IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al., Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants.	No. 4:15-cv-386-CVE-PJC (Related: No. 4:15-cv-381-CVE-FHM)

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING A RULING FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ON SUBJECT-MATTER JURISDICTION

The Chamber of Commerce of the United States of America, National Federation of Independent Business, State Chamber of Oklahoma, Tulsa Regional Chamber, and Portland Cement Association ("Plaintiffs") respectfully submit this response in opposition to the Motion to Stay Proceedings Pending a Ruling from the United States Court of Appeals for the Sixth Circuit on Subject-Matter Jurisdiction ("Stay Motion") (Doc. 39) filed by the United States Environmental Protection Agency ("EPA"), Gina McCarthy, in her official capacity as Administrator of the EPA, the United States Army Corps of Engineers ("Corps"), and Jo-Ellen Darcy, in her official capacity as Assistant Secretary of the Army (Civil Works) (collectively, "the Agencies").

BACKGROUND

On July 10, 2015, Plaintiffs filed a complaint in this Court seeking to enjoin an administrative rule enacted by the Agencies that redefines "waters of the United States" under the Clean Water Act. *See* Clean Water Rule: Definition of "Waters of the United States," 80

Fed. Reg. 37,053-37,127 (June 29, 2015) ("Final Rule"). Plaintiffs claim that the Final Rule exceeds the Agencies' authority under (1) the Clean Water Act; (2) the Commerce Clause and the Necessary and Proper Clause; (3) the Tenth Amendment; (4) the Administrative Procedure Act; and (5) the Regulatory Flexibility Act. Compl. ¶¶ 22-28. Shortly thereafter, Plaintiffs filed a petition for review of the Final Rule with the U.S. Court of Appeals for the Tenth Circuit. Plaintiffs filed this petition in order to ensure federal review of the Final Rule, recognizing that the Agencies might challenge this Court's jurisdiction and that the deadline for filing a petition for review under 33 U.S.C. § 1369(b)(1) is 120 days. *See* Compl. ¶ 26. Pursuant to the judicial lottery, Plaintiffs' petition was transferred to the U.S. Court of Appeals for the Sixth Circuit and consolidated with similar petitions that were filed in various circuit courts.

On July 20, 2015, the Agencies filed a motion to stay proceedings pending a ruling from the Judicial Panel on Multidistrict Litigation ("JPML") on the Agencies' motion to transfer and consolidate related district court actions. Doc. 25. This Court granted the motion. Doc. 32.

On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit issued an order staying the implementation of the Final Rule pending a ruling from the Sixth Circuit on whether it has jurisdiction over the petitions for review. *In re Final Rule: Clean Water Rule: Definition of "Waters of the United States,"* No. 15-3799, 2015 WL 5893814 (6th Cir. Oct. 9, 2015) (Ex. A). In issuing the order, the Court recognized "the burden—potentially visited nationwide on governmental bodies, state and federal, as well as private parties—and the impact on the public in general, implicated by the Rule's effective redrawing of jurisdictional lines over certain of the nation's waters." *Id.* at *3. The court found that the petitioners had "demonstrated a substantial possibility of success on the merits of their claims" and that a stay of the Final Rule was warranted in order to "silence[] the whirlwind of confusion that springs from uncertainty about

the requirements of the new Rule and whether they will survive legal testing." *Id.* The Court subsequently set oral argument for December 8, 2015 on the jurisdictional question.

On October 13, 2015, the JPML denied the Agencies' motion to transfer this case and consolidate it with other actions. *In re Clean Water Rule: Definition of "Waters of the United States,"* No. MDL 2663, 2015 WL 6080727, at *1 (J.P.M.L. Oct. 13, 2015) (Ex. B). The Panel determined that transfer and consolidation would "not serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation" because "these actions will involve only very limited pretrial proceedings." *Id.* The Panel also recognized that the different jurisdictional rulings issued by three district courts weighed against centralization. *Id.*

On October 13, 2015, the Agencies filed a motion asking this Court to issue another stay until the U.S. Court of Appeals for the Sixth Circuit determines whether it has jurisdiction over the petitions for review of the Final Rule. Plaintiffs now file this response in opposition.

STANDARD OF REVIEW

This Court has a "virtually unflagging obligation" to exercise the jurisdiction given to it. *Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (federal courts have a "strict duty to exercise the jurisdiction that is conferred upon them by Congress"). Although the Court has the inherent discretion to stay a case, this discretion should "be used sparingly and only upon a clear showing by the moving party of hardship or inequity so great as to overbalance all possible inconvenience of the delay to [the] opponent." *Nelson v. Granite State Ins. Co.*, No. 08-1165, 2010 WL 680878, at *1 (W.D. Okla. Feb. 25, 2010); *see Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936) (the proponent of a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else"). Thus, "the burden is on the party seeking the stay to demonstrate there is a pressing need for

delay and that the other party will not suffer harm from entry of the stay order." *Nelson*, 2010 WL 680878, at *1. In addition, a stay is especially difficult to secure in cases where, as here, the plaintiffs have "alleged … continuing harm and sought … injunctive or declaratory relief." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005).

ARGUMENT

The Court should deny the Stay Motion for at least four reasons. First, this Court must determine its own jurisdiction irrespective of the Sixth Circuit's jurisdictional decision, so no judicial or party resources will be conserved by staying this action. Second, the Stay Motion will not promote comity among the federal courts because inconsistent decisions cannot be avoided (indeed, there are already conflicts among the federal courts on the jurisdictional question) and are commonplace; moreover, robust judicial review among the various courts promotes effective decisionmaking. Third, the Agencies will suffer no harm if this case continues forward because they have already briefed these legal issues multiple times. Finally, Plaintiffs will be harmed by a stay because additional delays will extend the uncertainty over the validity of the Final Rule and increase the likelihood that enforcement of the Final Rule will harm Plaintiffs and their members. Accordingly, this Court should deny the Stay Motion and issue a briefing schedule so that this case may move forward to the merits.

I. The Agencies Have Not Shown the Need for a Stay.

"[T]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Plaintiffs brought this action under the Administrative Procedure Act, which permits a reviewing court to review a "final agency action," 5 U.S.C. § 704, and "hold unlawful and set aside actions, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* § 706(2)(A). Accordingly, this Court has subject-matter jurisdiction

over Plaintiffs' action unless Congress has created "a specific grant of statutory authority elsewhere." *NRDC v. Abraham*, 355 F.3d 179, 192-93 (2d Cir. 2004).

Plaintiffs have consistently maintained that this Court has jurisdiction over this action. *See, e.g.*, Compl. ¶ 26. The Agencies, however, argue that this Court has no jurisdiction by contending that Section 1369(b)(1) of the Clean Water Act places judicial review of the Final Rule in the courts of appeals. Section 1369(b)(1) "specifies seven categories of agency action for which a challenge must be brought as an original proceeding in a court of appeals rather than in a district court." *Nw. Envtl. Advocates v. E.P.A.*, 537 F.3d 1006, 1015 (9th Cir. 2008). In particular, it provides for review in the courts of appeals of an action of the EPA 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). The Agencies claim that the court of appeals has exclusive jurisdiction because the Final Rule, which reshapes the scope of the Agencies' authority to regulate water (and wetlands) in Oklahoma and across the nation, somehow "approv[ed] or promulgat[ed] [an] effluent limitation or other limitation" and "issu[ed] or den[ied] [a] permit." *Id*. But instead of filing a motion to dismiss for lack of subject-matter jurisdiction, the Agencies seek to preserve a second bite at the apple by asking this Court to stay the case until the Sixth Circuit determines whether it has jurisdiction to review the Final Rule. The motion should be denied.

First, the Court should deny the Stay Motion because the Sixth Circuit's decision will have no effect on this case. It is hornbook law that only decisions from the U.S. Court of Appeals for the Tenth Circuit and the Supreme Court of the United States are binding on this Court. "The federal courts spread across the country owe respect to each other's efforts and

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

The Agencies do not dispute this point. Indeed, they recently acknowledged that the Eleventh Circuit must determine whether the Southern District of Georgia had jurisdiction to review an APA challenge to the Final Rule. *See* Brief of Appellees at 48, *Georgia v. McCarthy*, No. 15-14035 (11th Cir. Sept. 21, 2015) (Ex. C) (recognizing that the court "has appellate jurisdiction to consider the issue of subject-matter jurisdiction under the Clean Water Act"). Accordingly, regardless of the Sixth Circuit's decision, this Court will have "an independent obligation to determine whether subject-matter jurisdiction exists" over this case. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006); *1mage Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006). A stay therefore will not "conserve the resources of the Court and the parties." Stay Motion at 6.

For this reason, other district courts have declined to stay similar actions and have examined their own jurisdiction. *See North Dakota v. EPA*, No. 15-59, 2015 WL 5060744 (D.N.D. Aug. 27, 2015) (finding jurisdiction and staying operation of the Final Rule in thirteen states); *Georgia v. McCarthy*, No. 15-79, 2015 WL 5092568 (S.D. Ga. Aug. 27, 2015) (denying motion for preliminary injunction for lack of jurisdiction); *Murray Energy Corp. v. EPA*, No. 15-110, 2015 WL 5062506 (N.D. W. Va. Aug. 26, 2015) (dismissing case for lack of jurisdiction).

The U.S. Court of Appeals for the Eleventh Circuit has also denied a similar stay motion from the Agencies and is expected to address its jurisdiction soon. *Georgia*, No. 15-14035 (11th Cir. Sept. 14, 2015) (denying appellees' motion to stay proceedings until the Sixth Circuit has ruled on the jurisdictional question and ordering expedited briefing).[1] At most, a stay would allow this Court to receive the views of another court before making its own jurisdictional determination. But waiting to get another court's non-binding views on a similar legal issue is no reason to grant a stay. Indeed, granting a stay whenever a court in another jurisdiction is considering similar issues would be entirely unworkable where, as here, numerous actions have been filed around the country.

Second, staying this case will not "promote comity among the federal courts by avoiding inconsistent rulings on the identical issue." Stay Motion at 6. Regardless how the Sixth Circuit rules, this Court will have to make its own determination about whether it has jurisdiction. The possibility of conflict thus cannot be avoided. Indeed, there are already "inconsistent rulings" in multiple circuits, and there are likely to be others given the JPML's ruling that the district court actions around the country should not be centralized. In any event, the pendency of multiple challenges to the Final Rule is not a *problem* to be fixed—it is a *benefit* of our judicial system. When multiple courts examine a difficult question, it promotes the "thorough development of

[1] The Agencies' cases in support—*Ohio v. EPA*, No. 15-2467, 2015 WL 5117699 (S.D. Ohio Sept. 1, 2015), *Greco v. NFL*, No. 13-1005, 2015 WL 4475663 (N.D. Tex. July 21, 2015), and *Meijer, Inc. v. Abbott Labs.*, No. 07-5470, 2009 WL 723882 (N.D. Cal. Mar. 18, 2009)—are distinguishable because they involve stays pending decisions from courts of appeals *within the same circuits*. *Baykeeper v. EPA*, No. 07-725 (N.D. Cal.), also is inapposite. The Agencies conveniently fail to mention that *both* parties in *Baykeeper* requested the stay. *See id.*, Doc. 8 ("EPA requests this Court to stay further proceedings in this case, except for the filing of EPA's answer, until the Sixth Circuit resolves whether it or this Court has jurisdiction over Plaintiffs' request for judicial review of the final rule…. Plaintiffs concur in the requested stay of proceedings in this Court."), and *both* parties requested dismissal of the action. *See id.*, Doc. 22 ("Plaintiffs … and Defendants … stipulate to the dismissal of this action without prejudice.").

legal doctrine by allowing litigation in multiple forums." *Mendoza*, 464 U.S. at 163. In the near future, the Final Rule will be examined by "thorough, scholarly opinions written by some of our finest judges." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977). Courts considering the validity of the Final Rule may reach differing conclusions about the validity of the Final Rule. But even a circuit split would assist in the ultimate administration of justice by distilling the case for further appellate review. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2581 (2012) (noting the widely different conclusions reached by the Fourth, Sixth, Eleventh, and D.C. Circuits concerning the constitutionality of the Affordable Care Act's individual mandate and that only the Fourth Circuit concluded that the individual mandate's penalty was a tax); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (identifying dozens of cases before the district courts, courts of appeals, and state courts on the issue of same-sex marriage and noting their importance in helping "to explain and formulate the underlying principles this Court now must consider"). Whatever the result, the litigation of these cases in different courts ensures that the Final Rule will receive more rigorous review.[2]

The JPML roundly rejected the Agencies' previous attempts to avoid resolution in this Court based on the potential for inconsistent rulings. *See, e.g.*, JPML Oral Argument Transcript at 4 (Ex. D) (Kaplan, J.) ("This is an inherent situation for the government in that the government gets challenged on all sorts of decisions by all sorts of plaintiffs potentially in all [13] Circuits …

[2] The EPA recently made these same arguments to support a proposed rulemaking that would give the agency the "discretion to relitigate an issue across different circuits." *See* EPA, *Amendments to Regional Consistency Regulations*, 80 Fed. Reg. 50,250, 50,255 (Aug. 19, 2015) ("By revising the regulations in part 56 to fully accommodate intercircuit nonacquiescence, the EPA is acting consistently with the purpose of the federal judicial system by allowing the robust percolation of case law through the circuit courts until such time as U.S. Supreme Court review is appropriate .... [T]hough circuit conflict may undermine national uniformity of federal law to some degree for some period of time, it also advances the quality of decisions interpreting the law over time.").

and potentially in 94 different District Courts … and eventually the Supreme Court sorts it out."); *id.* at 18 (C. Breyer, J.) ("[C]ircuit splits happen all the time and you can't sort of centralize something to avoid a circuit split."); *id.* at 8 (Proctor, J.) ("I think what my colleagues are trying to tell you is this is the price of doing business when you are the government. You are going to get challenged around different places."). With no authority even remotely suggesting that the Sixth Circuit's jurisdictional decision would somehow be binding on this Court, the Agencies once again seek to "short circuit" the normal process by staying this case so that "one Court [can] come up with [its] … interpretation of what the law should be." *Id.* at 5 (C. Breyer, J.). This is not the type of "comity interest" that warrants a stay.

Third, the Agencies will not be harmed if this Court denies the Stay Motion. Because the Agencies have briefed this issue in multiple courts, it would require little effort simply to refile their motions in this Court. Moreover, litigating similar legal issues in multiple courts is not unusual for government defendants. The United States is far "more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues," both because of "the geographic breadth of government litigation and also, most importantly, because of the nature of the issues the government litigates." *United States v. Mendoza*, 464 U.S. 154, 159-60 (1984). The Agencies' harms are not the type of "clear case of hardship or inequity," *Grider v. Keystone Health Plan Central, Inc.*, 2004 WL 1047840, at *1 n.1 (E.D. Pa. May 5, 2004), that can justify the "extraordinary measure" of staying litigation, *United States v. Breyer*, 41 F.3d 884, 893 (3d Cir. 1994).

Finally, a stay would harm Plaintiffs. As Plaintiffs have previously documented, the Final Rule will harm landowners with waters on their property by forcing them to submit to expensive and time-consuming federal permitting requirements in order to conduct routine

activities on their property. *See* Plaintiffs' Motion for Preliminary Injunction at 19-24.[3] In addition, given the costly and burdensome requirements of complying with federal regulations, many individuals and small business owners will simply forego their plans for improving their property, as the modest benefits they hoped to achieve will not outweigh the substantial costs. While the Court previously has questioned the immediacy of Plaintiffs' harms, there is no question that they will occur. At a minimum, Plaintiffs have a significant interest in having this issue resolved as expeditiously as possible.

The Stay Motion, however, seeks unnecessarily to delay resolution of this case. Although the Agencies claim they seek to extend this Court's stay only until the Sixth Circuit determines whether it has jurisdiction, this Stay Motion will not be their last. Regardless of how the Sixth Circuit rules, the Agencies likely will ask this Court for another stay. If the Sixth Circuit determines it has jurisdiction, the Agencies likely will ask for another stay until the Sixth Circuit rules on the merits. If the Sixth Circuit determines it lacks jurisdiction, the Agencies likely will ask for a stay so they can file a petition for rehearing en banc or a petition for certiorari. Either way, granting the Stay Motion would lead to substantial delays.

