. at 124-25; *see also E.I. du Pont de Nemours & Co. v. Train*, 528 F.2d 1136, 1139 (4th Cir. 1975) (setting forth the jurisdictional dispute). The Supreme Court affirmed the Fourth Circuit, concluding that the purpose of the Section 304(b) effluent limitations guidelines was to accomplish the goals of Section 301, 430 U.S. at 130-31. The Supreme Court, like the Fourth Circuit, considered the guidelines to be promulgated under Section 301 for purposes of judicial review, and added that it would be "truly perverse" if the courts of appeals had the authority to review numerous individual actions in which EPA issued or denied an

NPDES permit but not "the basic regulations governing" those permitting decisions. *Id.* at 136.

The Supreme Court also observed that the regulations at issue established effluent limitations guidelines for existing point sources of pollution, while similar regulations for new point sources, issued under Section 306, 33 U.S.C. § 1316, were expressly reviewable in the courts of appeals under section 509(b)(1). 430 U.S. at 136. Under those circumstances, the Court stated, it would be irrational to hold that effluent limitation guidelines for existing sources would be reviewed in the district court while the same type of regulations addressing new sources would be reviewed in the courts of appeals. *Id.* at 136-37. The Court thus stressed a pragmatic interest in concluding that court of appeals jurisdiction under Section 509(b)(1) encompasses the power to review all of the regulations that govern NPDES permitting. *Id.*

Second, in *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980) (per curiam), the Supreme Court held that Section 509(b)(1)(F) vested jurisdiction in the courts of appeals to review "EPA's action denying a variance and disapproving effluent restrictions contained in a permit issued by an authorized state agency." 445 U.S. at 194. In the decision below, the Ninth Circuit had narrowly construed Section 509(b)(1)(F) and concluded that EPA's action in disapproving a State-issued permit was not a decision by EPA "issuing or denying" a permit. 445 U.S.

at 196. The Supreme Court reversed, holding that because "the precise effect of [EPA's] action is to 'den[y]' a permit within the meaning of § 509(b)(1)(F)," jurisdiction was exclusively in the courts of appeals. 445 U.S. at 196. The Court rejected the formalistic approach taken by the Ninth Circuit, where "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; *see also id.* at 197 n.9 (citing with approval the Sixth Circuit's similar approach in *Republic Steel Corp. v. Costle*, 581 F.2d 1228, 1230 n.1 (1978)).

As Judge McKeague correctly noted, the D.C., Fourth, and Eighth Circuits have all followed the Supreme Court's lead in *E.I. du Pont* and *Crown Simpson* by interpreting Section 509(b)(1) in a practical manner that hews to the Congressional intent of resolving actions that govern the NPDES program in an orderly and efficient manner. Opinion at 11; *id.* at 16 (finding that the movants' arguments "find[] practically no support in the case law").

Moreover, the panel decision is entirely consistent with the Supreme Court's instruction that to the extent there is any ambiguity as to whether jurisdiction lies in a district court or in a court of appeals, it should be resolved in favor of review in the court of appeals. Opinion at 14-15 (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 745 (1985), and *State of Tenn. v. Herrington*, 806 F.2d 642, 650 (6th

Cir. 1986) (finding that "policy considerations are relevant . . . where Congress' intent is ambiguous"). *See also Iowa League of Cities v. EPA*, 711 F.3d 844, 861 (8th Cir. 2013) (noting, in the context of a petition brought under Section 509(b)(1), that "the Supreme Court has recognized a preference for direct appellate review of agency action pursuant to the APA"); *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 193 (2d Cir. 2004) (citing cases from the D.C., Second, Seventh, and Tenth Circuits for the proposition that "when there is a specific statutory grant of jurisdiction to the court of appeals, it should be construed in favor of review by the court of appeals").

In short, the panel's jurisdictional decision adheres to the decisions of the Supreme Court, and none of the parties seeking rehearing even contend that the decision conflicts with this Court's precedent. Accordingly, the parties seeking rehearing have failed to demonstrate that the panel decision "directly conflicts with Supreme Court or Sixth Circuit precedent." 6th Cir. I.O.P. 35(a).

