Nos. 16-5038, 16-5039

ORAL ARGUMENT REQUESTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al., and **STATE OF OKLAHOMA EX REL. PRUITT,**
Plaintiffs-Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and **UNITED STATES ARMY CORPS OF ENGINEERS, et al.,**
Defendants-Appellees.

On Appeal from the U.S. District Court for the Northern District of Oklahoma,
Nos. 4:15-cv-386 and 4:15-cv-381 (Hon. Claire V. Eagan)

RESPONSE BRIEF FOR THE FEDERAL DEFENDANTS-APPELLEES

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GLOSSARY

APA	Administrative Procedure Act
EPA	United States Environmental Protection Agency
MDL Panel	Panel on Multidistrict Litigation
NPDES	National Permit Discharge Elimination System

INTRODUCTION

The Clean Water Act prohibits any person from discharging pollutants into the "waters of the United States," except as specifically allowed. 33 U.S.C. §§ 1311(a); 1362(7), (12). EPA and the U.S. Army Corps of Engineers (together, the "Agencies") promulgated the Clean Water Rule in response to the Supreme Court's repeated suggestions that the Agencies should clarify the statutory phrase through regulatory action. *See* "Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed. Reg. 37,054 (June 29, 2015); 33 U.S.C. §§ 1362(7). If waters are "waters of the United States" under the Rule, a landowner must obtain a federal Clean Water Act permit before discharging pollutants. Otherwise, there is no such prohibition.

Plaintiffs here challenged the Clean Water Rule both in district-court complaints and in petitions for review to this Court. Their petitions for review, with others across the country, were transferred to the Sixth Circuit under 28 U.S.C. § 2112(a). After full briefing and argument on the issue of jurisdiction, the Sixth Circuit determined in a published opinion and judgment that it has jurisdiction under the Clean Water Act to review the Rule, and is now preparing to decide the merits of Plaintiffs' claims. The district court then correctly held that the Sixth Circuit's exercise of jurisdiction over Plaintiffs' claims is exclusive, and it properly dismissed Plaintiffs' duplicative district-court cases without prejudice.

Plaintiffs are entitled to their day in court, and they shall have it – in the Sixth Circuit. They are *not* entitled to two separate days, in two separate courts, on the same

claims. The Sixth Circuit's decision was controlling in the case before the district court. Even if it were not, however, dismissal was required, because the Clean Water Act precludes district-court review of the limitations established by the Clean Water Rule. Under either rationale, this Court should affirm the district court's dismissal of Plaintiffs' claims.

STATEMENT OF JURISDICTION

Plaintiffs' Complaints challenged the validity of the Clean Water Rule. As this brief will demonstrate, the district court lacked subject-matter jurisdiction over that challenge because the Clean Water Act, 33 U.S.C. § 1369(b)(1), provides that the U.S. Courts of Appeals have exclusive jurisdiction over such challenges.[1] The district court also lacked jurisdiction under the Administrative Procedure Act, which allows review only to the extent there is "no other adequate remedy in a court." 5 U.S.C. § 704. Plaintiffs here have an adequate remedy in the Sixth Circuit. The district court dismissed Plaintiffs' Complaints without prejudice on February 24, 2016.

Oklahoma, plaintiff in No. 4:14-cv-00381, filed a timely notice of appeal on April 19, 2016. The Chamber of Commerce of the United States of America, lead

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[1] 33 U.S.C. § 1369 is frequently called "Section 509," its section number in the original Act. For clarity, this brief refers to the codified statutory provisions.

plaintiff in No. 4:15-00386 (the "Chamber") filed a timely notice of appeal on April 19, 2016. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Was the district court correct to dismiss Plaintiffs' district-court cases for lack of subject-matter jurisdiction, given that the Sixth Circuit had already accepted exclusive jurisdiction under 33 U.S.C. § 1369(b)(1) to review the same claims as part of the same parties' petitions for review of the Clean Water Rule?
2. Assuming for the sake of argument that the Sixth Circuit's decision is not controlling here, should this Court affirm the district court's dismissal on the alternative ground that Section 1369(b)(1) of the Clean Water Act grants exclusive jurisdiction to the courts of appeals to consider challenges to the Clean Water Rule?

STATEMENT OF THE CASE

I. THE CLEAN WATER ACT'S RESTRICTIONS ON DISCHARGING POLLUTANTS

Congress enacted the Clean Water Act "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To accomplish that goal, the Act prohibits "the discharge of any pollutant by any person," except in compliance with the Act's various effluent-limitation and permitting provisions. *Id.* § 1311(a). This prohibition applies to discharges of

pollutants "to navigable waters," which the Act defines as "the waters of the United States, including the territorial seas." *Id.* § 1362(7), (12).

The scope and meaning of "waters of the United States" is therefore a critical component of the Act, determining where the Act's various prohibitions, permitting obligations, and other limitations apply. If a particular water is a "water of the United States," then the Act's requirements are triggered and a person cannot discharge a pollutant into that water from a point source unless authorized by a Clean Water Act permit or exempted by the Act. *See* 33 U.S.C. §§ 1311(a), 1362(7), (12)(A). If it is not a water of the United States, then that prohibition does not apply.

II. THE CLEAN WATER RULE

Because waters may have close physical, biological, or chemical connections, Congress recognized that the Act could not achieve its objectives if it were limited to those waters that support navigation. Congress used a broad phrase to define the waters that the Act protects, S. Rep. No. 92-414, at 77 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742-43, leaving the precise contours of that phrase to be defined by administrative action. By the mid-1980s, both EPA and the Corps had promulgated (substantively equivalent) definitions of "waters of the United States" to apply to the sections of the Act that they administer. Those regulations defined "waters of the United States" to include traditional navigable waters; the territorial seas; tributaries; interstate waters; waters whose use, degradation, or destruction could

affect interstate or foreign commerce; impoundments of other waters of the United States; and adjacent wetlands. *See* 40 C.F.R. § 122.2 (1987) (EPA); 33 C.F.R. § 328.3 (1987) (Corps).

The Supreme Court has considered that definition several times. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006). Most recently, in *Rapanos*, the Court considered a particular application of the Act to certain wetlands. All members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense, but five Justices vacated the specific application of the Act to the waters in question. No rationale for that holding gained the support of a majority of the Court. *Compare Rapanos*, 547 U.S. at 733, 742 (opinion of Scalia, J.) (focusing on whether waters are "relatively permanent, standing or flowing" or have "a continuous surface connection" to such waters), *with id.* at 780 (Kennedy, J., concurring) (focusing on whether waters have a "significant nexus" to traditional navigable waters by significantly affecting their "chemical, physical, and biological integrity").

The opinions in *Rapanos* left significant uncertainty about the scope of the Agencies' authority under the Act. The Agencies were required to proceed more frequently on a case-by-case basis, determining the reach of the Act by considering whether particular waters fell within the existing regulatory definition and also

satisfied one or more of the Justices' opinions in *Rapanos*. Those determinations demanded significant time and resources of both the Agencies and the regulated public. Recognizing this problem, several Justices have suggested that the Agencies should clarify the reach of the Act through a revised regulatory definition of "waters of the United States." *See id.* at 758 (Roberts, C.J., concurring); *id.* at 811-12 (Breyer, J., dissenting); *see also Sackett v. EPA*, 132 S. Ct. 1367, 1375-76 (2012) (Alito, J., concurring).

The Clean Water Rule was a direct response to this need. The Agencies issued a proposed rule in 2014, after EPA's Office of Research and Development prepared a detailed technical report. *See* Definition of "Waters of the United States" Under the Clean Water Act, Proposed Rule, 79 Fed. Reg. 22,188 (Apr. 21, 2014). The comment period on the proposed rule lasted more than 200 days and over one million comments were submitted. 80 Fed. Reg. at 37,057. The Agencies held more than 400 meetings with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, federal agencies, and others. *Id.* Many stakeholders urged the Agencies to provide more bright-line boundaries that would minimize delays and costs. *Id.*; *see also, e.g.*, *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring).

On June 29, 2015, EPA and the Corps promulgated the Clean Water Rule. 80 Fed. Reg. at 37,054. The Rule was guided by the best available peer-reviewed science

and by the Agencies' policy judgments, legal interpretations, and experience in implementing the Clean Water Act for more than 40 years. *Id.* at 37,055-56. The Agencies' overriding objective was to meet a compelling need for clear, consistent, and easily-implementable standards. *Id.* at 37,057. The Rule defines and protects tributaries that impact the integrity of downstream waters. It provides that in order to warrant protection under the Act as a river, stream, or tributary, the water must show physical features of flowing water—a bed, banks, and an ordinary high water mark. *Id.* at 37,058. The Rule protects "adjacent waters" that are close to rivers and lakes and their tributaries, because these adjacent waters impact downstream traditional navigable waters. The extent of these "adjacent waters" is likewise defined by clear physical and measurable boundaries. *Id.* The Rule does still require some "case-by-case determinations by the agencies," AFBF Br. at 2, but it provides substantially more certainty to the regulated public than the prior *Rapanos*-based regime. *Id.* at 37,054, 37,057.

III. JUDICIAL REVIEW OF THE CLEAN WATER RULE

A. The Clean Water Act's provisions for centralized judicial review

Congress has provided for judicial review of administrative action authorized by the Clean Water Act in two ways. First, in Section 1369, Congress provided for review in the U.S. Courts of Appeals of certain enumerated types of agency action. Those include (as relevant here) actions by EPA's Administrator:

> (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.

33 U.S.C. § 1369(b)(1).[2] "Where [Section 1369] review is available, it is the exclusive means of challenging actions covered by the statute." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013). The purpose of Section 1369(b)(1) was to establish "a clear and orderly process for judicial review" of agency action under the Act in Section 1369(b)(1). H.R. Rep. No. 92-911 at 136 (1972). For that reason, petitions for review must be filed within 120 days after the challenged agency action, and after that time, the agency action is not "subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b).

Second, for final agency action that does not fall within Section 1369(b)(1), review is available in the district courts under the APA. *See* 5 U.S.C. § 702. An APA suit is available within six years of the date of the challenged action, *see* 28 U.S.C. § 2401(a), but only if "there is no other adequate remedy in a court." 5 U.S.C. § 704.

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[2] Section 1369(b)(1)(E) and (F) refer to: 33 U.S.C. § 1311 (prohibiting the discharge of pollutants and providing for effluent limitations for classes and categories of point sources); *id.* § 1312 (authorizing other effluent limitations to protect water quality); *id.* § 1316 (providing for national new-source performance standards); *id.* § 1342 (providing for permits to discharge pollutants under the National Pollutant Discharge Elimination System); *id.* § 1345 (prohibiting the unpermitted disposal of sewage sludge).

B. Petitions for review in the courts of appeals

Immediately after the Rule was promulgated, sixteen petitions for review were filed in eight different courts of appeals. Two of those petitions were filed in this Court by the same parties that are Plaintiffs here. *See Oklahoma v. EPA*, No. 15-9551 (filed July 22, 2015); *Chamber of Commerce v. EPA*, No. 15-9552 (filed July 23, 2015).

Where multiple courts of appeals receive petitions for review of the same agency action, those petitions are consolidated in a single Circuit to avoid forum-shopping and the potential for conflicting decisions. 28 U.S.C. § 2112(a). Under Section 2112(a), the Judicial Panel on Multidistrict Litigation (the "MDL Panel") transfers the petitions to one circuit chosen randomly from those in which petitions are filed in the first ten days that review is available. On July 28, 2015, the MDL Panel consolidated all the petitions for review of the Clean Water Rule in the Sixth Circuit. *In re EPA & Dep't of Def. Final Rule,* MCP No. 135 (J.P.M.L.), Dkt. No. 3.