The Agencies argue that *Catskill Mountains v. EPA*, 630 F. Supp. 2d 295 (S.D.N.Y. 2009), supports a stay. But the case should serve as a cautionary tale instead. In *Catskill Mountains*, plaintiffs filed a complaint in the Southern District of New York challenging the EPA's Water Transfers Rule. *Id.* at 303. After petitions for review challenging the Water Transfers Rule were transferred to the U.S. Court of Appeals for the Eleventh Circuit, the EPA

[3] Because the Agencies are complying with the Sixth Circuit's nationwide stay of the Final Rule, Plaintiffs would consent to stay briefing of their motion for a preliminary injunction until such time as the Agencies begin enforcing the Final Rule. But if the Sixth Circuit lifts the stay and the Agencies begin enforcing the Final Rule, Plaintiffs likely would ask the Court to review their motion on an expedited schedule. For now, Plaintiffs ask only that the Court set a briefing schedule so that this case may move forward to the merits.

asked the district court to stay the litigation, arguing that jurisdiction was proper in the Eleventh Circuit and that staying the case would not "unduly delay judicial resolution of the dispositive question presented by plaintiffs' complaints." *Id*., Doc. 29 at 14 (Dec. 24, 2008). The district court granted the motion to stay. On October 26, 2012, more than four years after the plaintiffs filed their complaint, the Eleventh Circuit ruled that it did not have jurisdiction over the petitions. *See Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012). The EPA filed a petition for rehearing en banc, which was denied on March 5, 2013, and a petition for certiorari, which was denied on October 15, 2013. *See Catskill Mountains v. EPA*, 8 F. Supp. 3d 500 (S.D.N.Y. 2014). As a result of the stay, the district court did not address the merits of the Water Transfers Rule until March 28, 2014. *See id*. That decision was appealed, and the Second Circuit will hear oral argument on December 1, 2015. Thus, it has been more than *seven years* since the plaintiffs in *Catskill Mountains* filed their complaint challenging EPA's rule and the plaintiffs still do not have a final resolution. No interest in comity can justify that type of delay.[4]

II. This Court Should Set a Briefing Schedule to Resolve Its Jurisdiction and Address the Merits of Plaintiffs' Claims.

Because this Court ultimately must assess its jurisdiction, there is no reason to delay briefing the issue. Accordingly, the Court should deny the Stay Motion and instead adopt a schedule to brief the Court's jurisdiction and address the merits of Plaintiffs' claims. *See Ernest K. Lehmann & Assocs. v. Salazar*, 602 F. Supp. 2d 146, 153 (D.D.C. 2009) (noting that summary

[4] The stay in *Riverkeeper Inc. v. EPA*, No. 06-12987, 2007 WL 4208757 (S.D.N.Y. Nov. 26, 2007), resulted in extraordinary delay as well. After the district court granted the motion to stay on November 26, 2007, the U.S Court of Appeals for the Fifth Circuit waited until July 23, 2010 (more than two and a half years) to resolve its jurisdiction. *See ConocoPhillips Co. v. EPA*, 612 F.3d 822, 831 (5th Cir. 2010).

judgment is "the proper mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and consistent with the APA standard of review").[5]

CONCLUSION

For the foregoing reasons, the Agencies' Stay Motion should be denied.

Dated: October 29, 2015

Respectfully submitted,

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[5] As Plaintiffs have previously explained, *see* Motion for Preliminary Injunction 7-8, the Agencies have the authority voluntarily to "postpone the effective date of [the Rule], pending judicial review." 5 U.S.C. § 705. Plaintiffs would not oppose the Stay Motion if the Agencies agreed to stay enforcement of the Final Rule until the conclusion of proceedings in this Court and any subsequent appeals.

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2015, I electronically served the foregoing pleading with the Clerk of Court using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants that was sent to the following CM/ECF registrants:

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EXHIBIT “A”

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Re: Case Nos. 15-3751/15-3799/15-3817/15-3820/15-3822/15-3823/15-3831/15-3837/15-3839/15-3850/15-3853/15-3858/15-3885/15-3887/15-3948,
In re: EPA; Originating Case No. : EPA-HQ-OW-2011-0880

Dear Counsel,

The Court issued the enclosed order today in this case.

Sincerely yours,

s/Cathryn Lovely for Amy Gigliotti
Opinions Deputy
Direct Dial No. 513-564-7012

Enclosure

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 15a0246p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

In re: ENVIRONMENTAL PROTECTION AGENCY AND DEPARTMENT OF DEFENSE FINAL RULE; "CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES," 80 FED. REG. 37,054 (JUNE 29, 2015).

STATE OF OHIO, STATE OF MICHIGAN, and STATE OF TENNESSEE (15-3799); STATE OF OKLAHOMA (15-3822); STATE OF TEXAS, STATE OF LOUISIANA, and STATE OF MISSISSIPPI (15-3853); STATE OF GEORGIA, STATE OF WEST VIRGINIA, STATE OF ALABAMA, STATE OF FLORIDA, STATE OF INDIANA, STATE OF KANSAS, COMMONWEALTH OF KENTUCKY, NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, STATE OF SOUTH CAROLINA, STATE OF UTAH, and STATE OF WISCONSIN (15-3887),

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Respondents.

Nos. 15-3799/3822/3853/3887

On Petition for Review of a Final Rule from the United States Army Corps of Engineers and the Environmental Protection Administration.

No. EPA-HQ-OW-2011; Judicial Panel on Multi-District Litigation, No. 135.

Decided and Filed: October 9, 2015

Before: KEITH, McKEAGUE and GRIFFIN, Circuit Judges.

McKEAGUE, J., delivered the order of the court in which GRIFFIN, J., joined. KEITH, J. (pg. 7), delivered a separate dissent.

ORDER OF STAY

McKEAGUE, Circuit Judge. Petitioners in these four actions, transferred to and consolidated in this court by the Judicial Panel on Multi-District Litigation for handling as a multi-circuit case, represent eighteen states[1] who challenge the validity of a Final Rule adopted by respondents U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency, "the Clean Water Rule." 80 Fed. Reg. 37,054 (June 29, 2015). The Clean Water Rule clarifies the definition of "waters of the United States," as used in the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, "through increased use of bright-line boundaries" to make "the process of identifying waters protected under the Clean Water Act easier to understand, more predictable and consistent with the law and peer reviewed science, while protecting the streams and wetlands that form the foundation of our nation's water resources." 80 Fed. Reg. at 37,055. Petitioner states contend that the definitional changes effect an expansion of respondent agencies' regulatory jurisdiction and dramatically alter the existing balance of federal-state collaboration in restoring and maintaining the integrity of the nation's waters. Petitioners also contend the new bright-line boundaries used to determine which tributaries and waters adjacent to navigable waters have a "significant nexus" to waters protected under the Act are not consistent with the law as defined by the Supreme Court, and were adopted by a process that failed to conform to the rulemaking requirements of the Administrative Procedures Act ("APA").

Although petitioners have moved the court to dismiss their own petitions for lack of subject matter jurisdiction under 33 U.S.C. § 1369(b)(1)—a matter on which briefing is pending—they also move for a stay of the Clean Water Rule pending completion of the court's review. Respondents and numerous intervenors oppose the stay.[2] Respondents contend that we

[1]The eighteen petitioner states are Ohio, Michigan, Tennessee, Oklahoma, Texas, Louisiana, Mississippi, Georgia, West Virginia, Alabama, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah and Wisconsin.

[2]Among the respondent-intervenors are several environmental conservation groups and several respondent-intervenor states who support the new Rule: New York, Connecticut, Hawaii, Massachusetts, Oregon, Vermont, Washington and the District of Columbia.

have jurisdiction, but insist that petitioners have not made the requisite showing to justify a stay of the Rule that became effective August 28, 2015. For reasons that follow, we now grant the stay pending determination of our jurisdiction.

The parties agree that our decision is guided by consideration of four factors: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). *See also Nken v. Holder*, 556 U.S. 418, 433 (2009). These are not prerequisites that must be met, but interrelated considerations that must be balanced. *Griepentrog*, 945 F.3d at 153. The motion for stay is addressed to our discretion, early in the case based on incomplete factual development and legal research, for the purpose of preserving the status quo pending further proceedings. *United States v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004). The party seeking a stay bears the burden of showing that the circumstances of the particular case justify exercise of our discretion, guided by sound legal principles, to maintain the status quo pending conclusive determination of the legality of the action. *Nken*, 556 U.S. at 433–34.

The present circumstances pose a threshold question: What is the status quo? Petitioners ask us to stay enforcement of the Clean Water Rule that went into effect on August 28, 2015. They ask us to restore the status quo as it existed before the Rule went into effect. Respondents' position is that the status quo is best preserved by leaving the Rule alone. Considering the pervasive nationwide impact of the new Rule on state and federal regulation of the nation's waters, and the still open question whether, under the Clean Water Act, this litigation is properly pursued in this court or in the district courts, we conclude that petitioners have acted without undue delay and that the status quo at issue is the pre-Rule regime of federal-state collaboration that has been in place for several years, following the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006).

Regarding this "open question," we are mindful of the dissent's concern that we should not consider exercising our discretionary power to issue a stay before confirming our jurisdiction

under the Clean Water Act, 33 U.S.C. § 1369(b)(1), to do so. We have no doubt of our authority, however, "to make orders to preserve the existing conditions and the subject of the petition[s]" pending our receipt and careful consideration of briefing on the jurisdictional question. *See United States v. United Mine Workers of Am.*, 330 U.S. 258, 291 (1947). While petitioners have grounds to question our jurisdiction, *see* § 1369(b)(1), respondents' contrary position has color as well. *See Nat'l Cotton Council of Am. v. U.S. E.P.A.*, 553 F.3d 927, 933 (6th Cir. 2009). Briefing on the jurisdictional question will be completed and the question ripe for decision in a matter of weeks.

Meanwhile, we conclude that petitioners have demonstrated a substantial possibility of success on the merits of their claims. Petitioners first claim that the Rule's treatment of tributaries, "adjacent waters," and waters having a "significant nexus" to navigable waters is at odds with the Supreme Court's ruling in *Rapanos*, where the Court vacated the Sixth Circuit's upholding of wetlands regulation by the Army Corps of Engineers. Even assuming, for present purposes, as the parties do, that Justice Kennedy's opinion in *Rapanos* represents the best instruction on the permissible parameters of "waters of the United States" as used in the Clean Water Act,[3] it is far from clear that the new Rule's distance limitations are harmonious with the instruction.

Moreover, the rulemaking process by which the distance limitations were adopted is facially suspect. Petitioners contend the proposed rule that was published, on which interested persons were invited to comment, did not include any proposed distance limitations in its use of terms like "adjacent waters" and significant nexus." Consequently, petitioners contend, the Final Rule cannot be considered a "logical outgrowth" of the rule proposed, as required to satisfy the notice-and-comment requirements of the APA, 5 U.S.C. § 553. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). As a further consequence of this defect, petitioners contend, the record compiled by respondents is devoid of specific scientific support for the distance limitations that were included in the Final Rule. They contend the Rule is therefore not

[3]There are real questions regarding the collective meaning of the Court's fragmented opinions in *Rapanos*. *See United States v. Cundiff*, 555 F.3d 200, 208–10 (6th Cir. 2009).

the product of reasoned decision-making and is vulnerable to attack as impermissibly "arbitrary or capricious" under the APA, 5 U.S.C. § 706(2).

In the extant briefing, respondents have not persuasively rebutted either of petitioners' showings. Although the record compiled by respondent agencies is extensive, respondents have failed to identify anything in the record that would substantiate a finding that the public had reasonably specific notice that the distance-based limitations adopted in the Rule were among the range of alternatives being considered. Respondents maintain that the notice requirements were met by their having invited recommendations of "geographical limits" and "distance limitations." Perhaps. But whether such general notice satisfies the "logical outgrowth" standard requires closer scrutiny. Nor have respondents identified specific scientific support substantiating the reasonableness of the bright-line standards they ultimately chose. Their argument that "bright-line tests are a fact of regulatory life" and that they used "their technical expertise to promulgate a practical rule" is undoubtedly true, but not sufficient. At this stage, at least, we are satisfied that petitioners have met their burden of showing a substantial possibility of success on the merits.

There is no compelling showing that any of the petitioners will suffer immediate irreparable harm—in the form of interference with state sovereignty, or in unrecoverable expenditure of resources as they endeavor to comply with the new regime—if a stay is not issued pending determination of this court's jurisdiction. But neither is there any indication that the integrity of the nation's waters will suffer imminent injury if the new scheme is not immediately implemented and enforced.

What is of greater concern to us, in balancing the harms, is the burden—potentially visited nationwide on governmental bodies, state and federal, as well as private parties—and the impact on the public in general, implicated by the Rule's effective redrawing of jurisdictional lines over certain of the nation's waters. Given that the definitions of "navigable waters" and "waters of the United States" have been clouded by uncertainty, in spite of (or exacerbated by) a series of Supreme Court decisions over the last thirty years, we appreciate the need for the new Rule. *See Rapanos*, 547 U.S. 715; *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of*

Engineers, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121 (1985). In one sense, the clarification that the new Rule strives to achieve is long overdue. We also accept that respondent agencies have conscientiously endeavored, within their technical expertise and experience, and based on reliable peer-reviewed science, to promulgate new standards to protect water quality that conform to the Supreme Court's guidance. Yet, the sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being.

A stay allows for a more deliberate determination whether this exercise of Executive power, enabled by Congress and explicated by the Supreme Court, is proper under the dictates of federal law. A stay temporarily silences the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing. A stay honors the policy of cooperative federalism that informs the Clean Water Act and must attend the shared responsibility for safeguarding the nation's waters. *See* 33 U.S.C. § 1251(b) ("It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution."). In light of the disparate rulings on this very question issued by district courts around the country—enforcement of the Rule having been preliminarily enjoined in thirteen states[4]—a stay will, consistent with Congress's stated purpose of establishing a national policy, 33 U.S.C. § 1251(a), restore uniformity of regulation under the familiar, if imperfect, pre-Rule regime, pending judicial review.

Accordingly, on due review of the relevant considerations in light of the briefs filed by petitioners, respondents and intervenors, and in the exercise of our discretion, we GRANT petitioners' motion for stay. The Clean Water Rule is hereby STAYED, nationwide, pending further order of the court.

[4]*See North Dakota v. U.S. E.P.A.*, No. 3:15-cv-59, 2015 WL 5060744 (D.N.D. Aug. 27, 2015) (staying operation of the Rule in North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, and New Mexico).

DISSENT

KEITH, Circuit Judge, dissenting. Because I believe that it is not prudent for a court to act before it determines that it has subject-matter jurisdiction, I respectfully dissent.

If we lack jurisdiction to review the Rule, then we lack jurisdiction to grant a stay. *See Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 77–78 (D.C. Cir. 1984) (holding that a district court did not have jurisdiction to review a rule or issue a writ of mandamus because of a special review statute that assigned judicial review to the courts of appeals); *see also Greater Detroit Recovery Auth. v. EPA*, 916 F.2d 317, 321–24 (6th Cir. 1990) (holding that a district court was without subject-matter jurisdiction and, therefore, did not have the authority to award attorneys' fees because a special review statute gave the courts of appeals exclusive jurisdiction).

One of the issues in this case is whether this court has exclusive jurisdiction to review the Rule in the first instance. We can enjoin implementation of the Rule if we determine that we have jurisdiction. But until that question is answered, our subject-matter jurisdiction is in doubt, and I do not believe we should stay implementation of the Clean Water Rule.

Because subject-matter jurisdiction is a threshold determination, I do not reach the merits of the petitioners' motion.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

EXHIBIT “B”

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: CLEAN WATER RULE: DEFINITION OF "WATERS OF THE UNITED STATES" MDL No. 2663

ORDER DENYING TRANSFER

Before the Panel: The federal government defendants[1] move under 28 U.S.C. § 1407 to centralize pretrial proceedings in this litigation in the District of District of Columbia. This litigation currently consists of nine actions pending in seven districts, as listed on Schedule A.[2] Several States (and the District of Columbia) have filed an interested party response in support of the motion to centralize these actions in the District of District of Columbia. All other responding parties—including plaintiffs in all nine actions and two interested parties—oppose centralization. Should the Panel centralize this litigation, the opposing parties variously suggest in the alternative that the Panel select the District of North Dakota, the Southern District of Georgia, and the Southern District of Texas as the transferee district for this litigation.