II. The Panel Decision Does Not Contain a Precedent-Setting Error of Exceptional Public Importance.

A proceeding "involves a question of exceptional importance" under Rule 35(a)(2) where the decision constitutes "a precedent-setting error of exceptional public importance." 6th Cir. I.O.P. 35(a). The petitions for rehearing conflate the importance of the underlying Clean Water Rule and even the significance of the scope of jurisdiction under Section 509(b)(1) with the relevant question of whether

the panel decision itself constitutes a precedent-setting error of exceptional public importance. The importance of the issues that this Court will address in merits briefing is peripheral to the question of whether the panel's jurisdictional decision should be reviewed by the Circuit sitting en banc.

As an initial matter, a disagreement with a panel decision on the merits warrants en banc review only in the rarest of circumstances, as Judge Sutton observed in his concurrence in *Mitts*. 626 F.3d at 370-71. Here, the panel decision is "the product of a substantial expenditure of time and effort by three judges and numerous counsel." *Mitts*, 626 F.3d at 370. Each judge considered the statutory language and the relevant case law interpreting it. The ultimate conclusion that the Clean Water Rule is reviewable under Section 509(b)(1) is correct.

First, the Clean Water Rule falls within the plain language of Section 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E), which provides for exclusive appellate jurisdiction to review an EPA action in "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 [of the CWA]." The Rule is an "other limitation" because it is a restriction on those who discharge a pollutant into protected waters and on those who issue permits, such as the State Petitioners here. And the Rule was promulgated under Section 301, 33 U.S.C. § 1311, which prohibits the discharge of any pollutant by any person to waters of the United States except as in compliance with law. *See* 80 Fed. Reg. at

37,055 (citing, among other provisions, 33 U.S.C. § 1311 as "authority for this rule"); *see also* Background Section I (explaining that "waters of the United States" is an essential element of the discharge prohibition in 33 U.S.C. § 1311). By defining where the discharge prohibition of Section 301 applies, the Clean Water Rule implements the most fundamental limitation in the Act.

Second, the panel majority was correct in concluding, consistent with *National Cotton,* that the Clean Water Rule is an underlying permitting regulation reviewable under Section 509(b)(1)(F). Opinion at 11-16, 19. *National Cotton* is merely one example of circuit courts applying the Supreme Court's opinion in *Crown Simpson* to give Section 509(b)(1) a "practical rather than a cramped construction." *Natural Res. Def. Council v. EPA*, 673 F.2d 400, 405 (D.C. Cir. 1982). *See* Opinion at 12 (citing cases) and 30 n.2 (recognizing that *National Cotton* is consistent with the predominant view) (Griffin, J., concurring). As these circuit court decisions amply demonstrate, applying a practical construction to Section 509(b)(1)(F) allows for the "clear and orderly process for judicial review" intended by Congress, *see* H.R. Rep. No. 92-911 at 136, 1 Legis. Hist. at 823, where parties may challenge not only the grant or denial of a permit, but also EPA's rules that govern the Section 402 NPDES permitting process.

Several Petitioners seek rehearing for the simple reason that the three judges on the panel wrote separate opinions. North Dakota, et al. Pet. at 6-9; Utility Water

Act Grp. Pet. at 4. But the mere existence of separate opinions does not indicate that the jurisdictional conclusion the panel reached is erroneous, nor does it warrant rehearing en banc.

It is also incorrect that "a number of judges" on the court have called into question the jurisdictional holding of *National Cotton*. Nat'l Ass'n of Mfrs. Pet. at 3. Judge McKeague, of course, expressly agreed with *National Cotton*. In dissent, Judge Keith did not question *National Cotton*; he simply concluded that its holding did not extend to the Clean Water Rule. Judge Griffin observed that *National Cotton* is neither unique nor divergent from the predominant view of other circuits. Opinion at 30, n.2. Nowhere in his concurrence did Judge Griffin state (or even suggest) that rehearing en banc is warranted, as he has in other circumstances. *See Lewis v. Humboldt Acquisition Corp. Inc.*, 634 F.3d 879, 882 (6th Cir. 2011) (Griffin, J., concurring in panel decision) ("I write separately because our precedent on this issue of exceptional importance is misguided and contrary to the overwhelming authority of our sister circuits. Accordingly, the question appears appropriate for rehearing en banc.").