Although Plaintiffs represent here that they filed "protective" petitions for review only out of an "abundance of caution," Chamber Br. at 9; *see* Oklahoma Br. at 9; Oklahoma did not treat its petition as protective before the Sixth Circuit. Instead, Oklahoma joined other State petitioners in asking the Sixth Circuit to enjoin the Agencies from implementing the Clean Water Rule pending the Sixth Circuit's review. The court granted that relief and stayed the Rule nationwide, exercising its jurisdiction to preserve the pre-Rule status quo pending the court of appeals review that Plaintiffs

themselves sought. *In re EPA & Dep't of Def. Final Rule,* 803 F.3d 804 (6th Cir. 2015). Plaintiffs are currently enjoying the benefits of that relief – even as they argue that it was beyond the Sixth Circuit's power to grant.

Plaintiffs also filed motions to dismiss their own Sixth Circuit petitions as a means for that court to consider its jurisdiction under Section 1369(b)(1). After extensive briefing and oral argument, the Sixth Circuit denied the motions to dismiss, holding that it does have exclusive jurisdiction to hear challenges to the Clean Water Rule. *In re U.S. Dep't of Def. & EPA Final Rule*, 817 F. 3d 261, 265-74 (6th Cir. Feb. 22, 2016) (herein, "*In re EPA*"). Judge McKeague, announcing the Court's judgment in the lead opinion, concluded that the Clean Water Rule is subject to court-of-appeals review. First, he found that the Rule is an "other limitation" under Section 1369(b)(1)(E) because, even though it is not self-executing, it "alter[s] permit issuers' authority to restrict point-source operators' discharges into covered waters" and acts as a "restriction on the activity of some property owners." 817 F.3d at 269. "These restrictions, of course, are presumably the reason for petitioners' challenges to the Rule." *Id.* Furthermore, that limitation arises "under Section 1311" because Section 1311 was one of the statutory bases for the Agencies' authority to promulgate the Rule. *Id.* at 269 n.4.

Second, Judge McKeague concluded that the Clean Water Rule is also reviewable under Section 1369(b)(1)(F), which authorizes review of EPA actions to

issue or deny National Pollutant Discharge Elimination System ("NPDES") permits under 33 U.S.C. § 1342. Judge McKeague cited the Sixth Circuit's prior decision in *National Cotton Council v. EPA*, 553 F.3d 927 (6th Cir. 2009), which had in turn relied on precedent from the Supreme Court and from other circuits. *See* 817 F.3d at 271. In *National Cotton*, the Sixth Circuit had held that Section 1369(b)(1)(F) places jurisdiction in the courts of appeals "to review the regulations governing the issuance of permits." 553 F.3d at 933. Judge McKeague found the Clean Water Rule to be just such a rule. *See* 817 F.3d at 270-73.

Judge Griffin concurred in the judgment. He rejected the contention that the Clean Water Rule is an "other limitation" within the meaning of Section 1369(b)(1)(E) because he found the term "waters of the United States" to be "used in the Act's definitional section, § 1362," rather than the sections listed in subsection (E). 817 F.3d at 276. However, Judge Griffin agreed that subsection (F) was a basis to review the Rule because the Supreme Court, the D.C. Circuit, and the Ninth Circuit had all adopted "a functional approach to jurisdiction under subsection (F)." *Id.* at 281. That approach led to *National Cotton*, which Judge Griffin found both controlling and also consistent with "the predominant view of the other circuits." *Id.* at 283 n.2.

Judge Keith dissented. He agreed with Judge Griffin's interpretation of Section 1369(b)(1)(E), but he would have held that the Clean Water Rule also did not fall

within Section 1369(b)(1)(F) because he did not view *National Cotton* as controlling. *Id.* at 283-84.

The Sixth Circuit also issued a "Judgment" denying the motions to dismiss. *In re EPA*, No. 15-3751 (lead case) (Feb. 22, 2016) (S. App. 10). Various petitioners (including Plaintiffs here) then sought rehearing en banc of the jurisdictional ruling. The Sixth Circuit accepted their petitions as timely and set a briefing schedule. After full briefing, the court denied the petitions for rehearing on April 21, 2016. The court announced that the original panel "concludes that the issues raised in the petitions were fully considered upon the original submission and decision." No judge of the full court requested a vote on the suggestion for rehearing en banc. *In re EPA*, No. 15-3751 (Apr. 21, 2016) (S. App. 11).

As of the date of this brief, petitioners in the Sixth Circuit have sought and been granted an extension of time to file a petition for a writ of certiorari from the Sixth Circuit's Judgment concerning jurisdiction. According to petitioners' motion for an extension of time, they have not yet determined whether they will petition for certiorari.

C. District-court challenges to the Clean Water Rule

Many of the same parties whose petitions for review are pending in the Sixth Circuit also filed district-court actions under the APA. As of the date of this brief,

eighteen such cases have been filed in fourteen different district courts. This appeal arises from two of those cases.

Three district courts decided the jurisdictional question prior to the Sixth Circuit's decision. Two of them held that they lacked jurisdiction to consider the APA challenges. *See 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). The third reached the opposite conclusion and entered a preliminary injunction against the Rule that applies only in the States that are plaintiffs in that case. *North Dakota v. EPA*, No. 3:15-cv-59, 2015 WL 5060744 (D.N.D. Aug. 27, 2015).

Meanwhile, the Agencies moved for centralization of district-court pretrial proceedings under 28 U.S.C. § 1407. On October 13, 2015, the MDL Panel denied that motion, leaving the district courts to discern how their local challenges to the Rule fit in with the nationwide litigation. *In re Final Rule: Clean Water Rule: Definition of "Waters of the United States"*, MDL No. 2663 (J.P.M.L.), Dkt. No. 163 at 1. The district courts, including the District of North Dakota, have generally responded by staying the cases before them or dismissing without prejudice. There is no pending briefing on the merits of the Clean Water Rule challenges in any district court.

Finally, the pending district-court case in the Northern District of Georgia is also the subject of an interlocutory appeal to the Eleventh Circuit. On August 16,

2016, the Eleventh Circuit ordered that case held in abeyance and ordered the district court not to proceed with the merits of the underlying case. *See Georgia v. McCarthy*, No. 15-14035 (11th Cir. Aug. 16, 2016) (S. App. 15) ("*Georgia* Order"). "If there were an exhibition hall for prudential restraint on the exercise of judicial authority," the Eleventh Circuit said, "this case could be an exemplar in the duplicative litigation wing." *See Georgia* Order at 6 (S. App. 20). The court noted that it would be a "colossal waste of judicial resources" to have the same issues pending simultaneously before two courts of appeals at once. *Id.*

D. District-court proceedings here

Plaintiffs filed their complaints in July 2015 and, shortly thereafter, moved to consolidate their two cases and moved for a preliminary injunction. The Agencies moved to stay the litigation in light of the possible transfer of the district-court cases by the MDL Panel and the assignment of the petitions for review to the Sixth Circuit. The district court received briefing at that time about the possible effect of the Sixth Circuit decision. On July 31, 2015, the district court stayed the cases pending a ruling by the MDL Panel. *See* (S. App. 1). The court noted that "the filing of [the Sixth Circuit] petitions weighs heavily in favor of staying this case," because "[i]f the Sixth Circuit finds that appellate jurisdiction is appropriate, that will mean that these cases never should have been filed in district court and that this Court does not have jurisdiction over plaintiffs' claims." *Id.* at 6 (S. App. 6). The district court also noted

that proceedings in multiple district courts "would undoubtedly be a waste of judicial resources . . . if it is ultimately determined that jurisdiction is appropriate only in a federal circuit court of appeal," and that "the Federal Defendants would be significantly prejudiced by a patchwork quilt of preliminary injunctions granted or denied by various federal district courts." *Id.* at 8 (S. App. 8).

After the MDL Panel denied the motion for district-court consolidation, the Agencies asked the district court to keep its stay in effect, noting that the Sixth Circuit had set a schedule for the parties to brief the jurisdictional issue. Again, Plaintiffs had an opportunity to respond.

When the Sixth Circuit issued its decision, the Agencies informed the district court that they intended to seek dismissal of Plaintiffs' cases. Based on the parties' prior arguments, the district court decided that a new motion was unnecessary and dismissed Plaintiffs' cases *sua sponte*. *See* Op. at 4 (App. 76). The court reviewed the procedural posture of the case, including the parties' arguments about jurisdiction and the potential effect of the Sixth Circuit decision, and noted that it had an obligation to determine whether subject-matter jurisdiction exists. *Id.* at 3 (App. 75) (citing *1mage Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006)). Under binding Tenth Circuit law, the district court held, jurisdiction under Section 1369(b)(1) is "exclusive," and therefore the Sixth Circuit's "finding of appellate jurisdiction divests this Court of jurisdiction." *Id.* at 4 (App. 76) (citing *Maier v. EPA*, 114 F.3d

1032, 1036-37 (10th Cir. 1997)). The court dismissed without prejudice so that if the Sixth Circuit's jurisdictional finding were reversed, Plaintiffs would be able to re-file their district-court actions.

SUMMARY OF ARGUMENT

The district court correctly held that the effect of the Sixth Circuit's *In re EPA* decision is to preclude its own jurisdiction in this case. Plaintiffs cannot pursue relief from the district court here while litigating the very same claims against the same Agencies in the Sixth Circuit. That conclusion does not require the Court to avoid considering its own jurisdiction, but only to respect the effect that the Sixth Circuit's jurisdictional decision has on district-court review here.

First, the APA and the Clean Water Act establish mutually exclusive grounds for jurisdiction. If review is "available" under the Clean Water Act, 33 U.S.C. § 1369(b)(1), it is not available under any other statute. *Hayes v. Whitman*, 264 F.3d 1017, 1025 (10th Cir. 2001). By accepting jurisdiction, the Sixth Circuit confirmed that Plaintiffs have an adequate forum for their claims, precluding district-court review under the APA. *See* 5 U.S.C. § 704. Plaintiffs argue that the Sixth Circuit's decision is not persuasive, but the Sixth Circuit has accepted jurisdiction and denied rehearing of that question en banc. This Court need not agree with the Sixth Circuit to acknowledge that Court's ability to provide Plaintiffs a remedy.

Second, the Sixth Circuit's decision must control Plaintiffs' district-court challenges to the Clean Water Rule because the Sixth Circuit is the court designated under 28 U.S.C. § 2112(a) to decide petitions for review from this Circuit. For that statute to function as Congress intended, the designated court under Section 2112(a) must be able to reach a controlling decision on jurisdictional questions, just as it does on merits questions. Otherwise, that court's consolidated, nationally-applicable decision would be undermined by delayed and conflicting decisions on the same issues from the district courts and possibly other courts of appeals.

Third, the doctrines of issue preclusion and law-of-the-case preclude Plaintiffs from re-litigating the same jurisdictional questions against the same Agencies here. Although the Sixth Circuit has not yet decided the merits of Plaintiffs' claims, that court took steps to indicate that it is very unlikely to reconsider its jurisdictional holding.