On the basis of the papers filed and hearing session held, we conclude that Section 1407 centralization will not serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation. These actions all involve challenges to a rule recently promulgated by the EPA and the Corps (the Clean Water Rule) that purports to interpret the jurisdictional phrase "waters of the United States" in the Clean Water Act. *See* 80 Fed. Reg. 37,054 (Jun. 29, 2015). The resolution of these actions will involve only very limited pretrial proceedings. Discovery, if any, will be minimal, as these cases will be decided on the administrative record. Motion practice will consist of motions regarding that record, motions for preliminary injunctive relief, and summary judgment motions. In short, these actions will turn on questions of law with respect to whether the EPA and the Corps exceeded their statutory and constitutional authority when

[1] The federal government defendants include the United States Environmental Protection Agency (EPA), the United States Army Corps of Engineers (the Corps), and, in their official capacities only: Gina McCarthy, the Administrator of the EPA; Jo-Ellen Darcy, the Assistant Secretary of the Army; Lieutenant General Thomas P. Bostick, the Chief of Engineers and Commanding General of the Corps; and John McHugh, Secretary of the Army.

[2] The Panel has been notified of five additional related actions pending in the District of Arizona, the Northern District of California, the District of District of Columbia, the Southern District of Texas, and the Western District of Washington.

they promulgated the Clean Water Rule. Accordingly, centralization under Section 1407 is inappropriate. *See, e.g.*, *In re Lesser Prairie-Chicken Endangered Species Act Litig.*, MDL No. 2629, __ F. Supp. 3d __, 2015 WL 3654675, at *1 (J.P.M.L. Jun. 9, 2015) (denying centralization of regulatory challenges that would be decided on the administrative record); *In re Envtl. Prot. Agency Pesticide Listing Confidentiality Litig.*, 434 F. Supp. 1235, 1236 (J.P.M.L. 1977) (same).

Additionally, centralization of these actions would be problematic due to their procedural posture. Several motions for preliminary injunctive relief already have been ruled upon, resulting in different jurisdictional rulings by the involved courts. Two courts have held that only the United States Courts of Appeals have jurisdiction over these regulatory challenges, whereas another reached the opposite conclusion, that jurisdiction over these actions properly resides in the United States District Courts.[3] Centralization thus would require the transferee judge to navigate potentially uncharted waters with respect to law of the case. This procedural complication also weighs against centralization in this instance.

IT IS THEREFORE ORDERED that the motion for centralization of these actions is denied.

PANEL ON MULTIDISTRICT LITIGATION

Sarah S. Vance
Chair

Marjorie O. Rendell
Lewis A. Kaplan
R. David Proctor
Charles R. Breyer
Ellen Segal Huvelle
Catherine D. Perry

[3] The Panel has been informed that, on October 9, 2015, the United States Court of Appeals for the Sixth Circuit stayed application of the Clean Water Rule on a nationwide basis pending further order of that court.

IN RE: CLEAN WATER RULE: DEFINITION OF "WATERS OF THE UNITED STATES" MDL No. 2663

SCHEDULE A

Northern District of Georgia

SOUTHEASTERN LEGAL FOUNDATION, INC., ET AL. v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., C.A. No. 1:15−02488

Southern District of Georgia

STATE OF GEORGIA, ET AL. v. MCCARTHY, ET AL., C.A. No. 2:15−00079

District of Minnesota

WASHINGTON CATTLEMEN'S ASSOCIATION, ET AL. v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., C.A. No. 0:15−03058

District of North Dakota

NORTH DAKOTA, ET AL. v. U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL., C.A. No. 3:15−00059

Southern District of Ohio

STATE OF OHIO, ET AL. v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., C.A. No. 2:15−02467

Northern District of Oklahoma

STATE OF OKLAHOMA v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., C.A. No. 4:15−00381
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL. v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., C.A. No. 4:15−00386

Southern District of Texas

STATE OF TEXAS, ET AL. v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., C.A. No. 3:15−00162
AMERICAN FARM BUREAU FEDERATION, ET AL. v. U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL., C.A. No. 3:15−00165

EXHIBIT “C”

No. 15-14035-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF GEORGIA, *et al.*,

Plaintiffs-Appellants,

v.

REGINA McCARTHY, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Georgia, No. 2:15-cv-00079 (Hon. Lisa Godbey Wood)

RESPONSE BRIEF FOR THE FEDERAL DEFENDANTS-APPELLEES

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U.S. Army Corps of Engineers

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I hereby certify as required by Eleventh Circuit Rules 26.1 and 26.1-3 that, to the best of my knowledge, the following is a complete list of persons and entities that have an interest in the outcome of this case.

Alabama Department of Environmental Management

American Farm Bureau Federation

American Forest and Paper Association

American Petroleum Institute

American Road And Transportation Builders Association

Avila, Aaron P., U.S. Department of Justice

Bishop, Timothy S., Mayer Brown LLP

Bondi, Pamela Jo, Attorney General, Florida

Bosshardt, Stacey, U.S. Department of Justice

Bostick, Thomas P., Lieutenant General, U.S. Army Corps of Engineers

Brasher, Andrew, Solicitor General, Office of the Attorney General, Alabama

Bregman, Lauren, U.S. Army

Bromby, Craig A., Deputy General Counsel, North Carolina Department of Environment and Natural Resources

Butler, Timothy A., Deputy Solicitor General, Office of the Attorney General, Georgia

Chanay, Jeffrey A., Chief Deputy Attorney General, Kansas

Chiappini, Vincent M., U.S. Army

Commonwealth of Kentucky

Conway, Jack, Attorney General, Kentucky

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Cooper, David R., U.S. Army Corps of Engineers

Coots, James D., Senior Assistant Attorney General, Georgia

Cruden, John, U.S. Department of Justice

Darcy, Jo Ellen, Assistant Secretary for Civil Works, U.S. Army

Delery, Stuart F., U.S. Department of Justice

Dertke, Daniel R., U.S. Department of Justice

Dona, Amy J., U.S. Department of Justice

Douglas, Parker, Chief of Staff & Federal Solicitor, Office of the Attorney General, Utah

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Garbow, Avi S., U.S. Environmental Protection Agency

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Georgia Environmental Protection Division

Goessling, Shannon L.

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Greater Houston Builders Association

Green, Tyler, Solicitor General, Office of the Attorney General, Utah

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Grishaw, Letitia, U.S. Department of Justice

Gunter, J. David, U.S. Department of Justice

Guzman, Javier, U.S. Department of Justice

Hayes, Sam M., General Counsel, North Carolina Department of Environment and Natural Resources

Hirsch, Sam, U.S. Department of Justice

Horder, Richard A., Kazmarek Mowrey Cloud Laseter LLP

Indiana Department of Environmental Protection

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Jones, Lisa, U.S. Department of Justice

Kansas Department of Health & Environment

Kazmarek Mowrey Cloud Laseter LLP

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Kentucky Department of Environmental Protection

Kimberly, Michael B., Mayer Brown LLP

Kupchan, Simma, U.S. Environmental Protection Agency

Leading Builders of America

Lin, Elbert, Solicitor General, Office of the Attorney General, West Virginia

Lundman, Robert J., U.S. Department of Justice

Lynch, Loretta E., United States Attorney General

Mann, Martha, U.S. Department of Justice

McCarthy, Regina, Administrator, U.S. Environmental Protection Agency

McHugh, John M., Secretary of the Army

Mergen, Andrew C., U.S. Department of Justice

Morrisey, Patrick, Attorney General, West Virginia

National Alliance of Forest Owners

National Association of Home Builders

National Association of Manufacturers

National Association of Realtors

National Cattlemen's Beef Association

National Corn Growers Association

National Mining Association

National Pork Producers Council

National Stone, Sand, and Gravel Association

Navaro, Ann, U.S. Army Corps of Engineers

Neugeboren, Steven, U.S. Environmental Protection Agency

North Carolina Department of Environmental and Natural Resources

Norton, Andrew J., Deputy General Counsel, North Carolina

Department of Environment and Natural Resources

O'Donnell, Jessica, U.S. Department of Justice

Office of the Alabama Attorney General

Office of the Florida Attorney General

Office of the Georgia Attorney General

Office of the Indiana Attorney General

Office of the Kansas Attorney General

Office of the Kentucky Attorney General

Office of the South Carolina Attorney General

Office of the Utah Attorney General

Office of West Virginia Attorney General

Office of the Wisconsin Attorney General

Olens, Samuel S., Attorney General, Georgia

Park, Robert, U.S. Army

Peterson, Erica N., Assistant Attorney General, West Virginia

Public Lands Council

Reyes, Sean D., Attorney General, Utah

Riley, Sean J., Chief Deputy Attorney General, Kentucky

Samuels, Stephen, U.S. Department of Justice

Schimel, Brad D., Attorney General, Wisconsin

Schmauder, Craig R., U.S. Army

Schmidt, Derek, Attorney General, Kansas

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Smith, James Emory Jr., Deputy Solicitor General, Office of the Attorney General, South Carolina

South Carolina Department of Health and Environment

Southeastern Legal Foundation, Inc.

State of Alabama

State of Florida

State of Georgia

State of Indiana

State of Kansas

State of South Carolina

State of Utah

State of West Virginia

State of Wisconsin

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Swanson, Kristofor R., U.S. Department of Justice

Tanner, R. Brian, U.S. Department of Justice

Texas Farm Bureau

Tseytlin, Misha, General Counsel, Office of the Attorney General, West Virginia

United States of America

United States Army Corps of Engineers

United States Department of Justice

United States Department of the Army

United States Environmental Protection Agency

U.S. Poultry and Egg Association

Utah Department of Environmental Quality

Vaden, Christopher, U.S. Department of Justice

Webb, E. Brantley, Mayer Brown LLP

Wehling, Caroline, U.S. Environmental Protection Agency

Wendelowski, Karyn, U.S. Environmental Protection Agency

West Virginia Department of Environmental Protection

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STATEMENT REGARDING ORAL ARGUMENT

The Federal Defendants-Appellees are prepared to present oral argument if it would be of assistance to the Court in determining whether the district court properly concluded that it lacked jurisdiction over Plaintiffs-Appellants' claims, which must be brought as a petition for review under Clean Water Act Section 509(b)(1), 33 U.S.C. § 1369(b)(1).

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* Authorities chiefly relied upon are marked with an asterisk.

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RULES AND REGULATIONS:

LEGISLATIVE HISTORY:

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* Authorities chiefly relied upon are marked with an asterisk.

GLOSSARY

Agencies	United States Environmental Protection Agency and the United States Army Corps of Engineers
APA	Administrative Procedure Act
Corps	United States Army Corps of Engineers
CWA	Clean Water Act
EPA	United States Environmental Protection Agency
MDL Panel	Judicial Panel on Multidistrict Litigation
NPDES	National Pollutant Discharge Elimination System

INTRODUCTION

Section 301 of the Clean Water Act (the "CWA" or the "Act") makes the discharge of any pollutant by any person into "waters of the United States" unlawful, except as in compliance with other specified provisions of the Act. 33 U.S.C. §§ 1311(a), 1362(7) & (12)(A). Because of the nationwide importance of the term "waters of the United States" to the administration of the Act and to further clarify the term's meaning, the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers (the "Corps"; collectively, the "Agencies") promulgated the Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (the "Clean Water Rule" or the "Rule"). The Rule "clarifies the scope of 'waters of the United States' consistent with the [CWA], Supreme Court precedent, and science." *Id.*

Plaintiffs-Appellants States[1] moved in the district court for a preliminary injunction against the Rule. The district court correctly concluded that it lacked jurisdiction to enter a preliminary injunction because Section 509(b)(1) of the CWA vests exclusive, original jurisdiction to review the Clean Water Rule in the courts of appeals. 33 U.S.C. § 1369(b)(1). That ruling is correct because the Clean Water Rule fits comfortably within two of Section 509(b)(1)'s provisions—the EPA

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[1] Plaintiffs-Appellants States are: Georgia, West Virginia, Alabama, Florida, Indiana, North Carolina Department of Environment and Natural Resources, Kansas, Kentucky, South Carolina, Utah, and Wisconsin.

"Administrator's action . . . in approving or promulgating any effluent limitation or other limitation under section 1311 [(i.e., CWA Section 301)] . . . [and] in issuing or denying any permit under section 1342 [(i.e., CWA Section 402)]." *Id.* § 1369(b)(1)(E) & (F). The Rule is an "other limitation under section [301]" because it establishes where the fundamental Section 301-prohibition on pollution applies. Similarly, it is a action relating to issuing or denying permits because it establishes where a Section 402 permit is required.

This Court's decision in *Friends of the Everglades v. U.S. Environmental Protection Agency*, 699 F.3d 1280 (11th Cir. 2012), is not to the contrary. There, this Court held that it lacked jurisdiction under Section 509(b)(1) to hear a challenge to the "water-transfer rule," a "rule [that] created a permanent exemption from the [CWA] permit program for pollutants discharged from water transfers." *Id.* at 1284. Unlike the water-transfer rule, the Clean Water Rule does not create a permanent exemption from the CWA's permitting requirements; instead it establishes the reach of "waters of the United States," a foundational block of the CWA and its permitting program. That is a far cry from the permanent exemption from the CWA's permitting program at issue in *Friends of the Everglades*.

STATEMENT OF JURISDICTION

As explained below, the district court correctly concluded that it lacked jurisdiction to enter a preliminary injunction because CWA Section 509(b)(1), 33 U.S.C. § 1369(b)(1), provides for exclusive jurisdiction in the courts of appeals for

challenges to the Clean Water Rule. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) over the States' appeal of the district court's order of August 27, 2015, denying their motion for a preliminary injunction. The States timely filed their notice of appeal on September 9, 2015. *See* Doc. 77 (order denying plaintiffs' motion for preliminary injunction); Doc. 79 (notice of appeal); Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUE

CWA Section 509(b)(1), 33 U.S.C. § 1369(b)(1), provides for exclusive jurisdiction in the courts of appeals to review a variety of EPA actions. Did the district court correctly conclude that the Clean Water Rule is an action that must be reviewed in the courts of appeals and correctly deny the preliminary injunction on that basis?

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. Overview of the Clean Water Act

Congress enacted the Clean Water Act, 33 U.S.C. §§ 1251-1388, to respond comprehensively to the complex problem of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters," *id.* § 1251(a). To accomplish that goal, Section 301(a) of the CWA prohibits "the discharge of any pollutant" except in compliance with other specified sections of the Act. *Id.* § 1311(a). The Act defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A). The Act

defines "navigable waters" to mean "the waters of the United States, including the territorial seas." *Id.* § 1362(7).

The scope and meaning of "waters of the United States" is a critical component of the Act. Congress used that broad phrase to define the Act's reach because it recognized that restricting the reach of the CWA to the relatively few waterways that support navigation would make it impossible to achieve the objectives of the Act. S. Rep. No. 92-414, at 77 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742-43. Within the Act, the phrase "waters of the United States" determines *where* the Act's various prohibitions, permitting requirements, and other obligations apply. For example, if a particular water is a water of the United States, then the Act's permitting requirements are triggered and a person cannot discharge a pollutant from a point source into that water unless authorized by a CWA permit or otherwise exempted by the Act. *See* 33 U.S.C. §§ 1311(a), 1362(7) & (12)(A). If a water is not a water of the United States, then the permitting provisions of the Act do not apply to that water and a person may be able to lawfully discharge a pollutant to that water without a permit.

2. The Clean Water Rule

While the history of the Act makes clear that Congress intended "waters of the United States" to reach beyond traditional navigable waters, the precise contours of that phrase have been defined through administrative action. By the mid-1980s, both EPA and the Corps had promulgated substantively equivalent definitions of the term

"waters of the United States." Those regulations defined "waters of the United States" to include traditional navigable waters; interstate waters; other waters the use, degradation, or destruction of which could affect interstate or foreign commerce; impoundments of waters of the United States; tributaries; the territorial seas; and adjacent wetlands. *See* 40 C.F.R. § 122.2 (1987) (EPA); 33 C.F.R. § 328.3 (1987) (Corps).