Indeed, instead of seeking rehearing on the basis that the panel decision is *in conflict* with a prior decision of the Sixth Circuit, some parties seek to *overturn* this Court's decision in *National Cotton* on the grounds that *it* is in conflict with decisions of the Eleventh and Ninth Circuits. Nat'l Ass'n of Mfrs. Pet. at 10;

Wash. Cattlemen's Ass'n Pet. at 7; Util. Water Act Grp. Pet. at 5. However, *National Cotton* is in alignment with the decisions of the Supreme Court and the predominant view of other circuit courts and therefore rehearing en banc of the panel decision, which relied on *National Cotton*, is not warranted.

Notably, in *National Cotton*, the American Farm Bureau Federation and American Forest & Paper Association—which are also parties to this litigation—vigorously argued that the regulatory exclusion at issue there was reviewable under Section 509(b)(1)(E) and (F). *See* Attachment 1 (Brief of Am. Farm Bureau Fed'n and Am. Forest & Paper Ass'n, et al. in Opposition to Motion to Dismiss or Transfer). A unanimous panel of this Court agreed, finding that EPA's action was reviewable "under Section 509(b)(1)(F), at a minimum." 553 F.3d at 933.[5] Now, however, these same parties have reversed their position, and argue (with other petitioners for rehearing) that *National Cotton* must be overturned. They contend that rehearing is necessary to provide uniformity in the circuit courts with respect to Section 509(b)(1). Nat'l Ass'n of Mfrs. Pet. at 13; Wash. Cattlemen's Ass'n Pet. at 14; Util. Water Act Grp. Pet. at 2; *see also* Se. Legal Found. Pet. at 5, 9 (seeking rehearing to obtain "uniformity" and to avoid placing the Eleventh Circuit in an

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[5] No party to the 11 petitions for review that were consolidated in *National Cotton* sought further review of the jurisdictional issue in the subsequent petition for rehearing or the petitions for certiorari.

"awkward" position). While Federal Rule of Appellate Procedure 35(a)(1) recognizes a desire for "uniformity of *the court's* decisions," (emphasis added) a desire for uniformity *among the circuits* is not by itself a basis for granting rehearing en banc. That is the province of the Supreme Court or Congress. *See* Opinion at 17 (observing that despite the "uniform trend" of broad interpretation of Section 509(b)(1) since enactment of the CWA in 1972, "Congress has not moved to amend the provision or otherwise taken 'corrective' action.").

In any event, the circuit split between *National Cotton* and *Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012),[6] and *Northwest Environmental Advocates v. EPA,* 537 F.3d 1006 (9th Cir. 2008)*,* does not warrant the extraordinary process of en banc review.[7]

First, *National Cotton* is not an outlier. The panel that decided *National Cotton* was fully briefed with respect to the decision in *Northwest Environmental Advocates*—the logic of which was later adopted by the Eleventh Circuit in *Friends of the Everglades*—but the *National Cotton* panel plainly rejected that logic, citing instead to *E.I. du Pont* and decisions of the D.C. Circuit and earlier

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[6] Although Judge Griffin stated in his concurring opinion that *Friends of the Everglades* was an en banc decision, Opinion at 29, that is not the case; *Friends of the Everglades* was decided by a panel of two circuit judges and a district judge sitting by designation.

[7] The claim that the panel decision conflicts with the decisions of the D.C., Fourth, and Eighth Circuits with respect to Section 509(b)(1)(E), North Dakota, et al. Pet. at 9-12, is of no moment, as the majority of the panel concluded that jurisdiction is found under Section 509(b)(1)(F) and not under Section 509(b)(1)(E).

Ninth Circuit cases that the *Northwest Environmental Advocates* court attempted—but failed—to distinguish. *National Cotton*, 553 F.3d at 933. Thus, this case stands in contrast to others in which this Court has granted en banc review, such as *Lewis v. Humboldt Acquisition Corp.*, 634 F.3d at 882. There, the Court granted rehearing en banc, at Judge Griffin's urging, and ultimately concluded that changes in the Americans with Disabilities Act ("ADA") and the conflicting decisions of every other circuit court warranted abrogation of the Court's prior precedent regarding the burden of proof in an ADA claim. *See Lewis v. Humboldt Acquisiton Corp., Inc.*, 681 F.3d 312, 314-15 (6th Cir. 2012) (en banc). Where, as here, Petitioners seek to overturn a prior decision of the Court that is consistent with Supreme Court precedent and the prevailing view among the circuits, the standard for en banc review is not met.