Even if the Court finds that the Sixth Circuit's jurisdictional decision is no more than persuasive authority here, it should still affirm the district court's dismissal because Section 1369(b)(1) establishes exclusive review of the Clean Water Rule in the courts of appeals. Plaintiffs contend that the Clean Water Rule, as a definitional rule, does not fit within the plain meaning of any of Section 1369(b)(1)'s seven enumerated categories. Not only does the Clean Water Rule satisfy a plain-text interpretation of Section 1369(b)(1), the Supreme Court, this Court, and other courts of appeals have

held that it must be given a "practical rather than a cramped construction." *NRDC v. EPA*, 673 F.2d 400, 405-06 (D.C. Cir. 1982); *see also E.I. du Pont de Nemours v. Train*, 430 U.S. 112, 136-37 (1977); *Maier v. EPA*, 114 F.3d 1032, 1038 (10th Cir. 1997).

The Rule is an "other limitation," 33 U.S.C. § 1369(b)(1)(E), because it serves as a restriction on the "untrammeled discretion of the industry." *Va. Elec. Power Co. v. EPA*, 566 F.2d 446, 450 (4th Cir. 1977) ("*VEPCO*"). In the context of the Act, the Clean Water Rule restricts the ability of property owners to discharge pollutants into waters on their land, and it directs the Agencies and the States in their administration of permit programs. Plaintiffs' Complaints cite these very limitations as the basis for their challenges. The Rule is also reviewable under Section 1369(b)(1)(F), which provides for review of "the regulations governing the issuance of permits . . . as well as the issuance or denial of a particular permit." *National Cotton*, 553 F.3d at 933. The canons of construction that Plaintiffs cite do not conclusively compel any other interpretation, especially not one at odds with the weight of the case law. And the pragmatic interpretation of Section 1369(b)(1) that the Agencies propose meets Congress's objective of providing for timely, centralized and efficient review and nationally-applicable, uniform decisions.

STANDARD OF REVIEW

This Court reviews a dismissal for lack of subject matter jurisdiction de novo. *See, e.g.*, *Pueblo of Jemez v. United States*, 790 F.3d 1143 (10th Cir. 2015).

ARGUMENT

I. THE SIXTH CIRCUIT'S DETERMINATION THAT IT HAS JURISDICTION OVER PLAINTIFFS' CHALLENGES PRECLUDES DISTRICT-COURT JURISDICTION OVER THE SAME CLAIMS.

There are three doctrinal reasons why the district court was correct to consider itself constrained by the Sixth Circuit's decision. Taken separately or together, they are fully adequate to support the district court's dismissal without prejudice.

A. The Sixth Circuit's final decision to accept jurisdiction gives Plaintiffs a forum and an adequate remedy for their claims.

The first reason that the Sixth Circuit's decision here precludes district-court review is that it establishes that there is an "other adequate remedy in a court" for Plaintiffs' claims. 5 U.S.C. § 704. Under this Court's case law, if "review of Plaintiffs' claim *is* available under the Clean Water Act, it is not subject to review under the APA," and an APA claim that "duplicates Plaintiffs' Clean Water Act claim" must be dismissed. *Hayes*, 264 F.3d at 1025 (emphasis in original); *see also Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1155 (10th Cir. 2004); *City of Albuquerque v. U.S. Dep't of Interior*, 379 F.3d 901, 906, 910-11 (10th Cir. 2004). Other courts of appeals have similarly held that "[t]he availability of § [1369] review precludes the application of 5 U.S.C. § 704." *Sun Enters., Ltd. v. Train*, 532 F.2d 280, 288 (2d Cir. 1976); *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 664 (D.C. Cir. 1975). Moreover, the question of adequate remedy is a functional one, and APA review is not available to a plaintiff that has some other opportunity, even in the future, to challenge the agency

action in question. *Mobil Expl. & Prod. U.S., Inc. v. U.S. Dep't of Interior*, 180 F.3d 1192, 1199-1200 (10th Cir. 1999).

The Clean Water Act imposes the same division between district-court and court-of-appeals review as the APA, establishing a fully "bifurcated system of judicial review." *Maier*, 114 F.3d at 1036; *see Am. Petroleum Inst. v. Train*, 526 F.2d 1343, 1345 (10th Cir. 1975). Where direct review under the Clean Water Act is "*available*, it is the *exclusive* means of challenging actions covered by the statute." *Decker*, 133 S. Ct. at 1334 (emphasis added). Between these two statutes, there is always one court – but only one court – with jurisdiction to hear a particular litigant's challenge to a final agency action under the Act.

A court-of-appeals forum for judicial review of the Clean Water Rule is plainly "available" here, precluding district-court review under the APA. Plaintiffs do not, and cannot, explain why the Sixth Circuit is an inadequate forum for their claims. That court has already resolved the jurisdictional issue, it is currently considering motions about the content of the administrative record, and it has ordered the parties to begin filing merits briefs next month.

Instead, Plaintiffs rely on the principle that the courts have an independent obligation to examine their own jurisdiction. *See* Chamber Br. at 17; Oklahoma Br. at 15. But it does not follow that "[t]o the extent that the district court deferred to the Sixth Circuit, it committed legal error." Chamber Br. at 17. It is common for the

federal courts, even where they are not bound by another court's holdings, to be influenced or even constrained by the actions that another court has taken with respect to the same claims or parties. By recognizing the Sixth Circuit's decision, the district court did not fail to examine its own jurisdiction; it simply refused to second-guess the Sixth Circuit's decision (binding in *that* court) that the Sixth Circuit has jurisdiction over Plaintiffs' claims. It correctly applied Tenth Circuit law to conclude that where the Sixth Circuit has jurisdiction, the district courts do not.

The district court's holding does not mean that the Sixth Circuit has written binding law for this Circuit. *See* Chamber Br. at 17; Oklahoma Br. at 29. This Court will be free to develop its own Section 1369(b)(1) jurisprudence in another case. But the Court's duty to examine its jurisdiction coexists with the principle that courts "owe respect to each other's efforts and should strive to avoid conflicts." *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1176 (D.C. Cir. 1987). Here, as the district court recognized, Plaintiffs' petitions for review have been properly transferred to the Sixth Circuit's under Section 2112(a), and that court's rulings about Section 1369(b)(1) obviously are binding there. *See infra* pp. 24-32.

It makes no difference that, as all Plaintiffs and *amici* here emphasize, the Sixth Circuit's panel opinions were "fractured" or "splintered." *See* Chamber Br. at 12; Oklahoma Br. at 3. Perhaps recognizing that its decision on jurisdiction would affect litigation across the country, the Sixth Circuit made that decision as clear and final as

possible, despite the disagreement among the original panel. The Court issued a judgment, permitted petitions for panel rehearing or rehearing en banc, and then denied those petitions. In doing so, it established that it would provide an adequate forum for Plaintiffs' claims. For purposes of the jurisdictional inquiry under the APA, what matters is not how the Sixth Circuit reached its conclusion or whether this Court finds its reasoning persuasive – it is the fact of the conclusion itself.

Plaintiffs' argument that they should be allowed to maintain two separate challenges to the same agency action in two different courts at the same time is not only contrary to the text of the APA's judicial review provision, but also its purpose. The APA is a "gap-filling" statute that "merely provides [jurisdiction] where necessary." *Oljato Chapter*, 515 F.2d at 663. It waives sovereign immunity only where no other waiver of sovereign immunity is available, *see Fornaro v. James*, 416 F.3d 63, 66 (D.C. Cir. 2005), and that waiver of sovereign immunity must be strictly construed. *See, e.g., Bryan v. Office of Personnel Mgmt.*, 165 F.3d 1315, 1318-19 (10th Cir. 1999). Congress had no reason to subject the United States to a district-court suit under the APA when a litigant has an available court-of-appeals forum under another statute. Plaintiffs may have originally preferred that their petitions for review be "protective" only, preserving a forum for their challenge to the Rule in the event that the district court declined jurisdiction. *See* Chamber Br. at 9; *see* Oklahoma Br. at 9. But partly due to Plaintiffs' own actions, those petitions are no longer merely protective. The

Sixth Circuit has granted Plaintiffs' request for interim relief, has determined that it has jurisdiction, and is currently the *de facto* forum for claims by Plaintiffs and scores of other challengers. *See Georgia* Order at 7 (S. App. 21). Under the APA, that is sufficient. Plaintiffs' briefs offer no reason, and there is no reason, for them to have two active cases in two different courts, raising the same claims at the same time.

Plaintiffs may reply that the Sixth Circuit's decision is still subject to Supreme Court review, and even that (in their view) it is a good candidate for interlocutory Supreme Court review. As of the date of this brief, they have not sought certiorari, *see supra* p. 12, and even if they did, Supreme Court review at this stage is doubtful. In any event, the district court's decision to dismiss Plaintiffs' cases *without prejudice* blunts this objection. If the Supreme Court were later to hold that the Sixth Circuit is not authorized to hear Plaintiffs' claims, then Plaintiffs could re-file their district-court complaints. *See* 5 U.S.C. § 704. The six-year statute of limitations for APA claims makes it very likely that such a district-court action would still be timely. Plaintiffs would then have the same rights as other plaintiffs around the country whose cases have simply been stayed at the courts' discretion.

The APA's restriction reflects a more general policy against duplicative federal-court litigation. When a plaintiff files multiple cases involving the same claims, "the general principle is to avoid duplicative litigation." *Colo. River Water Cons. Dist. v. United States*, 424 U.S. 800, 817 (1976); *see Georgia* Order at 5-6 (S. App. 19-20). As a

result, "[d]istrict courts have discretion to control their dockets by dismissing duplicative cases." *Katz v. Gerardi*, 655 F.3d 1212, 1217 (10th Cir. 2011). The Eleventh Circuit held in forceful terms that this principle applies to the present case, and it recognized the courts' broad discretion to "stay *or dismiss* litigation in order to avoid duplicating a proceeding already pending in another federal court." *Georgia* Order at 6 (S. App. 20) (emphasis added).

Given uncertain jurisdiction, it made sense for Plaintiffs to file in two courts to preserve a forum for their claims. But once the Sixth Circuit determined that it may hear Plaintiffs' claims, there was no reason for the district court to entertain those same claims. The policy against duplicative litigation and the jurisdictional limitations of the APA point in the same direction, and the district court was correct to dismiss.[3]

B. The Sixth Circuit has jurisdiction to render a nationwide decision as the designated court under Section 2112.

Another compelling reason to conclude that the Sixth Circuit's decision is controlling is that, when Plaintiffs' petitions for review were transferred pursuant to 28 U.S.C. § 2112(a), the Sixth Circuit became uniquely authorized to consider and

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[3] This Court's rules on duplicative litigation are also relevant to the issue-preclusion argument presented below. *See infra* pp. 33-36; *Katz*, 655 F.3d at 1217.

finally decide whether Section 1369(b)(1) provides court-of-appeals jurisdiction over Plaintiffs' claims. Any other result would undermine the purpose of Section 2112.

1. The disposition of a petition for review transferred under Section 2112(a) must control related district-court challenges.

Section 2112 is a mandatory transfer statute that applies where, as here, an agency "receives two or more petitions for review" of a rule. 28 U.S.C. § 2112(a)(3). If that condition is met, the agency "shall" notify the MDL Panel, the MDL Panel "shall" randomly choose one court of appeals from among those in which petitions were filed, the MDL Panel "shall" consolidate the petitions for review in that court, and the agency "shall" file the administrative record in that court. *Id.*

Before Congress enacted Section 2112, the Clean Water Act itself contained a similar provision as part of Section 1369(b)(1). *See* Pub. L. 100-4, § 505(b), 101 Stat. 7, 75-76 (1987). Congress enacted that provision "to eliminate the 'race to the courthouse' phenomenon" and replace it with an "orderly means of consolidating applications for review of the same agency action." S. Rep. No. 99-50, at 32 (1985). Shortly thereafter, Congress replaced that mechanism with Section 2112, creating a comparable transfer provision that would apply to all petitions for review in the courts of appeals. Pub. L. 100-236, 101 Stat. 1731, 1731-32 (1988). Section 2112 was intended to prevent forum-shopping, which "detract[s] from the public's perception of the Federal courts as impartial, consistent arbiters of justice," and to avoid

"wasteful litigation to determine who won the race and thus which is the appropriate circuit for review." H.R. Rep. 100-72, at 2 (1987). Congress also noted that the transferee court "will take jurisdiction over all review proceedings dealing with the same order." *Id.* at 3; *see also generally* S. Rep. 100-263, at 2-4 (1987).