The Supreme Court has addressed the 1980s definition three times. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455 (1985); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs ("SWANCC")*, 531 U.S. 159, 121 S. Ct. 675 (2001); *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208 (2006). Most recently, in *Rapanos*, the Court issued a fractured decision, with no majority holding, regarding the standard for determining whether a water is a "water of the United States" protected under the Act. 547 U.S. at 718, 126 S. Ct. at 2214. In the wake of the conflicting opinions in *Rapanos*, the Agencies and regulated parties had to conduct a case-by-case analysis of almost any water in order to determine whether it fell within the existing regulatory definition and also satisfied one or more of the Justices' opinions in *Rapanos*. Recognizing that problem, several Justices suggested that the Agencies should more clearly define "waters of the United States" in order to clarify the reach of the CWA. *See, e.g., Rapanos*, 547 U.S. at 758, 126 S. Ct. at 2235-36 (Roberts, C.J., concurring); 547 U.S. at 811-12, 126 S. Ct. at 2266 (Breyer, J.

dissenting); *see also Sackett v. EPA*, 132 S. Ct. 1367, 1375-76 (2012) (Alito, J., concurring).

The Agencies responded to those suggestions with a comprehensive rulemaking to more clearly define "waters of the United States." EPA's Office of Research and Development prepared a thorough report entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence," based on a review of more than 1,200 peer-reviewed publications. The report provides much of the technical basis for the proposed and final rule. 80 Fed. Reg. at 37,057. The Agencies issued a proposed rule in 2014. *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, 126 S. Ct. at 2235-36 (Roberts, C.J., concurring).

On June 29, 2015, EPA and the Corps published the Clean Water Rule in the Federal Register, with an effective date of August 28, 2015. 80 Fed. Reg. at 37,054. EPA promulgated the Clean Water Rule pursuant to Section 301, 33 U.S.C. § 1311.

80 Fed. Reg. at 37,055 (citing, among other provisions, Section 301 as "authority for this rule"). The Rule was guided by the best available peer-reviewed science and by the Agencies' policy judgments, legal interpretations, and experience in implementing the CWA for more than 40 years. *Id.* at 37,055-56. The CWA is the nation's single most-important statute for protecting America's water against pollution, degradation, and destruction. *Id.* at 37,055. The Agencies' overriding objective was to fill a compelling need for clear, consistent, and easily-implementable standards. *Id.* at 37,057.

The Clean Water Rule meets these objectives in a number of ways. For example, the Rule clearly defines and protects tributaries that impact the integrity of downstream waters. The Rule 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 also protects "adjacent waters" that are close to rivers and lakes and their tributaries, because these adjacent waters impact downstream waters. The extent of these "adjacent waters" is likewise defined by clear physical and measurable boundaries. *Id.* The Rule's precise definitions substantially reduce the need for case-specific analyses. *Id.* at 37,054, 37,057. And the definitions determine *where* the Act's various prohibitions, permitting requirements, and other obligations apply, as explained above (p. 4).

3. Judicial Review under the Clean Water Act

To establish a clear and orderly process for judicial review, CWA Section 509(b)(1), 33 U.S.C. § 1369(b)(1), vests the federal courts of appeals with exclusive, original jurisdiction to review certain EPA actions. Those include actions by the EPA 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)(E) and (F). "Where that 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). Petitions for review generally must be filed within 120 days after the challenged EPA action. 33 U.S.C. § 1369(b)(1). After that time, the action is not "subject to judicial review in any civil or criminal proceeding for enforcement." *Id.* § 1369(b)(2); *see Decker*, 133 S. Ct. at 1334. Section 509(b)(1) thereby promotes, among other things, the ability of regulators, the regulated community, and the public to rely on the validity of EPA regulations that are not promptly challenged or that are upheld by a court of appeals.

When EPA engages in final agency action (including the promulgation of regulations) that is reviewable under general principles of administrative law, but that falls outside the categories listed in Section 509(b)(1), that EPA final agency action may generally be challenged in federal district court under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.* *See* 5 U.S.C. § 704. An APA suit may

be brought at any time within six years from the date of the challenged final agency action. 28 U.S.C. § 2401(a).

B. Challenges to the Clean Water Rule

Immediately after the Agencies published the Clean Water Rule, parties challenged it in both the courts of appeals and district courts.

1. Petitions for Review in the Courts of Appeals

To date, fifteen petitions for review challenging the Clean Water Rule have been filed in the courts of appeals pursuant to Section 509(b)(1).[2] These petitions for review include one filed in this Court by the very same States that are Plaintiffs-Appellants here. *See Georgia v. EPA*, No. 15-13252 (11th Cir.), filed July 20, 2015.

To address the possibility of conflicting court decisions and resulting confusion when petitions for review of the same agency action are filed in multiple courts of appeals, Congress has provided for consolidation of the petitions in a single circuit.

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[2] *See Murray Energy Corp. v. EPA*, No. 15-3751 (6th Cir.), filed July 13, 2015; *Se. Legal Found. v. EPA*, No. 15-13102 (11th Cir.), filed July 13, 2015; *Texas v. EPA*, No. 15-60492 (5th Cir.), filed July 16, 2015; *Utility Water Act Group v. EPA*, No. 15-60509 (5th Cir.), filed July 17, 2015; *North Dakota v. EPA*, No. 15-2552 (8th Cir.), filed July 17, 2015; *Georgia v. EPA*, No. 15-13252 (11th Cir.), filed July 20, 2015; *Waterkeeper Alliance v. EPA*, No. 15-72226 (9th Cir.), filed July 22, 2015); *Puget Soundkeeper Alliance v. EPA*, No. 15-72227 (9th Cir.), filed July 22, 2015; *Oklahoma v. EPA*, No. 15-9551 (10th Cir.), filed July 22, 2015; *NRDC v. EPA*, No. 15-2313 (2d Cir.), filed July 22, 2015; *Nat'l Wildlife Fed. v. EPA*, No. 15-1234 (D.C. Cir.), filed July 22, 2015; *Chamber of Commerce v. EPA*, No. 15-9552 (10th Cir.), filed July 23, 2015; *Ohio v. EPA*, No. 15-3799 (6th Cir.), filed July 24, 2015; *Am. Farm Bureau Fed'n v. EPA*, No. 15-3850 (6th Cir.), filed Aug. 6, 2015; *One Hundred Miles v. EPA*, No. 15-3948 (6th Cir.), filed Sept. 1, 2015.

See 28 U.S.C. § 2112(a). Section 2112(a) provides for the Judicial Panel on Multidistrict Litigation (MDL Panel) to transfer the petitions to one circuit chosen randomly from the circuits where petitions were filed. *See, e.g., Friends of the Everglades v. EPA*, 699 F.3d 1280, 1285 (11th Cir. 2012), (noting the consolidation of petitions for review of the water-transfer rule under Section 2112(a)). On July 28, 2015, the MDL Panel transferred all the petitions for review—including the States' petition for review filed in this Court—to the Sixth Circuit. *In re Final Rule: Clean Water Rule: Definition of "Waters of the United States,"* MCP No. 135 (J.P.M.L.), Doc. 3; Sixth Circuit No. 15-3799 (lead case).

On the same day the States filed their notice of appeal in this case, they (and others) made two filings in the Sixth Circuit. First, they asked the Sixth Circuit to resolve whether it has jurisdiction under Section 509(b)(1), by moving to dismiss their own petitions. *See* Sixth Circuit No. 15-3799 (lead case), Doc. 23. By doing so, the States have brought before the Sixth Circuit—the one Court that will now decide whether Section 509(b)(1) applies to all of the petitions for review that have been filed—the same Section 509(b)(1) issue that they seek to litigate in this appeal. The Sixth Circuit has entered an order establishing a streamlined process for briefing the jurisdictional issue: all motions challenging the Sixth Circuit's jurisdiction must be filed by October 2, 2015, all responses to those motions must be filed by October 23, 2015, and all replies must be filed by November 4, 2015. *See* Sixth Circuit No. 15-3799 (lead case), Doc. 26.

Second, the States (and others) moved in the Sixth Circuit for a stay of the Clean Water Rule "on a nationwide basis," asking the Sixth Circuit to block further implementation of the Clean Water Rule pending that Court's review. *See* Sixth Circuit No. 15-3799 (lead case), Doc. 24, at 2. The Agencies filed an opposition to the motion for stay on September 23, 2015, and the States' reply is due by September 28, 2015. *See* Sixth Circuit No. 15-3799 (lead case), Doc. 35. Thus, the States are seeking from the Sixth Circuit the very same relief that they sought from the district court below, the denial of which they now appeal. Notably, the Agencies do not contest the Sixth Circuit's jurisdiction to grant the relief sought by the States, just the States' entitlement to that relief.

2. District Court Challenges

To date, fifteen district court actions challenging the Clean Water Rule have been filed in multiple district courts.[3] The district court cases include the one that has resulted in this interlocutory appeal.

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[3] *See Texas v. EPA*, No. 3:15-cv-162 (S.D. Tex.), filed June 29, 2015; *North Dakota v. EPA*, No. 3:15-cv-59 (D.N.D.), filed June 29, 2015; *Ohio v. U.S. Army Corps of Eng'rs*, No. 2:15-cv-2467 (S.D. Ohio), filed June 29, 2015; *Georgia v. EPA*, No. 2:15-cv-79 (S.D. Ga.), filed June 30, 2015; *Murray Energy Corp. v. EPA*, No. 1:15-cv-110 (N.D. W. Va.), filed June 29, 2015 and dismissed on August 26, 2015; *Am. Farm Bureau Fed'n v. EPA*, No. 3:15-cv-165 (S.D. Tex), filed July 2, 2015; *Oklahoma v. EPA*, No. 4:15-cv-381 (N.D. Ok.), filed July 8, 2015; *Chamber of Commerce v. EPA*, No. 4:15-cv-386 (N.D. Ok.), filed July 10, 2015; *Se. Legal Found. v. EPA*, No. 1:15-cv-2488 (N.D. Ga.), filed July 13, 2015; *Wash. Cattlemen's Ass'n v. EPA*, No. 0:15-cv-3058 (D. Minn.), filed July 15, 2015; *NRDC v. EPA*, No. 1:15-cv-01324 (D.D.C.), filed August 14, 2015; *Am. Exploration & Mining Ass'n v. EPA*, No. 1:15-cv-1323 (D.D.C.), filed

Cont.

As with Section 2112(a) and multiple petitions for review, Congress has provided for centralization of district court challenges. Specifically, 28 U.S.C. § 1407 authorizes the MDL Panel to transfer related district court cases to a single district court for pretrial proceedings.

The Agencies filed a motion with the MDL Panel to transfer all of the district court challenges to a single district court for pretrial proceedings, which would then proceed to consider the centralized challenges to the Rule if the Sixth Circuit were to conclude that it lacks jurisdiction over the petitions for review. The MDL Panel has set argument on the motion for October 1, 2015. The MDL Panel frequently issues its decision on centralization soon after argument. *See, e.g., In re Operation of the Mo. River Sys. Litig.*, 277 F. Supp. 2d 1378, 1379 (J.P.M.L. 2003) (noting that MDL Panel announced its centralization decision on the same day as argument, with opinion following later).

The Agencies sought a stay of proceedings (in some cases, unopposed) in each of the district court cases that may be subject to MDL consolidation. Most of those district courts granted stays pending the decision of the MDL Panel. The Northern District of West Virginia denied a stay because, like the district court here, it held that exclusive review of the Clean Water Rule lies in the courts of appeals, and that it

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August 14, 2015; *Puget Soundkeeper Alliance v. EPA*, No. 2:15-cv-01342 (W.D. Wash.), filed August 20, 2015; *Waterkeeper Alliance v. EPA*, 3:15-cv-3927 (N.D. Cal.), filed August 27, 2015; *Ariz. Mining Ass'n v. EPA*, 2:15-cv-1752 (D. Ariz.), filed Sept. 1, 2015.

therefore lacked jurisdiction. *Murray Energy Corp. v. EPA*, No. 1:15-cv-110, 2015 WL 5062506 (N.D. W.Va. Aug. 26, 2015). Only one district court, the District of North Dakota, has reached an opposite conclusion. It held that it has jurisdiction to review the Clean Water Rule and entered a limited preliminary injunction that applies to the parties before it. *North Dakota v. EPA*, No. 3:15-cv-59, 2015 WL 5060744 (D.N.D. Aug. 27, 2015). Now that the District of North Dakota has granted such relief, the Agencies have renewed their motion for a stay in that court, and the plaintiffs there have filed a motion requesting a scheduling order. *North Dakota v. EPA*, No. 3:15-cv-00059-RRE-ARS, Doc. 81, 82.

As a result of these procedural developments, all petitions for review challenging the Rule are pending in the Sixth Circuit, where litigation is actively proceeding. All district court cases, including the case below, are subject to transfer to another district court to be determined by the MDL Panel. If the Sixth Circuit finds that it lacks jurisdiction, proceeding in a district court chosen by the MDL Panel represents the best opportunity for all parties (including those with an interest in the Rule that are not before this Court) to obtain consistent and orderly judicial review of the Clean Water Rule.

3. Proceedings in this Case

The States filed their initial complaint challenging the Clean Water Rule in the District Court for the Southern District of Georgia on June 30, 2015, and an amended complaint on July 20, 2015. The amended complaint repeatedly alleges that the Clean

Water Rule defines "waters of the United States" too broadly and that the Rule constitutes an "expansion of federal authority over the States' core sovereign decisions regarding intrastate water and land use management." Doc. 31 ¶ 9. The States alleged:

> The Agencies' unlawful attempt to expand their authority to broad categories of non-navigable, intrastate waters and lands imposes great harm upon the States and their citizens. Once a water is determined to fall within the Agencies' authority, this determination eliminates the States' primary authority to regulate and protect that water under the State's standards, and imposes significant federal burdens upon the States. Such a federal jurisdictional finding also places significant burdens upon homeowners, business owners, and farmers by forcing them to obtain costly federal permits in order to continue to conduct activities on their lands that have no significant impact on navigable, interstate waters. See 33 U.S.C. §§ 1342, 1344.

Doc. 31 ¶ 10. Among other things, when a water is identified as part of the "waters of the United States," the States have the primary role for enacting water quality standards for that water. If the water fails to meet those standards, states have the primary role in setting "pollution limits, called Total Maximum Daily Loads" for "waters that fail to meet the [water quality standards]." Doc. 31 ¶ 88. The States also allege that the definition of "waters of the United States" established in the Rule will lead to "additional[] federally-mandated Clean Water Act permit applications," under the National Pollutant Discharge Elimination System (NPDES) program, which

States will be "required to process."[4] Doc. 31 ¶ 91. The States allege that the Clean Water Rule will also prohibit the States themselves from discharging pollutants into additional waters, thus requiring federal permits, when they "seek to construct roads, schools, and hospitals. The Rule expands the number of these activities that require a permit." Doc. 31 ¶ 93.

The amended complaint alleges that these obligations are invalid under the CWA, the APA, and the Commerce Clause and the Tenth Amendment of the Constitution. Doc. 31 ¶¶ 104-39.

The day after filing their amended complaint, the States moved for a preliminary injunction in the district court. The Agencies opposed the motion and moved to stay proceedings until the MDL Panel ruled on the pending motion to transfer this action, and all other district court actions, to a single district court for pretrial proceedings. The district court held a hearing on the motion for a preliminary injunction on August 12, 2015, and allowed the parties to file post-hearing briefs.

On August 27, 2015, the district court denied the motion for a preliminary injunction, concluding that the court "has no jurisdiction to enter a preliminary injunction." Doc. 77 at 6. The court held that the Clean Water Rule "constitutes a limitation under section 1311 of the Clean Water Act," and thus falls within Section

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[4] The States chose to become authorized to administer the NPDES program. The Act did not require them to take on that responsibility. *See generally* 33 U.S.C. § 1342(b).

509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E). Doc. 77 at 1. The court explained that, by defining waters of the United States, the Clean Water Rule's "undeniable and inescapable effect is to restrict pollutants and subject entities to the requirements of the Clean Water Act's permit program," Doc. 77 at 5, as the States had alleged in their complaint. The Rule therefore "operates as a limitation or restriction on permit issuers and people who would discharge into the bodies of water the Rule now includes as waters of the United States." Doc. 77 at 5. As a result, the court concluded, CWA Section 509(b)(1)(E) provides for exclusive, original jurisdiction over the States' challenge in the courts of appeals, where the States' petition for review is already pending. Doc. 77 at 5.