Second, overruling *National Cotton* with respect to Subsection 509(b)(1)(F) would not necessarily resolve the jurisdictional issue in this litigation. As Judges McKeague and Griffin both recognized, each of the regulations at issue in *National Cotton*, *Friends of the Everglades*, and *Northwest Environmental Advocates* excluded certain types of discharges from NPDES permitting requirements under 40 C.F.R. § 122.3 (Exclusions). Opinion at 13-14, 30. The Eleventh and Ninth Circuits both concluded that the respective regulatory exclusions at issue were purely exemptions from the CWA's permitting requirements that imposed no

limitations at all on regulated entities or regulators, and thus would never result in the approval or denial of a permit. *Friends of the Everglades*, 699 F.3d at 1287; *Nw. Envtl. Advocates*, 537 F.3d at 1016. *National Cotton*, on the other hand, correctly recognized that the regulatory exclusion at issue governed the NPDES permitting process. 553 F.3d at 933. Thus, even if *National Cotton* were reversed en banc, that would not resolve the question of where an EPA rule that constitutes much more than an exemption from the CWA's permitting requirement should be reviewed.

There is no support for the argument that the jurisdictional issue raised here would have necessarily resulted in a different outcome even in the Eleventh Circuit because of that court's decision in *Friends of the Everglades*. Nat'l Ass'n of Mfrs. Pet. at 9; *see also* Wash. Cattlemen's Ass'n Pet. at 13. The Southern District of Georgia, which is bound by Eleventh Circuit precedent, had no trouble distinguishing *Friends of the Everglades* on the ground that, unlike an exemption, the "undeniable and inescapable effect" of a rule comprehensively defining waters of the United States "is to restrict pollutants and subject entities to the requirements of the [CWA's] permit program." *Georgia v. McCarthy*, No. 2:15-cv-79-LGW, 2015 WL 5092568, at *2 (Aug. 27, 2015). *See* Fed. R. App. P. 35(b)(1)(B) ("[A petition may assert] that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the

authoritative decisions of other [courts of appeals] *that have addressed the issue*") (emphasis added). As the Southeastern Legal Foundation correctly states, each decision regarding jurisdiction under Section 509(b)(1) "is rooted in a unique piece of EPA regulation and can only be interpreted against that backdrop." Se. Legal Found. Pet. at 2.

Finally, some petitioners for rehearing claim that the panel decision will cause confusion and uncertainty about the fate of their duplicative district court cases. *See, e.g.*, Ohio et al. Pet. at 14; Se. Legal Found. Pet. at 9; Nat'l Ass'n of Mfrs. Pet. at 13-14; North Dakota, et al. Pet. at 14. These concerns are misplaced. Where 33 U.S.C. § 1369(b)(1) is found to apply, "it is the *exclusive* means of challenging actions covered by the statute." *Decker*, 133 S. Ct. at 1334 (emphasis added). Based on the panel decision, the consolidated challenges to the Rule can now move forward in this Court, and the district court challenges must be dismissed. *See also* Nat'l Ass'n of Mfrs. Pet. at 14 (conceding that where there is court of appeals jurisdiction under 33 U.S.C. § 1369(b)(1), "then it necessarily does *not* lie in the district courts under the APA.") (emphasis in original).