When an agency promulgates an important rule like the Clean Water Rule, Section 2112 ensures that all of the relevant parties will find out if that rule survives judicial review *nationwide*. Consolidation in the transferee court means that such a rule will be either upheld or set aside for the entire country at once, rather than implemented as a patchwork. That is why Oklahoma and other petitioners sought, and were granted, a nationwide stay of the Rule from the Sixth Circuit pending that court's review.

The legislative history of Section 2112 shows that this was deliberate: Congress explicitly wanted to establish a single-court review process to prevent litigants from shopping for a favorable forum. For Section 1369(b)(1) petitions, Congress chose in Section 2112 to prioritize expediency and nationwide consistency over the litigation of an issue (and unnecessary duplication of effort) across many districts and circuits. *Cf. Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 740-41, 744-45 (1985) (noting the benefits of initial court-of-appeals review of agency action under the Hobbs Act).

These principles are on display in one of the Fourth Circuit's *VEPCO* decisions. *See Va. Elec. & Power Co. v. EPA*, 655 F.2d 534 (4th Cir. 1981). There, an

EPA rule under the Clean Water Act was challenged in three different circuits under Section 1369(b)(1). Under the pre-1987 "race to the courthouse" rule, only the court of first filing had jurisdiction to decide the consolidated petitions. If Plaintiffs were correct here, each of those Circuits would have independently considered its own jurisdiction by separately deciding that first-filing question. Instead, the three courts resolved that issue through "consultation among the circuits," deciding that the Fourth Circuit would receive the consolidated petitions. *Id.* at 536. The Fourth Circuit then considered two simultaneous motions, one to dismiss the consolidated petitions for lack of jurisdiction under Section 1369(b)(1), and one to transfer them to the D.C. Circuit (which was considering related claims). Again, Plaintiffs' theory would have required the Fourth Circuit to decide the jurisdictional issue before reaching the transfer motion. Instead, the Fourth Circuit granted the transfer and deferred to the D.C. Circuit's resolution of the jurisdictional issue. In support of this process, the court cited "discretionary grounds of convenience of the courts and of the parties, of judicial economy, and of the advantages of a coherent single court review." *Id.* at 537. The same considerations warranted the district court's deference to the Sixth Circuit here.

The advantages of a "coherent single court review" are apparent when a district-court case and an associated, protective petition for review are simultaneously litigated within a Circuit. Ordinarily, the court of appeals resolves for the entire

Circuit whether the petition for review is appropriate or, alternatively, that litigation must proceed in the district court. *See, e.g.*, *Nat'l Auto. Dealers Ass'n v. FTC*, 670 F.3d 268, 270-71 (D.C. Cir. 2012) (resolving a dispute over district-court or direct court-of-appeals review). The transfer of a petition for review under Section 2112 may alter this process, but it does not erase the connection between the dual-track "protective" filings. The transferee court's decision on jurisdiction over the petition must control the district court's jurisdiction over the related complaint, just as if the petition had originally been decided within the Circuit. *See also infra* p. 37 (discussing law of the case). If Plaintiffs' contrary theory were correct, then a Section 2112 transfer would create a gap in the court of appeals' authority to bind the district courts and would always necessitate multiple separate decisions on jurisdiction. Section 2112 would thus work contrary to its own purposes, encouraging forum-shopping and creating uncertainty in the review of agency action. *See supra* pp. 25-26.

Giving such effect to the transferee court's jurisdictional decision does not mean that the transferee court could bind the courts of another Circuit to its view of the law. *See* Chamber Br. at 17-18, Oklahoma Br. at 29. As discussed above, *see supra* p. 21, the Sixth Circuit's decision here does not establish precedent for this Court's future interpretation of Section 1369(b)(1). But it is controlling in *this* case because that is the only way to give effect to Congress's choice, in Section 2112, to allow a single court of appeals to decide multiple challenges to the same agency action.

Where petitions for review under Section 1369(b)(1) are filed across the country, Congress decided to prioritized judicial economy, prompt resolution, and national uniformity over the uneven development of law across several different courts of appeals. That decision is effective only if the transferee court's authority under Section 2112 includes the authority to determine whether Section 1369(b)(1) provides an exclusive basis for challenges to the agency action at issue.

2. Plaintiffs' alternate approach, allowing the district courts to ignore a transferred petition for review, produces unworkable results.

The Agencies' understanding of the effect of a Section 2112 transfer not only honors Congress's intent in providing for consolidated review of nationwide rules, it also avoids critical problems that would eviscerate this carefully-constructed process. If this Court interpreted Section 1369(b)(1) and Section 2112 as Plaintiffs urge – allowing other courts to second-guess or ignore the transferee court's exercise of jurisdiction – those statutes could not serve their purposes of providing a forum for timely, definitive review.

For example, under Plaintiffs' theory, *see* Oklahoma Br. at 29, every district court in which an action was filed must independently interpret whether Section 1369(b)(1) applies to the Clean Water Rule and thus whether the Sixth Circuit's decision is correct. The only situation in which Section 1369(b)(1) and Section 2112 would accomplish the transfer of cases to a single court would be where the transferee

court concludes that it has jurisdiction, *and* every single district court (followed by the courts of appeals) independently concludes that it does *not* have jurisdiction. Allowing the court of origin to reconsider the transferee court's decisions would "generat[e] rather than reduc[e] the duplication and protraction Congress sought to check," *Korean Air Lines*, 829 F.2d at 1176, and is plainly contrary to Congress's goals in enacting Section 2112.

Parallel court-of-appeals and district-court proceedings would also create protracted and duplicative litigation over preliminary matters in cases, such as this one, that are based on a large and complex administrative record. The text of Section 2112 specifically addresses the handling of the record, providing for "one court of appeals . . . in which the record is to be filed." 28 U.S.C. § 2112(a)(3). That court then has the authority to hear disputes over the content of the record. *Id.* § 2112(b). If a jurisdictional dispute opened the door for district courts to hear the same claims, this provision would be meaningless. Many different district courts would simultaneously have to manage disputes over a potentially huge record.[4] Moreover,

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[4] This is not a hypothetical concern. EPA has designated an administrative record of more than 350,000 pages for the Clean Water Rule, and the Sixth Circuit petitioners have filed motions to supplement that record with additional categories of documents. *See Georgia* Order at 7 (S. App. 21) (noting the Sixth Circuit's "process of winnowing down the massive administrative record"). Plaintiffs' understanding of Section 2112 would burden the district court with the very same record disputes.

inconsistent rulings on those record disputes would compound the potential for conflicting merits decisions. Treating the transferee court's decision as controlling, as the district court did here, avoids that quandary.

Plaintiffs' theory would also work against the goal of both Section 2112 and Section 1369(b) of providing nationwide resolution of merits issues. This Court's decisions in Section 2112 have national effect, *see Qwest Corp. v. FCC*, 258 F.3d 1191, 1198 & n.5 (10th Cir. 2001), as have the decisions of other transferee courts. *See, e.g.*, *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 741 (5th Cir. 2011); *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 564 (D.C. Cir. 2004). For the Sixth Circuit's ruling to have similar nationwide effect here, however, it must be the only court with jurisdiction to consider the Clean Water Rule. Otherwise, the Sixth Circuit could hypothetically uphold the Rule, while multiple district courts could find the Rule deficient in some respect and set aside various provisions in different parts of the country. This, too, would frustrate Congress's intent that where multiple petitions are consolidated in one court that has the authority to consider them, that court should produce a nationwide result.

Finally, Plaintiffs' theory could result in the same cases being heard in two forums at once – or in *no* forum. In this case, the Sixth Circuit has found jurisdiction, so Plaintiffs' theory would give them two bites at the apple. If the Sixth Circuit were to rule in their favor on the merits, they could choose not to further contest its

jurisdiction, and if it were to rule against them, they could try again in the district courts of another Circuit. But in a different case, the opposite could occur. The transferee court of appeals and the district court, each considering its jurisdiction independently, could conclude that the Clean Water Act places jurisdiction in the *other* court – leaving Plaintiffs without a forum.

If Section 2112 is nothing more than a forum-selection "lottery," as Plaintiffs contend, *see* Oklahoma Br. at 29, then these results are unavoidable. Along with the petition for review, Section 2112 would also transfer out of the Circuit any ability to reconcile a single Plaintiff's double attempts to challenge agency action. Indeed, Plaintiffs' theory would allow them to *create* such conflicts by filing a "protective" petition for review and then seeking relief under that petition from the transferee court. The Court can avoid this confusion by adopting a more common-sense understanding of the purpose and effect of Section 2112. Section 2112 may place a petition for review and a district-court complaint in different Circuits, but it does not break the connection between them. The transferee court of appeals may make a decision about jurisdiction in the first instance, and the district court (as it did here) must follow that decision in the particular case.

C. The Sixth Circuit's decision to accept jurisdiction has preclusive effect because it involves the same issue and parties.

A third reason that the district court was right to defer to the Sixth Circuit's decision is that issue preclusion bars Plaintiffs here from re-litigating the same question of jurisdiction that they have already lost. Although the district court here did not actually apply the ruling of another court "without any question or independent analysis," Oklahoma Br. at 15, it could have done so, respecting that the *parties* are bound by the judgment of another court.

Issue preclusion (or collateral estoppel) has many of the same purposes as consolidation under Section 2112. Where the parties have had a "full and fair opportunity to litigate" an issue, issue preclusion "protect[s] against 'the expense and vexation attending multiple lawsuits, conserve[s] judicial resources, and foster[s] reliance on judicial action by minimizing the possibility of inconsistent decisions.'" *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008) (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979)).

Issue preclusion "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim.'" *Id.* at 892 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001)). This Court has identified four factors that are necessary for issue preclusion:

> (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Park Lake Res. Ltd. v. U.S. Dep't of Agr., 378 F.3d 1132, 1136 (10th Cir. 2004) (quoting *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1198 (10th Cir. 2000)). The parties here plainly had a full and fair opportunity to litigate the jurisdictional issue before the Sixth Circuit, and the Sixth Circuit decided the exact question that was also before the district court here. The only issue is whether the Sixth Circuit's decision should be considered "final" for purposes of issue preclusion. Oklahoma argues that it should not, because the Sixth Circuit has not yet entered a final judgment on the merits. *See* Oklahoma Br. at 32-34.

This Court has not applied the finality factor inflexibly, instead acknowledging that a jurisdictional dismissal can have preclusive effect even without a final judgment on the merits. *Park Lake*, 378 F.3d at 1136; *see also Matosantos Comm. Corp. v. Applebee's Int'l, Inc.*, 245 F.3d 1203, 1209-10 (10th Cir. 2001). For example, issue preclusion applies where "there has been an adjudication on the merits of a jurisdictional *issue*" and the court has dismissed on that basis. *Matosantos*, 245 F.3d at 1210 (quoting *Stewart Sec. Corp. v. Guaranty Trust Co.*, 597 F.2d 240, 241 (10th Cir. 1979)); *see also B. Willis, C.P.A., Inc. v. BNSF Ry. Corp.*, 531 F.3d 1282, 1301 n.24 (10th Cir. 2008)

(noting increased flexibility in the finality requirement). In *Park Lake*, 378 F.3d at 1136, this Court looked to the Restatement of Judgments for guidance on principles of preclusion. That treatise advises that "[w]hen a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation." RESTATEMENT (SECOND) OF JUDGMENTS § 12 (2016). Although claim preclusion, or res judicata, is available "only when a final judgment is rendered," issue preclusion is available based on "any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." *Id.* § 13.