Thirteen days after the district court denied the States' motion for a preliminary injunction, the States filed their notice of appeal. Although the States themselves have raised the jurisdictional issue and sought a stay in the Sixth Circuit, they moved to expedite their appeal on the jurisdictional issue in this Court. In the interest of maintaining uniform and orderly review of the Rule, the Agencies moved to stay proceedings in this Court pending the Sixth Circuit's ruling on jurisdiction and the MDL Panel's decision on whether to transfer this case to another district court for pretrial proceedings. The Court denied the motion to stay and granted the motion to expedite.

SUMMARY OF ARGUMENT

The district court correctly concluded that it lacked jurisdiction to enter a preliminary injunction because the Clean Water Rule fits squarely within Section 509(b)(1)(E) and (F). As an initial matter, and contrary to the States' repeated claim that Section 509(b)(1) should be read narrowly, the Supreme Court has established that it should be applied pragmatically. *See E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 97 S. Ct. 965 (1977); *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 100 S. Ct. 1093 (1980) (per curiam). Applying that case law, the District of Columbia Circuit, in an opinion by then-Judge Ginsburg, explained that Section 509(b)(1)(E) should be given a "practical rather than a cramped construction." *NRDC v. EPA*, 673 F.2d 400, 405 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 879, 103 S. Ct. 175 (1982).

Section 509 (b)(1)(E) provides for exclusive jurisdiction in the courts of appeals over challenges to the Rule because it is an EPA action "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 [(i.e., Sections 301, 302, 306, or 405 of the CWA)]." 33 U.S.C. § 1369(b)(1)(E). The Clean Water Rule is an "other limitation under section [301]" of the CWA. By defining what waterbodies are "waters of the United States," the Clean Water Rule establishes where the Act's prohibitions and requirements apply. The Rule limits or restricts both point sources and permit issuers.

With respect to point sources, the Clean Water Rule is an "other limitation" under Section 301, 33 U.S.C. § 1311, because it is places limitations or restrictions on

point sources that affect the untrammeled discretion of regulated parties. The Clean Water Rule determines where a point source can discharge pollutants without regulation under the CWA and where such point source must comply with the Act's prohibitions and requirements. Those prohibitions and requirements include the fundamental Section 301 prohibition on the discharge of pollutants. The States' pleadings here confirm this, as the States repeatedly allege that the Rule is a restriction or limitation on property owners under Section 301.

The Clean Water Rule also is a limitation or restriction on the States as permit-issuers. The Rule restricts the States in their operation of Section 402 permit-programs. The States must require and process permits for waters within the States that meet the Rule's definition of "waters of the United States."

The States' are wrong that this Court's decision in *Friends of the Everglades v. U.S. Environmental Protection Agency*, 699 F.3d 1280 (11th Cir. 2012), is controlling. The States gloss over the key point repeatedly stressed by this Court in *Friends of the Everglades*: the EPA rule at issue there imposed no restrictions on entities engaged in the activity at issue. In contrast, the Clean Water Rule limits point sources and the States as permit-issuers with respect to property within the reach of the Act set by the Clean Water Rule.

In addition to Section 509(b)(1)E), Section 509(b)(1)(F) provides for exclusive jurisdiction in the court of appeals for EPA action "in issuing or denying any permit under section 1342 [Section 402 of the CWA]." 33 U.S.C. § 1369(b)(1)(F). Because

the Clean Water Rule has the effect of triggering permit requirements, establishing that the CWA's permitting program applies to particular waters and particular discharges into those waters, the Rule falls within Section 509(b)(1)(F). This result is fully supported by the case law, which holds that Section 509(b)(1)(F) applies to regulations relating to permitting. Again, the States incorrectly rely on *Friends of the Everglades*, making the same mistake with respect to the Court's analysis of Section 509(b)(1)(F) as they do with respect to Section 509(b)(1)(E). Like its analysis of "other limitation" in subsection (E), the Court's analysis of subsection (F) was based on the fact that the rule at issue in *Friends of the Everglades* exempted a category of activities from the requirements of a permit and ensured that no permit would ever be issued or denied for discharges from the activity at issue.

The nationwide scope of the Clean Water Rule and its fundamental importance support the Agencies' argument that judicial review lies in the courts of appeals under Section 509(b)(1). The courts have repeatedly held that national rules are best reviewed directly in the courts of appeals, and the Clean Water Rule is plainly a rule with national implications. It amounts to one of the most important Clean Water Act rules ever promulgated.

The States are wrong that holding that the Clean Water Rule falls under Section 509(b)(1)(E) or (F) would render other subsections of (b)(1) superfluous or result in virtually all EPA actions falling within Section 509(b)(1). The other subsections of Section 509(b)(1) identify distinct EPA actions that Congress chose to list separately.

Section 509(b)(1)(E) applies only to actions promulgating effluent limitations or other limitations under specified sections of the Act, and the Agencies below identify several categories of EPA actions that do not fall within Section 509(b)(1).

Finally, the Court should wait until the Sixth Circuit (where the MDL Panel has consolidated all pending petitions for review) addresses the jurisdictional issue before deciding this appeal. The States filed both the district court action that resulted in to this interlocutory appeal and what they term "a protective petition for review" that is now before the Sixth Circuit. But they have now asked the Sixth Circuit both to rule on its jurisdiction and to stay the Rule. Because the States have squarely presented the Section 509(b)(1) jurisdictional question and their stay request to the Sixth Circuit, this Court should await a ruling from the Sixth Circuit on the question of Section 509(b)(1) jurisdiction before proceeding further.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's determination that it did not have jurisdiction to entertain the motion for a preliminary injunction. *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs*, 788 F.3d 1318, 1322 (11th Cir. 2015); *see also, e.g.*, *Doe v. FAA*, 432 F.3d 1259, 1261 (11th Cir. 2005) (reviewing *de novo* the issue of subject-matter jurisdiction in appeal from grant of preliminary injunction).

ARGUMENT

I. The district court correctly concluded that it lacked jurisdiction to enter a preliminary injunction because the Clean Water Rule fits squarely within Section 509(b)(1)(E) and (F).

To establish a clear and orderly process for judicial review, the CWA vests the federal courts of appeals with exclusive, original jurisdiction to review certain categories of EPA decisions implementing the Act. EPA actions that are originally reviewable in the courts of appeals include actions by the EPA 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[.]

CWA Section 509(b)(1)(E) and (F), 33 U.S.C. § 1369(b)(1)(E) and (F).

Contrary to the States' repeated claim that Section 509(b)(1) should be read narrowly (e.g., States Br. at 25), the Supreme Court has established that it should be applied pragmatically. In *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 97 S. Ct. 965 (1977), the Court held that Section 509(b)(1) review is appropriate for "the basic regulations governing" EPA's "individual actions issuing or denying permits." *E.I. du Pont* considered whether Section 509(b)(1) applied to the review of EPA's promulgation of nationally applicable effluent limitations, by regulation, for classes of sources, or whether it applied only to source-specific effluent limitations and variances that dictate the limits of individual conduct. The Court held that EPA's action fit within Section 509(b)(1)(E) because EPA had "promulgat[ed] an effluent limitation

for existing point sources under [Section] 301." 430 U.S. at 126, 97 S. Ct. at 979. It is clear that jurisdiction to review individual permits setting effluent limitations lies in the courts of appeals, and the Court stressed a pragmatic concern in determining the extent of that jurisdiction: The power to review individual permit decisions necessarily encompasses the power to review the basic rules that shape those decisions. *Id.*[5]

Second, in *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 100 S. Ct. 1093 (1980) (per curiam), the Court held that there was jurisdiction under Section 509(b)(1)(F) to review "EPA's action denying a variance and disapproving effluent restrictions contained in a permit issued by an authorized state agency." 445 U.S. at 194, 100 S. Ct. at 1093. The court of appeals in *Crown Simpson* had concluded that EPA's action in disapproving a State-issued permit was not a decision by EPA "issuing or denying" a permit under Section 509(b)(1)(F). 445 U.S. at 196, 100 S. Ct. at 1094. The Supreme Court rejected that narrow reading of Section 509(b)(1)(F), instead looking

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[5] After the Supreme Court decided *E.I. du Pont* in February 1977, the House and Senate considered potential amendments to the CWA. The House version of the amendments would have added a Section 509(b)(1)(G) and (H), providing for review of EPA regulations providing guidelines for effluent limitations and of EPA approval of State certification programs. The Senate version of the amendments did not contain comparable provisions. According to the Conference Report published on December 6, 1977, Congress did not include the proposed amendments to Section 509(b)(1) because "[t]hese provisions 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 indicates that Congress believed that Section 509(b)(1) already encompassed the proposed subsections (G) and (H), consistent with the Supreme Court's ruling in *E.I. du Pont* and contrary to the States' cramped reading of Section 509(b)(1).

to the "precise effect" of EPA's action. 445 U.S. at 196, 100 S. Ct. at 1095. Because "the precise effect of [EPA's] action is to 'den[y]' a permit within the meaning of § 509(b)(1)(F)," that provision applied and jurisdiction was exclusively in the courts of appeals. *Id.* The Court rejected the formalistic approach taken by the court of appeals, where "denials of [National Pollutant Discharge Elimination System] permits would be reviewable at different levels of the federal-court system depending on the fortuitous circumstance of whether the State in which the case arose was or was not authorized to issue permits." 445 U.S. at 196-97, 100 S. Ct. at 1095.

The courts of appeals, following the Supreme Court's lead in *E.I. du Pont* and *Crown Simpson*, have repeatedly explained that Section 509(b)(1) is to be interpreted pragmatically. For example, the District of Columbia Circuit, in an opinion by then-Judge Ginsburg, explained that Section 509(b)(1)(E) should be given a "practical rather than a cramped construction." *NRDC v. EPA*, 673 F.2d 400, 405 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 879, 103 S. Ct. 175 (1982); *see also, e.g., Va. Elec. & Power Co. v. Costle ("VEPCO")*, 566 F.2d 446, 449 (4th Cir. 1977) (recognizing jurisdiction to review regulations concerning intake of cooling water); *NRDC v. EPA*, 966 F.2d 1292, 1296-97 (9th Cir. 1992).

Pragmatically and properly construed, Section 509(b)(1) denies the district court review not only of particular effluent limitations, but of the general rules that govern those limitations. The Clean Water Rule falls squarely within Section 509(b)(1) as interpreted in the cases above. Although it does not impose particular

effluent limitations on particular sources, it is a "basic regulation[] governing" where point sources must obtain a permit or comply with the limitations of the Act and EPA's other regulations. The States themselves allege that the Rule imposes burdens on them both as sovereign partners in the administration of the Act and as regulated entities that must obtain federal permits as a result of the Rule.

In any event, the debate over whether Section 509(b)(1) should be given a "narrow" (States Br. at 25) or purportedly "broad[]" (States Br. at 28) interpretation is of limited importance because, as demonstrated below, the Clean Water Rule fits comfortably within the language of Section 509(b)(1)(E) and (F).

A. The Clean Water Rule falls within Section 509(b)(1)(E) because it is an "other limitation" under Section 301.

Section 509(b)(1)(E) provides for exclusive jurisdiction in the court of appeals over challenges to the Rule because it is an EPA action "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 [(i.e., Sections 301, 302, 306, or 405 of the CWA)]." 33 U.S.C. § 1369(b)(1)(E). By defining what waters are "waters of the United States," the Clean Water Rule establishes where the Act's prohibitions and requirements apply, and EPA promulgated the Clean Water Rule pursuant to Section 301, 33 U.S.C. § 1311. *See* 80 Fed. Reg. at 37,055 (citing, among other provisions, Section 301 as "authority for this rule"). In short, the Clean Water Rule is a limitation or restriction on both those who

discharge a pollutant into protected waters and who issue permits, such as the States here.

While the CWA does not define "other limitation," it does define "effluent limitation" as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into [waters of the United States], the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11). The Act therefore sets forth "other limitation" as an alternative to "effluent limitation," both of which are governed by the judicial review provision of Section 509(b)(1)(E). *Id.* § 1369(b)(1)(E). Although the phrase "other limitation" must have some meaning, the States do not propose one. To the contrary, they conflate the two phrases, claiming that the Rule is not an "other limitation" because it does not meet the statutory definition of "effluent limitation." States Br. at 14. But this Court "cannot assume that [Section 509(b)(1)(E)'s] inclusion [of the phrase 'other limitation'] was meaningless or inadvertent." *VEPCO*, 566 F.2d at 449 (4th Cir. 1977). Thus, in *Friends of the Everglades*, the Court separately analyzed whether the rule was an "effluent limitation" as defined under the Act and whether the rule was an "other limitation."[6] 699 F.3d at 1286-87; *see also, e.g., ConocoPhillips Co.*

[6] As a result, to the extent the States cite this Court's decision in *Friends of the Everglades* to support their conflation of "effluent limitation" and "other limitation," they are incorrect.

v. EPA, 612 F.3d 822, 831 (5th Cir. 2010) ("We have jurisdiction over challenges to an agency's action that result in 'other limitations' under the CWA, and coolant water intake regulations are deemed 'other limitations.'"); *see generally, e.g., Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment CSX Transp. N. Lines v. CSX Transp., Inc.*, 522 F.3d 1190, 1195 (11th Cir. 2008) ("[C]ourts must reject statutory interpretations that would render portions of a statute surplusage").

Moreover, that "other limitation" is not limited to "effluent limitation" is plainly shown by the amendment of Section 509(b)(1)(E) to include a reference to "section . . . 1345." 33 U.S.C. § 1369(b)(1)(E). In 1987, Congress amended Section 405, 33 U.S.C. § 1345, to require sewage sludge use and disposal regulations. *See* Pub. L. No. 100-4, § 406, 101 Stat. 7, 71-74 (1987). These regulations do not provide for "effluent limitations." At the same time, Congress amended Section 509(b)(1)(E) to include Section 405, thus underscoring that "other limitation" captures limitations that are distinct from effluent limitations. *See* Pub. L. No. 100-4, § 406(d)(3), 101 Stat. 7, 73 (1987).

An "other limitation under section 1311, 1312, 1316, or 1345" is a restriction on either point sources or permit issuers that is established under the listed sections. As this Court explained in *Friends of the Everglades*, "Black's Law Dictionary defines a 'limitation' as a 'restriction'." 699 F.3d at 1286 (quoting Black's Law Dictionary 1012

(9th ed. 2012)).[7] In addition, the Act's definition of "effluent limitation" as "restriction on" the discharge of constituents also indicates that an "other limitation" is also a "restriction." 33 U.S.C. § 1362(11).

This Court in *Friends of Everglades* then went on to examine if the rule imposed a "restriction" on the entities engaged in the practice addressed by the rule—that is, the "point sources." 699 F.3d at 1286 (analyzing whether the rule imposes a restriction on "private parties"). The Court's conclusion on that point is a critical difference between *Friends of the Everglades* and the present case.

Although the Court recognized that a "limitation" or "restriction" under Section 509(b)(1)(E) can apply to permit-issuers (typically States), it concluded that the particular rule at issue in *Friends of the Everglades* did not function as such an "other limitation" because it did not "operate as [a] 'restriction on the untrammeled discretion of the industry.'" *Id.* at 1287 (quoting *NRDC v. EPA*, 673 at 404-05, which was quoting *VEPCO*, 566 at 450). The Court observed that there is no restriction on permit issuers if the rule "frees the industry from the constraints of the permit process and allows the discharge of pollutants from" the activity at issue. *Id.*

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[7] *See also* Black's Law Dictionary 1076 (rev. 4th ed. 1968) (defining "limitation" as "[r]estriction or circumspection"); Webster's New World Dictionary of the American Language 820 (2d college ed. 1972) (defining "limitation" as "a limiting or being limited"; defining "limiting" as "that limits"; defining "limit" (noun) as "the point, line, or edge where something ends or must end" and "limit" (verb) as "to confine within bounds").