There is no evidence of any confusion or uncertainty in the district courts. In addition to the two district courts that previously held that jurisdiction to review the Clean Water Rule lies in the Sixth Circuit, *Murray Energy Corp. v. EPA*, No. 1:15-cv-110, 2015 WL 5062506 (N.D. W.Va. Aug. 26, 2015); *Georgia v.*

McCarthy, No. 2:15-cv-79, 2015 WL 5092568 (S.D. Ga. Aug. 27, 2015) (appeal pending), the Northern District of Oklahoma *sua sponte* dismissed two district court challenges for lack of subject matter jurisdiction upon receiving notice of this Court's decision. *Oklahoma v. EPA*, Case 4:15-cv-381-CVE-FHM (N.D. Okla. Feb. 24, 2016), Doc. 36 at 3. The assertion by the North Dakota Petitioners that this Court's holding on jurisdiction "creates immediate tension" with the case filed in the District of North Dakota, *see* North Dakota, et al. Pet. at 14, is illusory. The North Dakota District Court has taken note of the proceedings in this Court, invited a motion to dismiss once this Court determined its jurisdiction (which the Agencies have now filed), and has thus far not ruled on the pending motion to dismiss or record motion in the interim. *See North Dakota*, Case 3:15-cv-59 (D.N.D.), Doc. 98 at 6.

In contrast to the orderly and efficient centralized judicial review process that will occur in the Sixth Circuit, petitioners seek an alternative route going forward—one that would multiply in number and extend in time the individual challenges to the Rule in multiple district courts. That route would lead to a tremendous waste of judicial and party resources, greatly increase the likelihood of conflicting outcomes, and allow facial challenges to the Rule for years to come. As Petitioner American Farm Bureau Federation aptly argued in *National Cotton* when it advocated that this Court retain jurisdiction in that case under both Section

509(b)(1)(E) and (F), judicial review in the district courts would be "an unmitigated waste of time and resources for all involved—a practical nullity that would delay final adjudication without any discernible benefit." Attachment 1 at 16; *see id.* at 3, 16-18.

Because the panel decision contains no precedent-setting error of exceptional public importance, the petitions for rehearing en banc should be denied.

III. The Petition for Panel Rehearing Should Be Denied, as the NPDES Program Applies to All Waters of the United States, Including Wetlands.

In its petition for panel rehearing, Texas Alliance for Responsible Growth, Environment and Transportation ("TARGET") contends that the panel was unaware that TARGET's petition relates to a group of wetlands known as "Texas Coastal Prairie Wetlands" that is not subject to NPDES permitting under CWA Section 402, 33 U.S.C. § 1342, and that this Court thus lacks jurisdiction under Section 509(b)(1)(F). TARGET Pet. at 6-8. TARGET is incorrect as a matter of fact and law.

TARGET's assertion that wetlands are not subject to permitting under Section 402, 33 U.S.C. § 1342 (i.e., NPDES permitting) is wrong. In fact, wetlands that are waters of the United States are subject to permitting under Section 402, 33 U.S.C. § 1342 (which applies to point source discharges of pollutants other than

dredged or fill material), as well as under Section 404, 33 U.S.C. § 1344 (which applies to point source discharges of dredged or fill material). *See, e.g., United States v. Lucas*, 516 F.3d 316, 332 (5th Cir. 2008) (holding that septic systems discharging into wetlands are point sources that require NPDES permits under the CWA); *NC Shellfish Growers Ass'n v Holly Ridge Assocs.*, LLC, 278 F. Supp. 2d 654, 674 (E.D.N.C. 2003) (recognizing wetlands and other waters as waters of the United States subject to NPDES permit requirements).

Further, the APA and constitutional claims that TARGET asserts are largely duplicative of claims asserted by other parties challenging the Rule. *Compare* TARGET Pet. Ex. B ¶¶ 69-82 *with* State Petitioners' motion to stay, Case No. 15-3799, Doc. 24 at 7-20. TARGET's attempt to narrowly characterize its challenge to the Rule cannot divest this Court of its exclusive jurisdiction to review *all* the consolidated challenges to the Rule under 33 U.S.C. § 1369(b)(1) and 28 U.S.C. § 2112(a). *See* 28 U.S.C. § 2112(a) (requiring consolidation of "all proceedings" seeking review of a subject agency action).

The petition for panel rehearing lacks merit and should be denied.

CONCLUSION

The panel decision is consistent with the precedents of the Supreme Court and this Court, and it does not constitute a precedent-setting error of exceptional public importance. Accordingly, the petitions for rehearing should be denied.

Dated: April 1, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2016, I caused a true and correct copy of the foregoing to be served via the court's CM/ECF system on all registered counsel.

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