Other courts of appeals have similarly accorded issue-preclusive effect to non-final judgments if those judgments have "sufficient indicia of finality." *In re Bayshore Ford Truck Sales, Inc.*, 471 F.3d 1233, 1253 (11th Cir. 2006). Judge Friendly proposed that "'[f]inality' in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." *Lummus Co. v. Commonwealth Refining Co.*, 297 F.2d 80, 89 (2d. Cir. 1961). "As long as the issue is distinct, it does not matter if other aspects of a case remain to be decided." *Haber v. Biomet, Inc.*, 578 F.3d 553, 557 (7th Cir. 2009) (discussing the Restatement standards). This Court may find issue preclusion as long as there is no indication that the other court "has any intention of revisiting the issue." *In re Docteroff*, 133 F.3d 210, 216 (3d Cir. 1997).

The functional standard that the Restatement provides and that other courts have applied is met here. The Sixth Circuit is "significantly farther along the decisional path" than any other court. *Georgia* Order at 7 (S. App. 21). Although the Sixth Circuit did not dismiss the petitions for lack of jurisdiction, it did issue a judgment on the motions for dismiss that accepted jurisdiction over the merits, it considered and rejected en banc review, and it proceeded to order merits briefing. Its jurisdictional decision is effectively final barring intervention by the Supreme Court, which Oklahoma has not yet sought and concedes is "unlikely." Oklahoma Br. at 33; *see supra* p. 12. The Court should consider the Sixth Circuit's decision on jurisdiction sufficiently final to preclude Plaintiffs from relitigating it.[5]

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[5] Oklahoma argues that the Agencies have not considered themselves bound by the North Dakota district court's decision that Section 1369(b)(1) does not apply to the Clean Water Rule. That decision does not bear the same indicia of finality as the Sixth Circuit's decision because the district court has since held that its jurisdiction is "unclear" in light of the Sixth Circuit decision, staying the case pending further appellate decisions. *See North Dakota*, No. 3:15-cv-59 (D. N.D. May 24, 2016) (S. App. 12). In addition, traditional issue preclusion principles are limited to some degree by the nonacquiescence doctrine, under which federal agencies may "nonacquiesce" in the decision of an issue in one court where the same issue is presented in other courts. *See generally* Samuel Estreicher & Richard Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 687 (1989). Whereas the Sixth Circuit is acting on all petitions for review nationwide under Section 2112(a), the North Dakota court's decision does not have nationwide effect and may be subject to nonacquiescence.

Even if the Sixth Circuit's decision did not formally preclude the district court from reconsidering the question of Section 1369(b)(1) jurisdiction, the district court had discretion to treat that decision as law of the case. Oklahoma argues that this doctrine cannot apply beyond "subsequent stages in the same case." Oklahoma Br. at 31 (quoting *Arizona v. California*, 460 U.S. 605, 618-19 (1983)). But it is splitting hairs to argue that Plaintiffs' cases were "brought in different courts under different statutes," Oklahoma Br. at 31, when they filed protective petitions for review that they specifically *intended* to duplicate their district-court actions if necessary. The law-of-the-case doctrine "is a restriction self-imposed by the courts in the interests of judicial efficiency . . . and is designed to bring about a quick resolution of disputes by preventing continued re-argument of issues already decided." *Fox v. Mazda Corp. of Am.*, 868 F.2d 1190, 1194 (10th Cir. 1989) (quoting *Gage v. General Motors*, 796 F.2d 345, 349 (10th Cir. 1986) (internal citations omitted)).

Law-of-the-case doctrine was also "understandably crafted with the course of ordinary litigation in mind," *Arizona*, 460 U.S. at 618-19, and should be viewed here in that light. Ordinarily, in the case of a district-court complaint and a simultaneous petition for review of the same agency action, the court of appeals would decide for the entire Circuit which court has jurisdiction. *See supra* pp. 27-28. If this Court were to make that decision, even without creating binding Circuit precedent (for example, in an unpublished opinion), there can be no serious dispute that it would still create

law of the case affecting the related district-court complaint. Here, in considering Plaintiffs' petitions for review, the court of appeals could not make binding precedent for the district court for a different reason – the Section 2112 transfer. But the Sixth Circuit's decision should have the same effect in *this* case – Plaintiffs' parallel district-court complaints – as a decision by this Court.

II. THE DISTRICT COURT LACKED JURISDICTION BECAUSE THE CLEAN WATER ACT REQUIRES THAT CHALLENGES TO THE CLEAN WATER RULE BE RAISED IN THE COURTS OF APPEALS.

As Part I above demonstrated, the district court was correct to deem the Sixth Circuit's decision controlling for purposes of this case. But even if the Sixth Circuit's decision on Plaintiffs' petitions for review had no effect on the simultaneous district-court litigation of their claims, this Court should still affirm the district court. The Clean Water Rule is subject to exclusive Section 1369(b)(1) review.

Generally, statutes conferring federal-court jurisdiction are strictly construed. *See, e.g.*, *Grosvenor v. Qwest Corp.*, 733 F.3d 990, 995 (10th Cir. 2013). Here, however, there is no dispute that the federal courts may review the Clean Water Rule; the ambiguity is in *which* court has jurisdiction. In such a situation, this Court "must resolve that ambiguity in favor of review by a court of appeals." *Nat'l Parks & Cons. Ass'n v. FAA*, 998 F.2d 1523, 1529 (10th Cir. 1993) (citing *Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186, 192 (7th Cir. 1986)); *see also NRDC v. Abraham*, 355 F.3d 179, 193 (2d Cir. 2004) (citing other Circuits for the same rule); *Fla. Power & Light v. Lorion*, 470

U.S. 723 (1985). That is because the specific grant of jurisdiction shows "Congressional intent to carve out from the broader scheme a specific exception for this particular type of claim." *Nat'l Parks*, 998 F.2d at 1527 (quoting *California Save Our Streams Council v. Yeutter*, 887 F.2d 908, 911 (9th Cir. 1989). The Court should apply that general rule here in the specific context of the Clean Water Act.

A. The Supreme Court and the courts of appeals have interpreted Section 1369(b)(1) pragmatically.

Plaintiffs urge the Court to apply a purely textual analysis to Section 1369(b)(1), which in their view supports district-court jurisdiction. *See* Chamber Br. at 20-21; Oklahoma Br. at 16. As the next section will show, the statutory text supports court-of-appeals jurisdiction here. Section 1369(b)(1), however, has been called a "poorly drafted and astonishingly imprecise statute." *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1314 (9th Cir. 1992) (quoting *E.I. de Pont de Nemours & Co. v. Train*, 541 F.2d 1018, 1026 (4th Cir. 1976)). Its text does not reveal a plain, readily-determined answer to every interpretive question. Recognizing that Congress did not anticipate the myriad kinds of regulatory actions that would be necessary to administer the Act's limitations and permitting programs, the Supreme Court has held that the enumerated categories of Section 1369(b)(1) should be applied pragmatically.

For example, Section 1369(b)(1)(E) provides that court-of-appeals review is available for any "effluent limitation or other limitation" established under Section

1311. In *E.I. du Pont de Nemours v. Train*, the Supreme Court considered whether subsection (E) applied to the review of regulations that established nationally applicable effluent limitation guidelines for classes of sources, or whether it applied only to source-specific effluent limitations and variances. 430 U.S. at 136-37. The Court held that such nationwide regulations are reviewable under Section 1369(b)(1)(E), because where the courts of appeals may review numerous individual permit actions, they must also have "direct review of the basic regulations governing those individual actions." *Id.* at 136. In the Court's view, the power to review individual permit decisions necessarily encompasses the power to review the rules that shape those decisions.[6]

Likewise, in *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196-97 (1980), the Supreme Court considered whether the courts of appeals have jurisdiction to review EPA's decision objecting to effluent limitations in a State-issued NPDES permit. The

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[6] After the Supreme Court decided *Du Pont* in February 1977, the House and Senate considered potential amendments to the Clean Water Act. One such amendment would have added subsections (G) and (H) to Section 1369(b)(1), providing for review of EPA regulations that set guidelines for effluent limitations and for EPA approval of State programs. Those additions were not adopted because, according to the Conference Report, they "were omitted as unnecessary." H.R. Rep. No. 95-830, at 112 (1977) (Conf. Rep.), *reprinted in* 1977 U.S.C.C.A.N. 4424, 4487. This suggests, consistent with the Supreme Court's *Du Pont* decision, that Congress already understood Section 1369(b)(1) to include those related types of rules.

Court acknowledged that the text of Section 1369(b)(1)(F) refers to "issuing or denying any permit," not objecting to a permit. *Id.* at 194, 196. But it found Section 1369(b)(1)(F) review appropriate because objecting to a permit has the same "precise effect" as denying the permit outright. *Id.* at 196. Enforcing an arbitrary distinction between the two, the Court held, would create a "seemingly irrational bifurcated system" in which related regulatory actions "would be reviewable at different levels of the federal-court system depending on the fortuitous circumstance" of whether the State was authorized to issue permits. *Id.* at 196-97.

Plaintiffs contend that these cases are not analogous, but their arguments are based on distinctions that make no difference. For example, the Chamber argues that the Court chose a functional analysis in *Du Pont* only after finding that the text did not clearly preclude jurisdiction. Chamber Br. at 31. The Court, however, said that its pragmatic concern was *more important* than its textual holding and made the agency action "unambiguously" reviewable in the court of appeals. *Du Pont*, 430 U.S. at 136. The Chamber also claims that *Crown Simpson* is inapplicable because an EPA objection to a permit is much closer to "issuance or denial" of a permit, 33 U.S.C. § 1369(b)(1) than the Clean Water Rule, which more generally governs the issuance of permits. *See* Chamber Br. at 33; *see also* Oklahoma Br. at 19-20. But the fact remains that Plaintiffs' text-only theory is inconsistent with the holding of *Crown Simpson*, which was possible only with a pragmatic reading of Section 1369(b)(1).

This Court relied on *Crown Simpson* when it adopted a similarly pragmatic approach to the construction of Section 1369(b)(1) in *Maier v. EPA*. Maier petitioned EPA to update its regulations concerning secondary treatment processes at municipal wastewater plants, and EPA rejected that petition. 114 F.3d at 1036. Like the permit objections at issue in *Crown Simpson*, EPA's denial of a rulemaking petition is not plainly enumerated in the bare text of Section 1369(b)(1). The Court held, citing *Crown Simpson*, that "because Mr. Maier is essentially challenging the sufficiency of EPA's secondary treatment regulation, we have no difficulty construing this as a challenge to an 'action in approving or promulgating' [any effluent limitation or other limitation] under Section 1369." *Id.* at 1038; *cf. Platte Pipe Line Co. v. United States*, 846 F.2d 610, 611-12 (10th Cir. 1988) (holding that though a different forum-selection provision of the Act is unclear, a practical construction would effectuate the intent of Congress).