In contrast to the rule at issue in *Friends of the Everglades*, which the Court found to be purely an exemption from the Act's permitting requirements, the Clean Water Rule is an "other limitation" under Section 301, 33 U.S.C. § 1311, because it places limitations or restrictions on point sources that affect the "untrammeled discretion" of regulated parties. The States claim that the Rule "does not alter the ability of any party to discharge into waters of the United States; it merely changes what the federal government considers those waters to be." States Br. at 19. But as the States maintained in their amended complaint, *see supra* at 14-15, identifying the waters into which a party may not discharge pollutants without a permit reduces those parties' discretion and limits their ability to discharge. The Clean Water Rule constitutes a limitation because it determines where a point source can discharge pollutants without regulation under the CWA and where such point source must comply with the Act's prohibitions and requirements. Those prohibitions and requirements include the fundamental Section 301 prohibition on the discharge of pollutants. As the district court explained, 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." Doc. 77 at 5. That focus on the Rule's *effect* was correct under *E.I. du Pont*, in which the Supreme Court rejected the distinction that the States try to draw here between limitations stated in permits and limitations that arise from regulations that govern those permits.

The States' argument depends on the fallacy that a regulation clarifying the reach of the CWA—and thereby, the reach of the vast majority of CWA programs, including permitting programs—is not a "limitation." According to the States, the Rule's "only direct impact on parties is subjecting them to the Clean Water Act in the first place." States Br. at 15-16. But that proves the Agencies' point: by defining "waters of the United States" the Rule establishes the foundational scope of the Act—that is, *where* the Act applies—with all of the Act's attending restrictions on those waters, including the basic Section 301 prohibition on discharging pollutants without a permit. *See* Doc. 77 at 5 ("The [Clean Water] rule accomplishes significant limiting and significant restricting even if accomplished by way of defining.").[8]

This means, for example, that property owners who are operating a potential point source are restricted (or not) in the use of their property as a direct result of the Clean Water Rule. As EPA has explained, the Rule changes the definition of "waters of the United States," with some waters now clearly falling within the definition and some falling outside the definition. 80 Fed. Reg. at 37,055-60; *see also* EPA, Technical

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[8] The States quote the Rule as stating that it "does not establish any regulatory requirements," States Br. at 3, 6, 12, 19 (quoting 80 Fed. Reg. at 37,054), but the States omit the additional explanation that immediately follows, where the Agencies explain that the definition of "waters of the United States" functions by establishing where the Act's restrictions apply. "Programs established by the CWA, such as the section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the section 404 permit program for discharge of dredged or fill material, and the section 311 oil spill prevention and response programs, all rely on the definition of 'waters of the United States.'" 80 Fed. Reg. at 37,054.

Support Document for the Clean Water Rule: Definition of Waters of the United States (May 27, 2015), at 33 (explaining that, while scope of the Rule is narrower than the pre-Rule regulatory definition, it is generally broader than the agency practice in light of guidance issued after *SWANCC* and *Rapanos*, which was in effect immediately prior to this Rule), *available at* http://www2.epa.gov/cleanwaterrule/technical-support-document-clean-water-rule-definition-waters-united-states; Doc. 32 at 2 (States claim that Agencies have made a "drastic underestimation of the Rule's expansion"); *id.* at 20-21. For those waters that fall within the reach of the Act established by the Rule and for point sources within those waters, the Rule's limitations on point sources have the precise effect of restricting the operator's behavior.

The States' pleadings in this case, as they attempt to establish their standing and the harm to them from the Rule, are rife with allegations that the States themselves view the Rule as a restriction or limitation on property owners under Section 301. For example, the States' amended complaint confirms that the Rule operates as a limitation by restricting what property owners can do with their property without obtaining a permit: "The Rule imposes costs upon citizens because individuals and businesses must obtain federal permits, through a process that can take years and cost tens or hundreds of thousands of dollars. See 33 U.S.C. §§ 1342, 1344 (describing the permitting process)." Doc. 31 ¶ 146; *see also id.* ¶¶ 10, 91, 93, 100. Similarly, the States' motion for preliminary injunction accurately states that "[t]he definition of

'waters of the United States' serves as the trigger for numerous provisions in the CWA, including obligations imposed upon the States." Doc. 32 at 3. And the States repeatedly allege and argue that the Rule causes direct harm to property owners and the State as sovereign. *See, e.g.,* Doc. 32 at 20-24. The States cannot have it both ways. Their argument in favor of district court jurisdiction depends on the conclusion that the Rule is only a definition that does not restrict anyone, *see* States Br. at 18-19, but that conclusion is in direct conflict with their repeated allegations that the Rule imposes obligations on point sources and has direct, harmful effects. *See, e.g., United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 748 (D.C. Cir. 1998) (holding that factual admission in a pleading ordinarily constitutes binding judicial admission that admitting party cannot contradict absent waiver by opposing party).

The Clean Water Rule is also an "other limitation" because it is a limitation or restriction on the States as permit-issuers. *See, e.g., VEPCO*, 566 F.2d at 448; *NRDC*, 673 F.2d at 405 (holding that permit regulations were "a limitation on point sources and permit issuers"). The Rule restricts the States in their operation of Section 402 permit-programs. The States that have sought authorization for the Section 402 permitting program must process permits for waters within the States that meet the Rule's definition of "waters of the United States." The States concede as much in their motion for preliminary injunction. According to the States, the Rule "requires the State[s] to create, process, and issue additional NPDES permits." Doc. 32 at 23 (internal quotation marks omitted); *see also id.* at 2-3 ("An increase in the waters

covered under the CWA imposes additional, substantial obligations upon States under the CWA's Water Quality Standards ('WQS'), Section 404, and National Pollutant Discharge Elimination System ('NPDES') programs, requiring States to spend money they can never get back."); Doc. 31 ¶¶ 10, 91, 93, 100, 146.[9]

The States' primary argument on Section 509(b)(1)(E) is that *Friends of the Everglades* "answers the question," States Br. at 14, and is "controlling," *id.* at 17, here. It does not, and it is not. The States gloss over the key point stressed by *Friends of the Everglades*: the Court concluded that the EPA rule "impose[d] no restrictions on entities engaged in water transfers [i.e., the activity at issue]." 699 F.3d at 1286. This Court repeatedly stressed that this was the key to its conclusion. The water-transfer rule at issue "provide[d] no limitation whatsoever." *Id.* at 1287 (quoting *Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1016 (9th Cir. 2008)). The water-transfer "rule free[d] the industry from the constraints of the permit process and allow[ed] the discharge of pollutants from water transfers." *Id.* The Court distinguished the District of Columbia Circuit decision in *NRDC v. EPA* and the Fourth Circuit's decision in *VEPCO* because in those cases the "regulations operated as 'restriction[s] on the untrammeled discretion of the industry.'" *Id.* (quoting *NRDC v. EPA*, 673 F.3d at 404-05).

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[9] To be clear, the Agencies dispute many of the States' allegations of increased burdens, in particular their allegations of imminent and irreparable harm. But it is indisputable that the States are required to consider the scope of waters of the United States in their implementation of the CWA.

In stark contrast, the Clean Water Rule does not "free the industry from constraints" and it does not simply "allow the discharge of pollutants"; it instead limits point sources and restricts the discretion of persons who wish to discharge into waters that now fall within the reach of the Act established by the Rule. As the district court here correctly explained, "the Eleventh Circuit in *Friends* [*of the Everglades*] found that it did not have jurisdiction under § 1369(b)(1)(E) to review the water transfer rule at issue in that case, because rather than *restricting* pollutants, the water transfer rule *allowed* entities to pollute and exempted entities from the requirements of the Administrator's permit program." Doc. 77 at 4.

The States also claim that *Friends of the Everglades* did not consider "indirect effects" to determine if the EPA action constituted a "limitation." States Br. at 20. But that is beside the point, because the Clean Water Rule establishes where the CWA's restrictions on both point sources and permit issuers apply, as described above. The States themselves describe the impact as "direct": their brief claims that the "only *direct* impact on parties is subjecting them to the Clean Water Act in the first place." States Br. at 15-16 (emphasis added).

The States also claim that the Clean Water Rule should not be reviewable in the court of appeals because a hypothetical rule that solely constricted the reach of the Act would not be reviewable. States Br. 16, 19. But that suggestion is flatly inconsistent with this Court's analysis in *Friends of the Everglades*, which makes clear that reviewability turns on whether or not the rule at issue imposes a restriction. A rule

that "imposes no restrictions on entities engaged in" the relevant activity does not fall under Section 509(b)(1)(E), 699 F.3d at 1286, while a rule that imposes a restriction does.[10] Because the Clean Water Rule imposes restrictions on both point sources and permit issuers, it falls within Section 509(b)(1)(E). Borrowing the words of the district court, "the undeniable and inescapable effect" of a rule comprehensively defining "waters of the United States" "is to restrict pollutants and subject entities to the requirements of the [CWA's] permit program." Doc. 77 at 5; *see also Murray Energy Corp. v. EPA*, No. 1:15-cv-110, 2015 WL 5062506, at *6 (N.D. W.Va. Aug. 26, 2015). The very essence of defining what "waters of the United States" are under the CWA is to impose restrictions on permit writers and those who would like to discharge pollutants into waters that are defined to be part of the "waters of the United States."

B. The Clean Water Rule falls within Section 509(b)(1)(F) because it is a regulation that governs the issuance of permits.

Section 509(b)(1)(F) provides for exclusive jurisdiction in the court of appeals for EPA action "in issuing or denying any permit under section 1342 [Section 402 of the CWA]." 33 U.S.C. § 1369(b)(1)(F). As described below, the circuit courts have

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[10] Of course, the federal government disagreed with this Court's decision in *Friends of the Everglades* and petitioned the Supreme Court for a writ of certiorari to review this Court's judgment that the water-transfer rule does not fall within Section 509(b)(1)'s review provision. While the Supreme Court denied that petition, *EPA v. Friends of the Everglades*, 134 S. Ct. 421, 421 (2013), that is no indication that the Supreme Court approved of this Court's judgment, *see, e.g.*, *United States v. Carver*, 260 U.S. 482, 490, 43 S. Ct. 181, 182 (1923) ("The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.").

exclusive jurisdiction over Section 402 permit issuances and denials as well as regulations relating to permitting itself. *Friends of the Everglades* limits the reach of Section 509(b)(1)(F) to permitting regulations that have the effect of requiring permits, and not regulations that solely exempt a category of activities from the permit requirement. Because the Clean Water Rule has the effect of triggering permit requirements, establishing that the CWA's permitting program applies to particular waters and particular discharges into those waters, the Rule falls within Section 509(b)(1)(F).

The case law provides that Section 509(b)(1)(F) applies to regulations relating to permitting. The Supreme Court has held that judicial review of actions "functionally similar" to the issuance or denial of a NPDES permit should be in the courts of appeals. *See Crown Simpson*, 445 U.S. at 196, 100 S. Ct. at 1094. In that case, the court of appeals had held that it lacked jurisdiction over an EPA veto of a NPDES permit issued by an approved state based on its reading of the "clear and unmistakable language" of Section 509(b)(1)(F). *See Crown Simpson Pulp Co. v. Costle*, 599 F.2d 897, 903 (9th Cir. 1979) (quoting *Washington v. EPA*, 573 F.2d. 583, 587 (9th Cir. 1978)), *rev'd*, 445 U.S. 193, 100 S. Ct. 1093 (1980); *see also supra* at 22-23. The Supreme Court rejected that reading, concluding that initial review of EPA's veto of a permit proposed by the state permitting authority should be in the circuit courts, even though the veto was not a "denial" of a permit per se. 445 U.S. at 196-97, 100 S. Ct. at 1094-95.

Consistent with *Crown Simpson*, courts of appeals have recognized their statutory authorization under Section 509(b)(1)(F) to review EPA-promulgated rules that regulate the underlying permit procedures. For example, the Sixth Circuit recently held that "[t]he jurisdictional grant of § 1369(b)(1)(F) authorizes the courts of appeals 'to review the regulations governing the issuance of permits under section 402, 33 U.S.C. § 1342, as well as the issuance or denial of a particular permit.'" *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 933 (6th Cir. 2012) (quoting *Am. Mining Cong. v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992)).

The Ninth Circuit has repeatedly held that the courts of appeals have exclusive jurisdiction under Section 1369(b)(1)(F) to review EPA rules relating to permitting. *See NRDC v. EPA*, 526 F.3d 591, 601 (9th Cir. 2008) (recognizing the court's original jurisdiction to review an EPA rule that exempted discharges of oil and gas construction activities from NPDES permitting under Section 509(b)(1)(F), which "authorizes appellate review of EPA rules governing underlying permit procedures" (citation omitted)); *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 843 (9th Cir. 2003) (recognizing the court's jurisdiction under Section 509(b)(1)(F) to review rule specifying which municipal separate storm sewer systems and stormwater discharges are and which are not subject to NPDES permitting); *NRDC v. EPA*, 966 F.2d at 1296-97, 1304-06 (asserting jurisdiction under Section 509(b)(1)(F) to review a stormwater discharge rule that exempted from NPDES permit requirements various types of "light industry," construction sites less than five acres in size, and certain oil

and gas activities, based on the court's "power to review rules that regulate the underlying permit procedures").[11]

The Second Circuit exercised original jurisdiction over consolidated challenges to EPA's Concentrated Animal Feeding Operations Rule. The rule set forth NPDES permitting requirements, including provisions requiring operations of a certain size to seek a permit. The rule also interpreted the CWA definition of "point source" to determine when a discharge is considered a regulated discharge from a Concentrated Animal Feeding Operation as compared to when a discharge is exempt as agricultural stormwater. The rule was thus similar to the line-drawing in the Clean Water Rule because it concerned "challenges to the types of discharges subject to regulation." *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 495-98, 504-06 (2d Cir. 2005). The Fifth Circuit more recently considered consolidated challenges to the Concentrated Animal Feeding Operations Rule that EPA promulgated following the Second Circuit's remand decision in *Waterkeeper*. *See Nat'l Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011). In that case, the court analyzed EPA's permitting regulations that identify the types of dischargers or activities that require an NPDES permit. *Id.* at 749-51.

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[11] The Ninth Circuit took a narrower view of Section 509(b)(1)(F) in *Northwest Environmental Advocates v. EPA*, a case involving EPA's rule that completely exempted certain ballast water and other vessel discharges from NPDES permitting. 537 F.3d 1006 (9th Cir. 2008). The court focused on the finding that the regulation at issue completely exempted a category of activities from regulation, consistent with the reasoning of *Friends of the Everglades*.

There is no relevant distinction to be made between those cases, which accepted court of appeals review of EPA rules that identify which *discharges* and *dischargers* are subject to permit requirements, and the Clean Water Rule, which identifies which *waters* are subject to permit requirements. As in those cases, the Rule governs the issuance of permits under Section 402. By identifying where Section 301's prohibition on discharge applies, the Rule establishes where a Section 402 permit is required. The Rule thus directly implements the permitting requirement of the Act.

The States' complaint once again cuts against their argument and demonstrates why the Agencies are correct as to Section 509(b)(1)'s applicability. The complaint identifies the Rule's impact on Section 402 permitting as an important basis for the States' challenge. For example, according to the States, "the Rule has a significant effect on the States' administration of the [National Pollutant Discharge Elimination System] permitting program" because the States will be "required to process . . . additional federally-mandated Clean Water Act permit applications." Doc. 31 ¶ 91. The States further allege that the Rule "imposes great harm upon the States and their citizens" because it "places significant burdens upon homeowners, business owners, and farmers by forcing them to obtain costly federal permits in order to continue to conduct activities on their lands that have no significant impact on navigable, interstate waters." Doc. 31 ¶ 10. The Clean Water Rule also allegedly will require the States to apply for more federal permits themselves: "State agencies also apply for

federal permits themselves when they seek to construct roads, schools, and hospitals. The Rule expands the number of these activities that require a permit and imposes costs on States in their capacity as permit applicants as well." Doc. 31 ¶ 93.

The States again incorrectly rely on *Friends of the Everglades*, making the same mistake with respect to the Court's analysis of Section 509(b)(1)(F) as they do with respect to Section 509(b)(1)(E). Like its analysis of "other limitation" in subsection (E), the Court's analysis of subsection (F) was based on the finding that the water-transfer rule "exempts a category of activities from the requirements of a permit and ensures that no permit will ever be issued or denied for discharge from a water transfer." 699 F.3d at 1287. That is not the case with the Clean Water Rule, which establishes where a property owner must secure a Section 402 permit.