Other courts of appeals, following the Supreme Court's lead in *Du Pont* and *Crown Simpson*, have also given Section 1369(b)(1) a practical interpretation. For example, in *NRDC v. EPA*, 673 F.2d at 402, the D.C. Circuit was asked to review "consolidated permit regulations," which are "a complex set of procedures for issuing or denying NPDES permits" but "do not set any numerical limitations." Then-Judge Ginsburg noted that the Supreme Court's cases give Section 1369(b)(1) a "practical rather than a cramped construction," and held that the regulations were reviewable

under Section 1369(b)(1) as "basic regulations governing [individual permit] actions." *Id.* at 405-06; *see also Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 986 (D.C. Cir. 1997) (upholding Section 1369(b)(1)(E) jurisdiction to review a guidance for the adoption of effluent limitations). Similarly, under Section 1369(b)(1)(F), the Sixth Circuit has accepted jurisdiction over "rules that regulate the underlying permit procedures." *Nat'l Cotton*, 553 F.3d at 933 (quoting *NRDC v. EPA*, 966 F.2d 1292, 1296-97 (9th Cir. 1992). The principle that Section 1369(b)(1) requires a functional interpretation to effectuate Congress's purposes is well established in many Circuits, including this one.

B. The Clean Water Rule falls within Section 1369(b)(1)(E) because it is an "other limitation" on the discharge of pollutants.

The text of Section 1369(b)(1)(E) encompasses review of the Clean Water Rule, which is an action "promulgating any . . . other limitation under section 1311." 33 U.S.C. § 1369(b)(1)(E). EPA cited Section 1311 as part of its authority to promulgate the Rule, and a definition of "waters of the United States" is essential to give effect to Section 1311's prohibition on discharges. *See* 80 Fed. Reg. at 37,055. Moreover, the Rule is a "limitation" both on the public and on the regulators who issue NPDES permits under Section 1311, because it defines where discharges of pollutants are and are not allowed without an NPDES permit.

The Clean Water Act does not define "other limitation," but the Court may not "assume that its inclusion was meaningless or inadvertent." *VEPCO*, 566 F.2d at 449. Instead, it must be read as an alternative to "effluent limitation," which the Act describes as "any restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources." 33 U.S.C. § 1362(11). The courts have therefore understood the term "limitation" in Section 1369(b)(1)(E) to refer to "a restriction on the untrammeled discretion of the industry." *VEPCO*, 566 F.2d at 450.

The Rule is an "other limitation" because, although it does not specify permissible amounts or concentrations of discharges, it plainly restricts property owners' discretion to discharge pollutants in identifiable areas.[7] The Rule will require a federal permit for some discharges of pollutants that, in Plaintiffs' view, were "never before under federal control." Chamber Br. at 1. If the Rule takes effect, according to Plaintiffs, property owners will "be forced to submit to expensive, vague,

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[7] In the Agencies' view, the Rule has this limiting effect regardless of whether it covers more waters, or fewer, than previous (regulatory or case-by-case) definitions of "waters of the United States." Defining *any* waters as "waters of the United States" will burden a property owner's "untrammeled discretion," *VEPCO*, 566 at 450, and would therefore be reviewable as an "other limitation" under Section 1369(b)(1)(E). This answers Oklahoma's objection that it would be inconsistent to review increases in agency jurisdiction in the courts of appeals but decreases in the district courts. *See* Oklahoma Br. at 18.

burdensome, and time-consuming federal regulations before they can perform the most mundane of activities on their property." Chamber Compl. at 3 (App. 46); *see also* Oklahoma Compl. at 12-13 (App. 31-32); Oklahoma Br. at 3, 27; Landmark Br. at 2; AFBF Br. at 2.

The Agencies do not share Plaintiffs' pessimistic view of the consequences of the Rule, but they agree that the scope of "waters of the United States," as defined by the Rule, is central to the prohibition on discharges in Section 1311(a). It governs where the Act applies and makes all of the Act's restrictions – such as the permit programs that regulate point source discharges – applicable to those waters. The Rule therefore is a "limitation" on property owners' use of their land and waters. Plaintiffs' argument to the contrary is fundamentally inconsistent with the stampede to the courthouse that they have joined to stop the Rule from going into effect. *See In re EPA*, 817 F.3d at 269.

This interpretation of the textual phrase "other limitation" is supported by the case law. Most importantly, this Court in *Maier* held that EPA's decision not to grant Maier's petition for rulemaking was reviewable as "a challenge to an 'action in approving or promulgating'" limitations. 114 F.3d at 1037-38; *see supra* p. 42. Oklahoma does not even cite *Maier*. The Chamber argues that *Maier* is not on point because the court of appeals would clearly have had jurisdiction over his claims if they had been styled as a "challenge to the existing rule." Chamber Br. at 24 n.9 (citing

Maier, 114 F.3d at 1038). But this was more than a technical pleading mistake – Maier could not have styled his petition for rulemaking as a Section 1369(b)(1) challenge because it would have been time-barred by more than a decade. Instead, the Court found that EPA's response to that petition was a new agency action that could itself be reviewed under Section 1369(b)(1)(E) because it was functionally similar to other actions described in that section. *See Maier*, 114 F.3d at 1038. Even though EPA did not actively "approv[e] or promulgat[e]" any specific effluent limitation, 33 U.S.C. § 1369(b)(1)(E), the Court granted review because the *effect* of EPA's action was to maintain its approval of the existing limitations.

This Court's decision in *Maier* is consistent with the weight of precedent in other circuits concerning Section 1369(b)(1)(E). In *VEPCO*, the Fourth Circuit held that it had original jurisdiction under Section 1369(b)(1)(E) to review EPA regulations that required consideration of certain information in considering the "best available technology" for cooling water intake structures. 566 F.2d at 450. Although the regulations did not establish "specific structural or locational requirements," the Fourth Circuit held that the "mandatory" regulations served as "a limitation on point sources and permit issuers, for we construe that term as a restriction on the untrammeled discretion of the industry." *Id.* Following the Fourth Circuit, the Second Circuit and Fifth Circuit have similarly found that regulations governing cooling water intake structures are "other limitations" reviewable under Section

1369(b)(1)(E). *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 183-84 (2d Cir. 2004); *ConocoPhillips Co. v. EPA*, 612 F.3d 822, 831 (5th Cir. 2010).

As noted above, the D.C. Circuit found that "procedures for issuing or denying NPDES permits" constitute a "limitation" because they guide "who may take advantage of certain provisions." *NRDC*, 673 F.2d at 404-05 (citing *VEPCO*, 566 F.2d at 450). The Eighth Circuit, recognizing the "preference for direct appellate review of agency action" that the Supreme Court identified in *Florida Power & Light*, held that an "other limitation" is an agency action that causes regulated entities to "face new restrictions on their discretion." *Iowa League of Cities v. EPA*, 711 F.3d 844, 866 (8th Cir. 2013) (finding jurisdiction to review EPA letters explaining the agency's interpretation of its permitting regulations).[8]

The Clean Water Rule also acts as a limitation on States that administer NPDES permit programs under 33 U.S.C. § 1342, and Plaintiffs cite that limitation as another form of harm that the Rule allegedly causes. *See* Oklahoma Compl. at 12-13 (App. 31-32). Both the Fourth Circuit in *VEPCO*, 566 F.2d at 448, and the D.C.

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[8] In contrast, two courts of appeals have recently rejected arguments that an *exemption* from the Act's permitting requirements constitutes an "other limitation," because exemptions "free[] the industry from the constraints of the permit process." *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1286-87 (11th Cir. 2012); *see Nw. Envt'l Advocates v. EPA*, 537 F.3d 1006, 1016 (9th Cir. 2008).

Circuit in *NRDC*, 673 F.2d at 405, held that regulations governing the issuance of permits are reviewable under Section 1342(b)(1)(E) as an "other limitation" that applies to permit issuers. *Amicus* AFBF argues that the Rule is a *grant* of authority to permit issuers, rather than a limitation, but States are constrained to administer their permit programs in accordance with the Act, including the prohibitions established in Section 1311. *See* 33 U.S.C. § 1342(b)(1), (c)(3).

These considerations, and not reliance on Sixth Circuit-only case law, led Judge McKeague to the conclusion that the Clean Water Rule is subject to review under Section 1369(b)(1). Even if the petitioners' plain-language arguments have "facial appeal," he wrote, "we are hardly at liberty to ignore the consistent body of case law that has sprung from that language in encounters with the real world." *In re EPA*, 817 F.3d at 270. The real-world effect of the Clean Water Rule will be to "produce various limitations on point-source operators and permit issuing authorities." *Id.* The Southern District of Georgia similarly concluded that the Rule's "undeniable and inescapable effect is to restrict pollutants and subject entities to the requirements of the Clean Water Act's permit program." *Georgia v. McCarthy*, 2015 WL 5092568, *2. This Court cannot be blind to that effect, which provides a basis for review under Section 1369(b)(1).

Plaintiffs' counterarguments are unpersuasive because they refuse to credit the statutory context in which the Rule was promulgated. Although Plaintiffs base their

allegations of harm on the real-world effects of the Rule operating in conjunction with other provisions of the Act, *see supra* pp. 44-45, they would prefer to ignore those effects and consider the Rule "standing alone" for jurisdictional purposes. Chamber Br. at 22 (citing *In re EPA*, 817 F.3d at 276 (Griffin, J. concurring)). They cannot have it both ways. The courts have interpreted Section 1369(b)(1) in context rather than isolation, recognizing that the Agencies' regulatory actions fit into the overall administration of the Act by establishing "other limitation[s]." *See supra* pp. 45-47. Plaintiffs' claim that the Rule relates only to the definitions in 33 U.S.C. § 1362, *see* Chamber Br. at 22-23; Oklahoma Br. at 18-19, requires them to (selectively) ignore its function and effect. Put simply, the Rule does not stand alone. The Agencies cited Section 1311 as authority for the Rule because that section limits discharges of pollutants into "navigable waters," and the Agencies' regulatory definitions are necessary to apply that limitation to particular "waters of the United States."

Oklahoma argues that although "the Rule promulgates *something*," it is not an "other limitation" because it is not "closely related" to effluent limitations. Oklahoma Br. at 17. That gloss on the broad phrase "other limitation" is found neither in the statutory text nor in the cases that Oklahoma cites. In *VEPCO*, the Fourth Circuit found that the regulations under review were "closely related" to effluent limitations, but that was not a necessary condition for court-of-appeals review, and the Fourth Circuit's general holding was much broader. *See* 566 F.2d at 450. In *American Paper*

Inst. v. EPA, 890 F.2d 869, 877 (7th Cir. 1989), the Seventh Circuit found that it could not directly review "a general outline of the EPA's policy," which does not define "who must apply for a permit and when." The Clean Water Rule, in contrast, does define who must apply for a permit, and thus falls within Section 1369(b)(1)(E). *Id.* Furthermore, Section 1369(b)(1)(E) provides review of "other limitations" under 33 U.S.C. § 1345, which is completely unrelated to effluent limitations.

Oklahoma also argues that, according to the Agencies' own regulatory preamble, the Rule does not impose any new regulatory requirements. *See* Oklahoma Br. at 17-18 (citing 80 Fed. Reg. 37,054). Again, this argument ignores the relevant context: The preamble goes on to note that clarifying the scope of "waters of the United States" would affect the Act's various programs, including its NPDES permit program, and that entities "will continue to be regulated under these programs." 80 Fed. Reg. at 37,054. The Agencies also noted that the *reason* its definition "has continued to generate substantial interest, particularly within the small business community," is that "permits must be obtained for many discharges of pollutants into those waters." *Id.* at 37,102.