II. The nationwide scope and importance of the Clean Water Rule support centralized review in the courts of appeals, and the States' resort to canons of construction does not help them.

If ever there was a rule with nationwide scope and fundamental importance about the reach of the Clean Water Act, it is the Clean Water Rule. As explained below, this strongly supports that review should be in the courts of appeals under Section 509(b)(1).

The courts have repeatedly held that national rules are best reviewed directly in the courts of appeals. As the District of Columbia Circuit has explained in an opinion by then-Judge Ginsburg, "national uniformity . . . is best served by initial review in a court of appeals." *NRDC v. EPA*, 673 F.2d at 405 & n.15; *accord Am. Iron & Steel Inst.*

v. EPA, 115 F.3d 979, 986 (D.C. Cir. 1997). Further, "the case for first instance judicial review in a court of appeals is stronger for broad, policy-oriented rules." *NRDC v. EPA*, 673 F.2d at 405.

The Clean Water Rule is plainly a rule with national implications. The Rule applies nationwide. 80 Fed. Reg. at 37,054, 37,057. The Rule defines a critical term that is used "100 times in the Clean Water Act, in nearly every section." States Br. at 6. The Agencies promulgated the Rule following the submission of more than a million comments from commenters located in all parts of the United States and after calls from the judiciary to clarify the reach of the CWA. *Id.* at 37,057; *supra* at 6-7. It amounts to one of the most important Clean Water Act rules ever promulgated.

The States claim that the nationwide scope of the Clean Water Rule indicates that review should be in district courts across the country, rather than in the Sixth Circuit pursuant to Section 509(b)(1) and 28 U.S.C. § 2112(a). States Br. at 30. But that ignores the case law discussed above. And it would appear to reserve direct court of appeals review for less-foundational rules, which is plainly not what Congress intended.

Moreover, accepting the States' claim that the Rule should be reviewed first in the district courts would lead to a waste of judicial and party resources as well as

substantial delays in resolving challenges to the Rule.[12] Different district courts could reach different conclusions regarding the Clean Water Rule, "with the attendant risk of inconsistent decisions initially and on appeal." *NRDC*, 673 F.2d at 405 n.15.[13]

The States also contend that holding that the Clean Water Rule falls under Section 509(b)(1)(E) or (F) would render other subsections of (b)(1) superfluous and

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[12] Amici American Farm Bureau et al. claim that the challenges to the Rule are best heard in district court, since "district courts are better equipped to handle" motions regarding the sufficiency of the record and discovery. Am. Farm Bureau Br. at 13. As the Agencies have repeatedly explained, the challenges to the Rule should be resolved based on the administrative record compiled and certified by the Agencies. It is only because parties have attempted to use extra-record deliberative documents that the Agencies brought the likelihood of motion practice to the attention of the MDL Panel in the Agencies' motion to consolidate. *In re Clean Water Rule: Definition of "Waters of the United States,"* MDL No. 2663, Doc. 74 at 8-10. In any event, the courts of appeals routinely handle petitions for review of agency actions, including the issues that regularly arise about the content of the administrative record. *See, e.g., CTS Corp. v. EPA*, 759 F.3d 52, 64-65 (D.C. Cir. 2014) (discussing supplementation of administrative record in petition for review of EPA action).

[13] The other cases that the States rely on do not support their argument that review of the Clean Water Act lies in the district court. In *American Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165 (D.D.C. 2008), the district court reviewed a definition of "waters of the United States" that EPA had promulgated under Section 311 of the Act, 33 U.S.C. § 1321, which establishes liability for the discharge of oil or hazardous substances. That definition was therefore a "limitation," but because Section 311 is not one of the sections enumerated in Section 509(b)(1), review of that limitation was not exclusive to the court of appeals. *NRDC v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975), appears to have granted review of a definition of "waters of the United States," but the opinion does not consider any jurisdictional issue or disclose the basis for the court's review. For that reason, and because it was decided prior to both the Supreme Court's decision in *E.I. Du Pont* and the D.C. Circuit's decision in *NRDC v. EPA*, it has no persuasive value here.

that virtually all EPA actions would be reviewable only under Section 509(b)(1). States Br. at 23-27. Those arguments too miss the mark.

The States incorrectly contend that the "rule of superfluity" dictates that the Rule cannot constitute an "other limitation" under Section 509(b)(1)(E). As explained above, a plain text reading of the phrase "other limitation under sections 1311, 1312, 1316, or 1345" can only refer to limitations promulgated under those sections that are not effluent limitations. *See VEPCO*, 566 F.2d at 449 (4th Cir. 1977) ("[W]e cannot assume that [Section 509(b)(1)(E)'s] inclusion [of the phrase 'other limitation'] was meaningless or inadvertent."). Under the States' logic, viewing a regulation promulgated under Section 301, 33 U.S.C. § 1311, (like the Clean Water Rule) that restricts discharges (like the Clean Water Rule) as an "other limitation" would make Section 509(b)(1)(A) superfluous, since new source performance standards, identified in Section 509(b)(1)(A) are also a restriction under Section 1316. Although "standards" and "limitations" are both restrictions, the Act distinguishes between the two terms in a distinct manner throughout the Act. *See, e.g.*, 33 U.S.C. § 1312 ("water quality related effluent limitations"), *id.* § 1313 ("water quality standards"). Further, new source performance standards under Section 1316, unlike effluent and other limitations, are immediately and directly enforceable. *See id.* § 1316(b)(1)(B) (stating that standards are "effective upon promulgation"). Thus, it makes sense that Congress would have separately listed new source performance standards in Section 509(b)(1)(A).

The States also maintain that finding the Clean Water Rule reviewable under Section 509(b)(1) would render subsection (B) superfluous. States Br. at 25. While the States refer to subsection (B), they actually quote the language of subsection (C)—"an EPA action 'promulgating any effluent standard, prohibition, or pretreatment standard under section 1317,'" States Br. at 25. First, with respect to subsection (C), it makes sense that Congress would have specifically referenced Section 1317 in subsection (C) because subsection (E) does not include Section 1317. Specifically, subsection (C) refers to, for example, "promulgating any effluent standard . . . under section 1317"; subsection (E) only refers to "effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title."

Second, returning to subsection (B) (the subsection the States invoke, but do not quote), that provision applies to EPA action "in making any determination pursuant to *section 1316(b)(1)(C) of this title*," this title being title 33. The problem is, the section of the Act that subsection (B) refers to *does not exist*—there is no 33 U.S.C. § 1316(b)(1)(C). That Section 509(b)(1) refers to a section of the Act that does not exist seriously undermines the States' plain-language argument. A court should be extremely wary of attributing a plain meaning to the text or concluding that it fully and accurately reflects Congress's intent where a statutory provision refers to something that does not exist. At the very least, such a situation renders the provision ambiguous, and "[i]f there is any ambiguity as to whether jurisdiction lies with a district court or with a court of appeals, we must resolve that ambiguity in favor of

review by a court of appeals." *Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186, 192 (7th Cir. 1986); *NRDC v. Abraham*, 355 F.3d 179, 193 (2d Cir. 2004) (citing cases from the Second, Seventh, Tenth, and D.C. Circuits for the proposition that "when there is a specific statutory grant of jurisdiction to the court of appeals, it should be construed in favor of review by the court of appeals"); *see also Nuclear Info. & Res. Svc. v. U.S. Dep't of Transp. Research & Special Programs Admin.*, 457 F.3d 956, 960 (9th Cir. 2006).

Nor does holding that the Clean Water Rule is subject to Section 509(b)(1) threaten to render virtually all EPA actions reviewable only under Section 509(b)(1). For example, district courts review EPA actions taken in connection with CWA Section 303, 33 U.S.C. § 1313. *See, e.g., Fla. Wildlife Fed'n v. Jackson*, 853 F. Supp. 2d 1138 (N.D. Fla. 2012) (district court review of EPA-promulgated water quality standards under Section 303); *Am. Farm Bureau Fed'n v. EPA*, 984 F. Supp. 2d. 289 (M.D. Penn. 2013) (district court review of EPA-promulgated total maximum daily load under Section 303), *aff'd*, 792 F.3d 281 (3d Cir. 2015). District courts review challenges to administrative compliance orders issued by EPA pursuant to CWA Section 309(a), 33 U.S.C. § 1319(a). *Sackett v. EPA*, 132 S. Ct. 1367 (2012). District courts have also reviewed EPA's and the Corps' rules that exclusively implement Section 404. *See Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 440 F.3d 459 (D.C. Cir. 2006) (affirming district court review of rule promulgated by EPA and the Corps pertaining to dredge or fill material under CWA Section 404). And district courts review EPA's decision to withdraw specification of sites for disposal under

CWA Section 404(c), 33 U.S.C. § 1344(c). *See, e.g., Mingo Logan Coal Co. v. EPA*, 70 F. Supp. 3d 151 (D.D.C. 2014). All of these decisions are consistent with the Agencies' view of the limits of Section 509(b)(1).[14]

The States also claim that there is a "special hazard" in reading Section 509(b)(1) too broadly, in that, beyond 120 days, one cannot seek judicial review of EPA's action. States Br. at 17; *see* 33 U.S.C. § 1369(b)(1), (2). But this concern is plainly misplaced here. The Clean Water Rule is a national rule of unique importance, following a massive rulemaking procedure and more than a million comments. There are now more than two dozen challenges against the Rule pending in the district courts and Sixth Circuit. There simply is no risk that this Rule will slip through the 120-day period without scrutiny. It is already subject to judicial review.

III. The Court should wait until the Sixth Circuit has decided the jurisdictional question.

The States' approach here threatens to lead to confusion and chaos. The States filed both the district court action that led to this interlocutory appeal and what they term "a protective petition for review" in this Court, States Br. at 10, which the MDL Panel later transferred, along with all the other pending petitions for review, to the Sixth Circuit. The district court here denied the States' motion for a preliminary

[14] Relatedly, the States assert that that "most actions must be brought in district court under the APA." States Br. at 6. They do not cite anything supporting this "most" argument. In any event, if EPA's action fits within Section 509(b)(1), 33 U.S.C. § 1369(b)(1), then review can only be sought in the court of appeals.

injunction on August 27, 2015. The States did not immediately file an appeal from that order. Instead, on September 9, 2015, the States filed three documents that threaten the orderly resolution of the jurisdictional issue—the notice of appeal in this case; a motion in the Sixth Circuit to dismiss their "protective petition for review" for lack of jurisdiction under Section 509(b)(1); and another motion in the Sixth Circuit seeking a stay of the Clean Water Rule "on a nationwide basis," asking the Sixth Circuit to block further implementation of the Clean Water Rule pending that Court's review. Having squarely presented the Section 509(b)(1) jurisdictional question to the Sixth Circuit, the States then asked this Court to expedite their appeal from the district court's denial of a preliminary injunction, a motion this Court granted.

Notwithstanding the fact that this Court expedited briefing in this appeal, it would still be appropriate (indeed, it would be the far better course) for this Court to await a ruling from the Sixth Circuit on the question of the court of appeals' jurisdiction under Section 509(b)(1) before proceeding further. After this Court granted the motion to expedite this appeal, the Sixth Circuit established an orderly briefing process for the jurisdictional question that the States raised there. *See supra* at 10. As the Court designated by the MDL Panel under the random selection procedures of 28 U.S.C. § 2112(a), the Sixth Circuit is best positioned to resolve that question in a way that will clarify how judicial review of the Rule should proceed for the States and all other parties seeking review of the Rule. If the Sixth Circuit confirms its exclusive jurisdiction, then the States can pursue their petitions for review

in the Sixth Circuit, and there will be no need for adjudication of the many, disparate district court cases (including this one). If, on the other hand, the Sixth Circuit decides that Section 509 does not apply, then this Court could consider the Sixth Circuit's reasoning in deciding the States' appeal (or if this case has been consolidated by the MDL Panel under Section 1407, the Court could dismiss the appeal and the States could raise their arguments before the district court chosen by the MDL Panel).

Otherwise, there is a risk of conflicting decisions and confusion about where judicial review should occur. Before this Court proceeds any further, the circuit court where the MDL Panel has centralized all of the petitions for review (the Sixth Circuit)—and where the States themselves have asked for a jurisdictional ruling by moving to dismiss their own petitions—should resolve the jurisdictional question. If this Court were to proceed now, then potential chaos looms. For example, if this Court were to conclude that exclusive jurisdiction rests in the Sixth Circuit and then the Sixth Circuit were to conclude that it lacked jurisdiction, the States would be left without a court to turn to for judicial review. The situation is no better if the Sixth Circuit affirms its own jurisdiction while this Court finds that the district court has jurisdiction. That conflict would leave the Clean Water Rule open to simultaneous challenge in both district courts and courts of appeals, depending on the Circuit. Those potential problems can be avoided if this Court were to defer ruling on the question presented in this appeal until the Sixth Circuit has decided the issue.

While the Agencies do contest the district court's jurisdiction over the States' action, because (as the district court correctly found) judicial review of the Clean Water Rule rests originally and exclusively in the courts of appeals, 33 U.S.C. § 1369(b)(1), they do not ask this Court to defer resolving this appeal now on the grounds that this Court should decline to review the district court's holding. The Agencies recognize that this Court has appellate jurisdiction to consider the issue of subject-matter jurisdiction under the Clean Water Act. Rather, the reason this Court should defer a decision is because the States have placed that issue before another court of appeals at the same time, and that other court of appeals is where the MDL Panel transferred the various petitions for review. While the Supreme Court may sometimes benefit from having more than one court of appeals decide an issue, the States here are not entitled to create a conflict themselves by raising the same arguments in two courts simultaneously.

CONCLUSION

The district court's denial of the States' motion for a preliminary injunction should be affirmed and the case should be remanded to the district court to be dismissed for lack of subject matter jurisdiction. *See Doe v. FAA*, 432 F.3d 1259, 1261 (11th Cir. 2005) (in appeal from grant of preliminary injunction, holding that district court lacked subject matter jurisdiction and remanding with instructions to dismiss).

Respectfully submitted,

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September 28, 2015
90-5-1-4-20481

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,926 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system and that the foregoing brief was served by the Court's CM/ECF system, on counsel representing the parties to this matter. In addition, Britt Grant and Timothy Butler have consented to accept service on behalf of all plaintiffs-appellants, including those who are not being served by the Court's CM/ECF system.

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EXHIBIT “D”

FA15cleA

UNITED STATES JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION
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IN RE: CLEAN WATER RULE:
DEFINITION OF "WATERS OF THE
UNITED STATES" LITIGATION,

MDL # 2663

----------x

New York, N.Y.
October 1, 2015
12:55 p.m.

Before:

The United States Judicial Panel on Multidistrict Litigation

HON. SARAH S. VANCE, (Eastern District of Louisiana)
HON. MARJORIE O. RENDELL, (Third Circuit)
HON. CHARLES R. BREYER, (Northern District of California)
HON. LEWIS A. KAPLAN, (Southern District of New York)
HON. ELLEN SEGAL HUVELLE, (District of Columbia)
HON. R. DAVID PROCTOR, (Northern District of Alabama)
HON. CATHERINE D. PERRY, (Eastern District of Missouri)

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(Case called)

MS. MANN: Good morning, your Honor. Martha Mann for the Environmental Protection Agency and Army Corps of Engineers.

JUDGE PROCTOR: What is the status of the administrative record in this case?

JUDGE VANCE: That was my question.

MS. MANN: The administrative record has been compiled and certified. The index to the record has been filed in the Circuit.

JUDGE PROCTOR: What discovery needs to take place in each one of these cases then, beyond that?

MS. MANN: We do not believe, your Honor, that there should be discovery but we are not in control of that. What we have here is not a plain vanilla APA case. We don't come to this panel very often but when we do it is because this is a compelling reason.

Here, in these cases already, many of the plaintiffs have been have been relying non-record documents that they acknowledge are not part of the certified record. They have presented them in connection with their complaints --

JUDGE PROCTOR: For purposes of trial?

MS. MANN: 42 have presented them on the merits in a preliminary injunction motion and as part of their complaints and argued to the Courts that these are documents that should

be used by the Courts to decide those issues.

JUDGE HUVELLE: Have there been any rulings on these arguments already?

MS. MANN: Yes, Judge. In one case, the case in which there is a preliminary injunction in place, the Judge acknowledged that he did not have much of the record and he said that he had made his decision based on a handful of documents and delivered documents that he agreed were not part of the administrative record.