C. The Clean Water Rule falls within Section 1369(b)(1)(F) because it is a regulation that governs the issuance of permits.

In addition to jurisdiction under Section 1369(b)(1)(E), the courts of appeals have jurisdiction to review the Clean Water Rule under Section 1369(b)(1)(F).

Although the Clean Water Rule does not itself "issu[e] or deny[] any permit under Section 1342," it falls within a class of agency actions that is nonetheless reviewable in the courts of appeals because of their effect on the issuance or denial of permits.

As discussed above, *see supra* pp. 39-43, substantial case law from the Supreme Court and other Circuits establishes that Section 1369(b)(1)(F) applies to agency actions that govern the process of issuing or denying permits. Those cases begin with *Crown Simpson*, in which the Supreme Court held that EPA's objection to a state permit, an action that was "functionally similar" to the denial of a permit, must be reviewed in the courts of appeals. 445 U.S. at 196. In doing so, the Supreme Court reversed the court of appeals, which had held that it lacked jurisdiction based on the "clear and unmistakable language" of Section 1369(b)(1)(F). *See Crown Simpson Pulp Co. v. Costle*, 599 F.2d 897, 903 (1979) (quoting *Washington v. EPA*, 573 F.2d 583, 587 (9th Cir. 1978)). The Supreme Court held that although EPA's objection was not a denial per se, it had the same "precise effect," and thus did not justify an "additional level of judicial review." *Crown Simpson*, 445 U.S. at 196-97.

As the courts of appeals have applied *Crown Simpson*, they have recognized that its reasoning is not limited to those agency actions with the "precise effect" of denying a permit, but applies more generally to the regulations that govern permit issuance. For example, in *NRDC*, the D.C. Circuit found that Section 1369(b)(1)(F) enables court-of-appeals review of "the basic regulations governing [the listed]

individual actions." 673 F.2d at 405-06 (quoting *Du Pont*, 430 U.S. at 136). The Ninth Circuit has similarly held that Section 1369(b)(1)(F) "authorizes appellate review of EPA rules governing underlying permit procedures." *NRDC v. EPA*, 526 F.3d 591, 601 (9th Cir. 2008); *see Envtl. Def. Ctr. v. EPA*, 344 F.3d 832, 843 (9th Cir. 2003). And both the Second and Fifth Circuits accepted jurisdiction to review EPA's Concentrated Animal Feeding Operations Rules, which identified the types of dischargers and activities that are subject to the Act's permit requirements. *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 495-98, 504-06 (2d Cir. 2005); *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011).[9]

The Sixth Circuit gave Section 1369(b)(1)(F) a practical construction in *National Cotton*, holding that the Act requires court-of-appeals review of EPA's determination that the application of some pesticides to water bodies is exempt from Clean Water Act permitting. *See* 553 F.3d at 933. Based on the Supreme Court and D.C. Circuit precedents discussed above, the court accepted jurisdiction as part of its power "to review rules that regulate the underlying permit procedures." *Id.* (quoting *NRDC v. EPA*, 966 F.2d 1292, 1296-97 (9th Cir. 1992). That power, in the Sixth Circuit's view,

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[9] As noted above, the Ninth and Eleventh Circuits have not considered *exemptions* from Clean Water Act requirements to be reviewable under Section 1369(b)(1)(F), but those holdings are not on point here. *See supra* n. 8.

extends to "the regulations governing the issuance of permits under [33 U.S.C. § 1342], as well as the issuance or denial of a particular permit.'" *Id.* (quoting *Am. Mining Cong. v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992)).

The Sixth Circuit applied that construction of Section 1369(b)(1)(F) again in *In re EPA*, accepting jurisdiction over the Clean Water Rule itself. 817 F.3d at 274. Judge McKeague noted that "the effect of the Clean Water Rule is . . . to extend protection to some additional waters. This extension indisputably expands regulatory authority and impacts the granting and denying of permits in fundamental ways." 817 F.3d at 272. Although Judge Griffin disagreed with *National Cotton* and would have preferred to reject the "functional" reasoning of the controlling case law, he acknowledged that the Clean Water Rule is undoubtedly covered by the Sixth Circuit's case law allowing Section 1369(b)(1)(F) review of "any regulation 'governing' permits." *Id.* at 282 (Griffin, J., concurring). And contrary to the arguments of many of the Plaintiffs and *amici*, the principles that compelled Judge Griffin to find jurisdiction under Section 1369(b)(1)(F) are not limited to *National Cotton* or to the Sixth Circuit: Judge Griffin acknowledged that "the predominant view of the other circuits" is the same. *Id.* at 283 n.2. The Sixth Circuit had an opportunity to hear *In re EPA* en banc, potentially also reconsidering *National Cotton*, but declined to do so.

There is no distinction that justifies finding Section 1369(b)(1)(F) jurisdiction to review of EPA rules that identify which *discharges* and *dischargers* are subject to permit

requirements, as the courts have done, but not which *waters* are subject to permit requirements, as Plaintiffs urge here. As the Sixth Circuit held, the Clean Water Rule is plainly a regulation governing the issuance of permits by identifying where permits are required, and is thus subject to review under Section 1369(b)(1)(F). *See In re EPA*, 817 F.3d at 272; *id.* at 283 (Griffin, J.,concurring).

Plaintiffs' principal objection to jurisdiction under Section 1369(b)(1)(F) is that it appears inconsistent with "a plain-text reading." Oklahoma Br. at 21. The Chamber argues that the Rule "obviously did not 'issue' or 'deny' any particular permit" and "made no individualized permitting decisions of any kind." Chamber Br. at 15, 24. The problem for Plaintiffs is that their text-only rule "finds practically no solid support in the case law." *In re EPA*, 817 F.3d at 273. The relevant cases do not limit jurisdiction to the act of granting or denying an individual permit, or even to actions with that "precise effect." *See* Oklahoma Br. at 20 (citing *Crown Simpson*, 445 U.S. at 196). Adopting the rule that Plaintiffs propose would make this Court an outlier.

D. Canons of construction do not require the Court to ignore the relevant case law.

Plaintiffs attempt to buttress their arguments with canons of statutory construction. *See* Chamber Br. at 24-28; Oklahoma Br. at 21-26. But a canon of statutory construction is "'a product of logic and common sense,' properly applied

only when it makes sense as a matter of legislative purpose." *Longview*, 980 F.2d at 1312-13 (quoting *Alcaraz v. Block*, 746 F.2d 593, 607-08 (9th Cir. 1984)). To overcome the substantial case law affirming that context is important here, Plaintiffs' canons of construction would have to be unusually compelling. They are not.

1. *Expressio unius est exclusio alterius*

The first canon that Plaintiffs cite is *expressio unius est exclusio alterius*. They argue that by enumerating "seven categories of EPA actions" in Section 1369(b)(1), Congress made clear that the courts of appeals "do not have original jurisdiction over any other EPA actions." Chamber Br. at 25; *see* Oklahoma Br. at 24-26. That interpretive rule does not prevent the Court from finding that the Clean Water Rule is included within the enumerated categories as an "other limitation" within the meaning of Section 1369(b)(1)(E). But even if those categories were construed as narrowly as Plaintiffs propose, their conclusion that Section 1369(b)(1) excludes related agency actions is simply inconsistent with the case law described above, including this Court's decision in *Maier*.

Oklahoma cites three different specific actions under 33 U.S.C. § 1316 that are enumerated in Section 1369(b)(1), and suggests that such attention to detail indicates that Congress did not want the Section 1369(b)(1) categories to be construed any more generally. *See* Oklahoma Br. at 25. This argument is at odds with the fact that Section 1369(b)(1)(B) identifies one of those enumerated actions as "any

determination pursuant to section 1316(b)(1)(C)" – a section that *does not exist*.[10] The Court should be extremely wary of concluding that the text of Section 1369(b)(1) reflects Congress's purposeful and carefully expressed intent, *see* Oklahoma Br. at 24; AFBF Br. at 18, when that text refers to a statutory provision that is not present in the Act.

Plaintiffs contend that if the Court does not apply the *expressio unius* canon, then "virtually all EPA actions" would be subject to Section 1369(b)(1) review. Chamber Br. at 26 (quoting *North Dakota*, 2015 WL 5060744, at *1); *see also* AFBF Br. at 19. That is not the case, because not all EPA actions under the Act impose limitations or govern the issuance or denial of permits. Consistent with EPA's interpretation of Section 1369, the district courts routinely review: water-quality planning tools such as water quality standards and total maximum daily loads, *see* 33 U.S.C. § 1313; *see, e.g.*, *Defenders of Wildlife v. EPA*, 415 F.3d 1121 (10th Cir. 2005); *Am. Farm Bureau Fed'n*, 792 F.3d 281 (3d Cir. 2015); *Longview*, 980 F.2d at 1313; administrative compliance orders issued under 33 U.S.C. § 1319(a), *see Sackett v. EPA*, 132 S. Ct. 1367; and EPA's decisions to withdraw specification of sites for disposal under 33 U.S.C. § 1344(c), *see Mingo Logan Coal Co. v. EPA*, ___ F.3d ___, 2016 WL

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[10] Congress had considered a proposed Section 1316(b)(1)(C), but that provision was eliminated before the statute was enacted. *See* S. Rep. 92-1236, at 3805 (1972).

3902663 (D.C. Cir. July 19, 2016). The district court reviewed EPA's definition of "waters of the United States" in a regulation governing oil spill response plans under 33 U.S.C. § 1321, because that is not one of the provisions described in Section 1369(b)(1). *Am. Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165 (D.D.C. 2008). Some courts of appeals have denied review for agency actions that create exemptions rather than impose limitations. *See supra* n. 8. Respecting the jurisdictional scope that the case law gives to Section 1369(b)(1), and that the Agencies advance here, will not sweep these sorts of actions into the courts of appeals.

2. The canon against surplusage

The second interpretive canon that Plaintiffs cite is the rule that a statute should be interpreted to give effect to all its words and provisions, without rendering any superfluous. This "preference . . . is not absolute," and does not apply where it is not a "useful guide to a fair construction of the statute." *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) (quoting *Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004)). The canon "must be applied with judgment and discretion, and with careful regard to context . . . Sometimes drafters *do* repeat themselves." Scalia & Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 176 (2012) (emphasis in original). Section 1369(b)(1) contains at least one obviously superfluous element because it references a statutory provision that does not exist, *see supra* pp. 55-56, calling into question whether Congress carefully drafted that section to define an exclusive,

comprehensive list of reviewable agency actions. The surplusage canon, in this case, does not provide a useful guide to a fair construction of the Act.

Plaintiffs rely in particular on Section 1369(b)(1)(A), which allows review of new source performance standards promulgated under Section 1316 of the Act. If Section 1369(b)(1)(E) were construed broadly, they argue, it would swallow up Section 1369(b)(1)(A). *See* Chamber Br. at 27; Oklahoma Br. at 23. The problem is that under Plaintiffs' theory, *any* reference to Section 1316 in Section 1369(b)(1)(E) would be superfluous: The text of Section 1316 does not specify any "limitations" other than the national standards of performance, which are already reviewable under Section 1369(b)(1)(A). But Congress must have recognized, and intended review of, some kind of Section 1316 "limitation," because it deliberately altered an early version of Section 1369(b)(1) to cover both "other limitations" and actions "approving or promulgating" limitations under Section 1316. *Compare* S. 2770 (1971) at 179-80 *with* H.R. Rep. No. 92-911, at 58 (Oct. 28, 1971). The Court cannot presume that this change was "meaningless." *See VEPCO*, 566 F.2d at 449.

Given that Section 1316 national standards of performance were already reviewable under Section 1369(b)(1)(A), why would Congress change Section 1369(b)(1)(E) to include "other limitations" under Section 1316? Congress appears to have anticipated that defining national standards of performance under Section 1316 would necessarily involve related regulatory actions. For example, category listings

under Section 1316(b)(1)(B) are not themselves "standards of performance," but they define when and to whom those standards apply. The language that Congress added language to Section 1369(b)(1)(E) would cover those additional actions. That is consistent with the Agencies' position that Section 1369(b)(1)(E) applies to actions, such as the Clean Water Rule, that define when a source is subject to the prohibitions and limitations of the listed statutory sections.

When it passed the Act, Congress did not envision every type of regulatory action that might follow from it and consciously divide review of those actions among Section 1369(b)(1) and the APA. When it provided for review of "effluent limitations" under Section 1369(b)(1)(E), for example, it was not even settled whether EPA would establish such limitations through regulation or through individual permit decisions. *Du Pont*, 430 U.S. at 127. Congress could not have known whether EPA would promulgate performance standards and effluent limitations together with, or separately from, the foundational rules and definitions that would govern those actions. Plaintiffs' surplusage theory thus ascribes to Congress more foresight and exactitude than the Act itself suggests. The better interpretation is that Congress intended Section 1369(b)(1) to be broadly construed, and it drafted that provision to fill jurisdictional gaps rather than to avoid surplusage.

E. The purpose of Section 1369 is served by limiting review of the Clean Water Rule to the courts of appeals.

In their reliance on text-focused canons of construction, Plaintiffs omit some of the "oldest and most established" canons: "effectuating the intent of Congress" and "taking the statutory language in context." *WildEarth Guardians v. U.S. Fish & Wildlife Serv.*, 784 F.3d 677, 685 (10th Cir. 2015). "[T]he words of a statute must be read in their *context* and with a view to their place in the overall statutory scheme." *United States v. Burkholder*, 816 F.3d 607, 613 n.6 (10th Cir. 2016) (emphasis in original) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)). This requires the Court to interpret Section 1369(b)(1) in light of Congress's efforts to provide for efficient, timely, and nationally-binding review of fundamental Clean Water Act regulatory actions. Court-of-appeals jurisdiction over the Clean Water Rule respects that statutory context and serves the purposes of the Act.

The "national goal" stated in the Act is to eliminate the discharge of pollutants into waters of the United States. 33 U.S.C. § 1251(a)(1). The statute's backbone provisions for accomplishing this goal are its prohibition on the discharge of pollutants into waters of the United States and the program for permitting such discharges. *See* 33 U.S.C. §§ 1311(a), 1342. Generally speaking, the provisions of the Act that are enumerated in Section 1369(b)(1) effectuate these programs, including the

promulgation of limitations, the issuance or denial of permits, and the approval or disapproval of State programs.

The "case for first-instance judicial review in a court of appeals is stronger for broad, policy-oriented rules," *NRDC*, 673 F.2d at 405, and the 120-day period for raising such claims protects "EPA's interests in finality in certain matters, particularly certain rulemakings with substantial significance and scope." *Narragasett Elec. Co. v. EPA*, 407 F.3d 1, 5 (1st Cir. 2005). In providing for timely, centralized review under Section 1369(b)(1), Congress recognized that "administratively developed standards, rules and regulations under the Act" are often "national in scope and require even and consistent national application," and it therefore provided for centralized review of those actions in the courts of appeals. S. Rep. No. 92-414 at 85 (1971). As discussed above, Congress even provided for further consolidation of cases that were already subject to limited court-of-appeals review, first in the Act itself, and then in 28 U.S.C. § 2112. *See supra* pp. 25-26. Section 1369(b)(1), in the context of the Act as a whole, represents a strong policy choice in favor of timely, efficient, and nationally-uniform review of actions affecting the NPDES permit program.

Consolidated court-of-appeals review of the Clean Water Rule is necessary to carry out these statutory purposes. The Rule is foundational to all of the Act's key provisions, is clearly national in scope, and requires consistent national application. The considerations that led the Supreme Court to recognize Section 1369(b)(1)

jurisdiction over the "basic regulations" that govern the issuance of permits, *see Du Pont*, 430 U.S. at 136, apply with full force to the Rule.

Plaintiffs and *amici* offer several reasons why the Court should not read the Act to advance this purpose, but none is convincing. Most notably, they argue that placing review of the Clean Water Rule in the court of appeals is contrary to the presumption of reviewability because facial challenges to the Rule's validity would then have to be raised within 120 days under Section 1369(b)(1) instead of within 6 years under the APA. *See* Chamber Br. at 35-37; Oklahoma Br. at 26-27; States Br. at 14 (all citing *Sackett*, 132 S. Ct. at 1373); PLF Br. at 15-21. The presumption that agency action is subject to judicial review is not at issue here. The Agencies do not argue that judicial review is precluded, as in *Sackett*, or that its action is not final, as in *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016). Jurisdiction to review the Clean Water Rule is clearly available immediately; the only question is where. And in cases of doubt, the applicable presumption favors court of appeals review. *See Nat'l Parks*, 998 F.2d at 1529; *supra* pp. 38-39.

Instead, Plaintiffs focus on *how long* judicial review will be available, arguing that 120 days is an insufficient period to protect the public's rights. Congress disagreed. In the 1987 amendments to the Act, it extended the window for petitions from 90 days to 120 days "to assure that persons who will be significantly affected by an action of the Administrator will have ample opportunity to assess the consequences of such

action and if necessary file an application for review … [The Committee] has concluded that one hundred and twenty days is a reasonable period." S. Rep. 99-50, at 32. This reasoning applies to the Clean Water Rule just as it would to any other nationally-applicable rules, such as effluent limits established by regulations, that are described in Section 1369(b)(1).

The Court need only look at the present litigation context to see that Plaintiffs' concerns are misplaced. The Clean Water Rule is a national rule of unique importance, promulgated after a massive rulemaking process. There are now more than two dozen challenges to that Rule pending in district courts and courts of appeals, brought by more than 100 entities including States, municipalities, trade associations, industries, and environmental groups. Those entities had ample opportunity to communicate with their members during the rulemaking process, and the Agencies received more than a million public comments on the draft Rule. There is simply no risk that this Rule will slip through the 120-day window without scrutiny.

Plaintiffs also overstate the preclusive effect of court-of-appeals review of the Rule. If the Rule is upheld against these myriad court challenges, Section 1369(b)(2) will preclude a future defendant in an enforcement actions from raising the kinds of facial challenges to the Rule that can be (and are being) litigated now, which generally depend on the administrative record and not on the facts of any particular case. For example, the 120-day limit would preclude arguments that the Rule exceeds the

Agencies' authority under the Act or that the record failed to support the Agencies' conclusions. However, defendants might raise fact-specific objections that are not available in a facial challenge – for example, that the Agencies interpret the Rule inconsistently with the Act as applied specifically to them. *See Decker*, 133 S. Ct. at 1334. In short, the Court's "interpretation of the jurisdictional provisions of the [Act] should [not] turn on the situation of a class such as this." *NRDC*, 673 F.2d at 407.

Another pragmatic reason that Plaintiffs offer in favor of district-court review is to allow issues to percolate through the district courts and courts of appeals. *See* Chamber Br. at 38-39. That principle carries less weight, however, when the courts are asked to decide the purely legal question, on a voluminous administrative record with no factual variation, of the validity of a nationally-applicable standard or limitation.[11] In this situation, Congress has expressed a preference for centralized review, initially in Section 1369(b)(1) and then in Section 2112, to provide the regulated community with certainty and uniformity in the administration of the Act.

Finally, Plaintiffs argue that "simple, straightforward interpretations of jurisdictional rules" are necessary to avoid "eating up time and money as the parties

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[11] *Amici* argue that the district courts are in a better position to supervise discovery, *see* AFBF Br. at 20; Landmark Br. at 15-16, but facial review of the Rule is limited to the agency's administrative record.

litigate" questions of jurisdiction. Chamber Br. at 37 (quoting *Hydro Resources, Inc. v. EPA*, 608 F.3d 1131, 1160 n.23 (10th Cir. 2010));[12] *see also* Oklahoma Br. at 28; States Br. at 3-4, 9-10. But the pragmatic interpretation that the weight of case law has given to Section 1369(b)(1) has generally worked well. To the extent those cases leave doubt as to the proper court, a rule favoring court-of-appeals review encourages parties to seek review within 120 days, leaving plenty of time to file a later district-court complaint if necessary. *See* States Br. at 10-11.[13] The contrary approach that Plaintiffs urge would place this Court in conflict with other Circuits and would invite even more jurisdictional litigation.

More importantly, in the context of this case, Plaintiffs' argument that district-court review is necessary to promote litigation efficiency is simply risible. Plaintiffs have an opportunity for centralized, efficient review of their merits claims in the Sixth

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[12] *Hydro Resources* was not about *court* jurisdiction, but about *agency* jurisdiction to administer the Safe Drinking Water Act. The Court adopted an interpretation of the relevant statute that would avoid "complex jurisdictional tests" for agency jurisdiction. 608 F.3d at 1160 n.23. Here, that is the exact purpose of the Clean Water Rule – to replace the expensive, lengthy case-by-case determinations that *Rapanos* often required with a more uniform and predictable formulation of the Agencies' jurisdiction.

[13] In contrast, a rule favoring district-court review really would induce plaintiffs to "sue twice to protect their rights," States Br. at 4, *see id.* at 14, because a district court would rarely be able to reach a final decision on jurisdiction within the 120-day period for petitions for review.

Circuit, where briefing on the merits is already underway. They complain of delay in the Sixth Circuit's consideration of the merits, *see* Chamber Br. at 38, but that delay was due to *their own* efforts to dismiss *their own* petitions for review. And they continue to advance an interpretation of Section 1369(b)(1) that would not only allow them to litigate their claims simultaneously in the district courts of this Circuit, but also would require all 94 district courts to open their doors to plaintiffs raising the same myriad claims based on the same enormous administrative record. If those courts reached different conclusions, the confusion, expense, and delay of litigation would only multiply. *Amici* already complain of a jurisdictional "quagmire" in the Clean Water Rule litigation, AFBF Br. at 5 – and they are asking this Court to make it worse. The Supreme Court in *Crown Simpson* cautioned against the creation of "such a seemingly irrational bifurcated system." 445 U.S. at 197. The way to avoid "eating up time and money" in unnecessary litigation, Chamber Br. at 37, is to affirm the district court's judgment.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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ORAL ARGUMENT REQUESTED

The United States requests oral argument in this appeal to assist the Court in understanding the important legal issue at stake and the broader context of Clean Water Rule litigation in which it arises.

CERTIFICATES

I certify that this brief satisfies the requirements of Federal Rule of Appellate Procedure 32(a)(7)(B) and (C). This brief contains 16,491 words, excluding the portion exempted by Federal Rule of Appellate Procedure 32(a)(7)(b)(iii), which complies with the word limit set in this Court's order of June 13, 2016. It has been prepared in a 14-point Garamond font that meets the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6).

I certify that within two business days of filing, I will forward seven hard copies of this brief to the Clerk, which will be identical to the electronic filing.

I certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on August 19, 2016. Service will be accomplished on all counsel by the appellate CM/ECF system, by e-mail with agreement of counsel, or by U.S. Mail.

I certify that all required privacy redactions have been made.

I certify that, prior to filing, I have scanned this file using System Center Endpoint Protection updated on August 19, 2016, which indicates that it is free of viruses.

/s/ J. David Gunter II