JUDGE KAPLAN: But why isn't the fact that you now have a certified administrative record something that makes that argument moot?

MS. MANN: The record has always been what it is. Instead of the laying -- and this is a record, your Honor -- it is not a secret. Most of the record documents, almost all of them were posted on regulations.gov. This was an extensive rule-making, these are documents that parties have had access to.

JUDGE KAPLAN: I have the picture. I decided the proprietary college rule challenge. You now have a complete certified record. There is no doubt what is in it. There is some latitude for people to try to supplement the record, I understand that, but there is law on that and I don't see what the problem is.

MS. MANN: Well, the problem is if we are in 11

different district courts and 14 different cases and this Judge decides that he is going to either consider additional documents that everybody acknowledges are outside of the record or allow discovery which several of the parties have suggested they may seek and another judge says she is not going to consider non-deliberative or deliberative documents we are dealing with different records in different cases.

JUDGE KAPLAN: Isn't this situation an inherent situation for the government in that the government gets challenged on all sorts of decisions by all sorts of plaintiffs potentially in all 12 Circuits -- whatever the number is -- and potentially in 94 different District Courts and you are going to get interlocutory rulings or rulings, even final rulings in some of those venues that you will be happy with and you will get some you won't be happy with and eventually the Supreme Court sorts it out.

Why is this any different?

MS. MANN: This case is different because it is similar to the process that the panel has already initiated with the petition practice. This is a case that there isn't a clear decision yet as to whether the case should be heard --

JUDGE VANCE: You want to centralize this case on the merits. We centralize pretrial proceedings. If we centralize an injunction case on the merits for review of the administrative record, that's it. That's the merits. That's

not pretrial proceedings. There aren't any pretrial proceedings except these arguments about the record.

MS. MANN: It is not just arguments about the record.

JUDGE VANCE: Aren't you going to resolve a decision on the merits if we centralize these cases in DDC, isn't there going to be a decision on the merits of the case because the injunction will be before that judge?

MS. MANN: We would expect there would be, your Honor.

JUDGE BREYER: And isn't that process exactly the opposite of what the Supreme Court has encouraged the procedure to be which is that Judges may disagree on their interpretation of the law, it works its way up either it starts at the District Court it goes to the Court of Appeals, the Court of Appeals looks at it and then, if there is a division among courts of appeal, the Supreme Court steps in and tries to reconcile or resolve that difference.

So, their argument -- the Supreme Court's argument has been continually we want to have the argument explored by a number of judges to see whether or not there is a consensus or not and if there is not a consensus the Supreme Court will move in. And doesn't your application here completely short circuit that? It takes it away from that process and it looks to one Court to try to come up with their -- its hype -- interpretation of what the law should be.

MS. MANN: I say two points in response, Judge Breyer.

First, Congress, in deciding to create statutes like 2112 and 1407 recognize that there is value to centralization or consolidation where you would avoid inconsistent results.

Secondly, where you have this many parties -- we have nearly a hundred very diverse interests that are suing the United States on this rule. It is almost unthinkable that there is not an argument that is going to be presented whether it is at the Circuit Court or the District Court and if it is a question, an issue of national significance as the Greenhouse Gas Rule which came out of the D.C. Circuit, as the Cooling Water Intake Structure which came out of the Second Circuit and the Fifth Circuit, those are cases that clearly get to the Supreme Court without a circuit split. So, it doesn't do an end run around that, what it does is it creates one group of litigants that are working with the same record, you are avoiding a patchwork of preliminary injunctions like we have right now. We have an injunction in 13 states and in 37 states this rule is being implemented and enforced for the public --

JUDGE RENDELL: We centralize for pretrial proceedings so that discovery can be conducted in an efficient manner and that's not this case, is it?

MS. MANN: It is not a case that should have discovery, your Honor, but if it does end up having discovery, if we are going to have Judges that are going to allow discovery, shouldn't that discovery --

JUDGE BREYER: Why don't you go to Congress and get them to change the statute to say, look, you do exactly what Judge Rendell has described except in cases involving what you have here and in that case it all ought to be consolidated because it will make it a lot easier for the government to deal with it.

MS. MANN: Well, I think one of the facts that everybody I think recognizes is that often when the cases are consolidated for purposes of 1407 they do end up being resolved by the transferee court.

JUDGE PERRY: But we have a statute we are bound by. We can't just make it up and do what seems like a sensible thing, we have to follow the law, right?

MS. MANN: We believe, your Honor, that the statute is satisfied. There are common questions of fact. They are --

JUDGE VANCE: They're on the record.

JUDGE BREYER: It is resolved.

MS. MANN: Well, not if we are going beyond the record, your Honor. If we go beyond the record --

JUDGE PROCTOR: Counsel, your position is that the administrative record ought to be it, there should not be any other basis for challenging the rule, correct?

MS. MANN: That is our position, your Honor.

JUDGE PROCTOR: And if Congress wanted that to be the law it could have easily have done this: It could have said an

administrative procedure act challenges the rule making. Those are always consolidated or centralized in the District Court for the District of Colombia. In fact it says that in certain instances that's exactly how the APA rules are to be implemented, right?

MS. MANN: I believe in certain statutes themselves but not in the APA.

JUDGE PROCTOR: That's right. So you are outside that heartland.

I think what my colleagues are trying to tell you is this is the price of doing business when you are the government. You are going to get challenged around different places. You make your argument that discovery should not be permitted. You make your argument that the rule -- that the administrative record supporting the rule should be it in terms of consideration by the Court. If you lose on those things you have opportunities to appeal that, correct?

MS. MANN: Right; and then we end up with potentially inconsistent decisions in what is the record in all of these cases.

JUDGE HUVELLE: Will the Sixth Circuit's decision play in when you get that? If they decide that the jurisdiction lies in the Court of Appeals that's the end of it.

MS. MANN: It should be, your Honor, but I don't know that that is a guarantee. Right now we have one of the cases,

the District Judge there in the Southern District of Georgia agreed with the United States that jurisdiction does lie in the Circuit Court. She did not, however, dismiss that suit. That case has been appealed to the Eleventh Circuit and we are specifically in a situation where there are inconsistent jurisdictional decisions at the District Court level that are now going to be decided alternatively by the Sixth Circuit and the Eleventh Circuit.

JUDGE KAPLAN: This happens all the time. All the time.

JUDGE VANCE: So the record is certified in the Sixth Circuit?

MS. MANN: That's correct, your Honor.

JUDGE VANCE: How did you do that with all of these people fighting you? I mean, I thought these same petitioners filed protective petitions for review in the Sixth Circuit.

MS. MANN: Right, and under Section 2112 we have to file the record in the Circuit where the panels consolidates the cases.

JUDGE VANCE: But I mean are they raising all of these questions about adding to the record? They can't do that there is that what you are saying.

MS. MANN: They could, but they prefer to argue in the district courts. I think their plan of attack has been to try to advance the cases as far as they can in the district courts.

JUDGE VANCE: Thank you.

MS. MANN: Thank you.

JUDGE VANCE: Mr. Bein.

MR. BEIN: May it please the Panel, Philip Bein on behalf of seven states and the District of Columbia.

Unlike other states, we support this rule and we support the government's motion. We have intervened in the Sixth Circuit petitions to protect our waters and we need to intervene in all of the 14 District Court cases to do so as well because if there is a judgment to vacate the rule in any one of those 14 cases that could have nationwide effect and harm our waters.

In the absence --

JUDGE RENDELL: That would go back to the prior rule, correct? It will revert to the prior rule?

MR. BEIN: Correct.

JUDGE RENDELL: In whatever jurisdiction that is affected?

MR. BEIN: It would. If the rule was vacated we would revert to the prior rule but remember this rule was promulgated to create a better fit between the objective of the Clean Water Act in protecting downstream waters and how the Act actually works and we believe the rule enhances the protection of our waters.

JUDGE VANCE: That's a merits argument.

MR. BEIN: I understand it is a merits argument but I wanted to explain that forcing us to have to participate in 11 different courts to protect our interests would be extraordinarily burdensome and very unfair.

JUDGE KAPLAN: Nobody is forcing you to do anything.

MR. BEIN: Well, we are not forced to but we are at risk that our waters, if we don't intervene to assert our interests, that our waters will be impaired by a vacatur by any one of those 14 courts.

JUDGE BREYER: That could happen all the time with decisions. You can have some decision of another jurisdiction that somehow may impact something that you have an interest in. That's the way litigation works. If you have an interest in something, go there. If you don't have an interest, you don't go there.

MR. BEIN: The question is whether it makes sense for us to have to go to 11 Courts given our limited --

JUDGE BREYER: Maybe you will get 10 decisions in your favor rather than one court.

JUDGE HUVELLE: The problem with an MDL is it doesn't exist to make everything rational or across the board, it is where there is a need for common discovery, common factual development and so that the pretrial proceedings can be more rational. You may be right that it is going to be inefficient, it may well be inefficient for the number of judges that are

going to have to decide this but we would be making a large exception to the purposes for an MDL if we centralize in a matter where there may be squabbles over the administrative record but not a case subject to discovery.

MR. BEIN: I don't believe that's the case here. There are pretrial proceedings that have already occurred in a number of these cases and that are very likely to occur in the future. They're called preliminary injunction motions. And one of the facts, a common set of facts in each of those motions is the impact of vacatur of the rule or the impact of the rule on the equities and interests in third-party --

JUDGE VANCE: That's an individual, specific question, though.

MR. BEIN: It is an individual question as to the harm to the plaintiffs in those cases but they also have to consider -- judges deciding those motions have to consider the impact to the public interest and to third-parties. We are seven states, we are important third-parties and these are common issues that happen in all of these cases, these are pretrial proceedings. We think that that fits well within the purpose of consolidation under this rule.

JUDGE VANCE: Thank you.

Next up, Mr. Lin. What is your position?

MR. LIN: Good afternoon, your Honors. Elbert Lin, West Virginia Solicitor General. I am here on behalf of 18

different states in four litigations.

I think this Panel, you have basically put your finger on it. The problem with all of the other arguments on the other side both by the federal defendants and by the other states is that their arguments go to every single kind of APA case that happens. Anyone that has a nationwide impact there could be cases failed in a number of different jurisdictions. There could always be questions about supplementing the record. All of those questions were at issue in a case a couple months ago where this Panel denied centralization.

I just want to point out one other so I am not going to belabor the point but there is one other thing I want to emphasize and that is that these cases are at different procedural postures and you have heard the other side mention there is an injunction in the District of North Dakota that, by the government's own decision, their own affirmative advocacy only applies in 13 states.

Also in the Southern District of Georgia there is an appeal pending in the Eleventh Circuit. If these cases were to be centralized there would be some serious questions about the application of law of the case. What happens to the District of North Dakota injunction? What happens to the Eleventh Circuit decision when it comes down? And these are all sticky questions that don't need to be raised in this case because the government has conceded that there is no discovery and this is

a run of the mill, facial rule making challenge under the APA.

Thank you.

JUDGE HUVELLE: There are basically appeals in every circuit on the question of who has jurisdiction in the circuit or the district court. Are they pending in most of the circuits, the issue of who has got jurisdiction here?

MR. LIN: The issue of who has got jurisdiction is obviously being addressed by the Sixth Circuit on the protective petitions that were filed. In the district court proceedings the District of North Dakota, when he issued the preliminary injunction, decided that the district courts have jurisdiction.

JUDGE HUVELLE: Right.

MR. LIN: And then in the Eleventh Circuit the Southern District of Georgia decided in the context of a PI that the district courts don't have jurisdiction and that's now gone up to the Eleventh Circuit.

JUDGE HUVELLE: But North Dakota didn't go to the Circuit?

MR. LIN: The federal government has not appealed, your Honor.

JUDGE VANCE: That was going to be my question, on whether the North Dakota injunction was appealed. And it was not.

MR. LIN: It has not been appealed. I don't believe

the time has yet run though.

JUDGE VANCE: All right. Thank you.

MR. LIN: Thank you, your Honor.

JUDGE VANCE: Mr. Seby?

MR. SEBY: Yes, your Honor. Paul Seby on behalf of the State of North Dakota who have filed challenge to the All The Waters of United States rule in the District of North Dakota. We strongly oppose centralization of these cases.

The North Dakota case is the only active case of several cases and it is much further along. The Court in North Dakota denied the federal government's motion to stay the case pending the outcome of this proceeding because it said doing so would deprive us of our opportunity to pursue a preliminary injunction. Based upon that ruling we did file a motion for preliminary injunction prior to the implementation of the rule. The court held a hearing dropping its schedule to allow us to have a hearing prior the implementation of the rule. It held briefing on the matter and heard from witnesses; five from North Dakota, one from Alaska, one from Arizona and one from New Mexico, and found that the states demonstrated their high burden of establishing entitlement to preliminary injunction.

JUDGE VANCE: What happens to your injunction if we send these cases to the District of Colombia?

MR. SEBY: Our argument would be, in that unfortunate circumstance, that our injunction carries forward because the

Court has already found irreparable harm and a substantial likelihood of success on the merits and so we would argue if put in that position that we are still entitled to that judicial finding. But that would be a tremendous disruption of that case because the other parties, the other states that you would centralize to that jurisdiction presumably would be asking the Court for an injunction on their own raising different facts and different issues and so forth.

JUDGE VANCE: If the Courts found there was no jurisdiction it could wipe out your injunction?

MR. SEBY: It would, yes, and that would be a tremendous harm. We maintain in the District Court Judge Erickson found he has jurisdiction to issue the injunction and we opposed and tomorrow we will be filing a motion to dismiss the action in the Sixth Circuit arguing and advocating that the Clean Water Act for this kind of rule places original jurisdiction in the U.S. District Court and not the Court of Appeals.

JUDGE VANCE: Okay. I think we have your argument. Is there anything else you want to add?

MR. SEBY: No; just to emphasize that there is no discovery here. The agencies have an obligation to certify the record and Judge Erickson did not assume, nor do we, that the disputed elements of what may be or is not in the record or what is in the record, we don't agree with that and so there

may be a dispute about that but that is not discovery and that does not constitute a reason for the United States to argue centralization.

JUDGE VANCE: Thank you.

MR. SEBY: Thank you very much.

JUDGE BREYER: So if the case were centralized, for example in the District of Columbia, what happens to their injunction?

MS. MANN: As I have researched the issue, Judge Breyer, it would be considered the law of the case that would travel with the case to the District of Columbia and, as in any case, that could be an issue that could be raised again. One of the virtues of having it centralized --

JUDGE BREYER: What do you mean by raised again? You said one of two things, you said law of the case and then it could be raised again. I always thought law of the case meant it couldn't be.

JUDGE VANCE: It can be under certain circumstances.

JUDGE KAPLAN: You are right.

MS. MANN: In a Rule 54 kind of situation where if I were before you I could ask you to reconsider a decision that you had made just as we could ask Judge Erickson in North Dakota to revisit that decision.

JUDGE BREYER: In other words would it be based upon the record that it had been developed or would it be a de novo

hearing? What would happen?

MS. MANN: Based on the limited amount of research that I have been able to do it is something that could be reconsidered the same way that the original Judge would have considered it on reconsideration.

JUDGE HUVELLE: What if the Judge in the district were to hold that he had no jurisdiction that rested with the Court of Appeals? What happens then? It seems to me that the issue of who has got jurisdiction first is clouding everything.

MS. MANN: It is a very important decision. It is one that is clouding everything. Two judges have agreed with the United States that the case belongs in Circuit Court, only one Judge has not. And one of the reasons that we had suggested the Southern District of Ohio as a transferee court would be that it is within the Sixth Circuit and if that Court came to a certain conclusion it would not create a Circuit split on the question of jurisdiction.

JUDGE HUVELLE: That's a peculiar way to try to avoid a circuit split. I mean, basically circuit splits happen all the time and you can't sort of centralize something to avoid a circuit split.

MS. MANN: Well, we see it as attractive because it creates certainty for the parties and the public but we also have suggested the District of Columbia as a good option --

JUDGE VANCE: She is not cheering for that.

MS. MANN: She did earlier.

JUDGE HUVELLE: I like the District of Columbia, we are a very small jurisdiction but I am confused at how it will play out because if you centralize and the Circuit says the District Court has no jurisdiction, that's the end of their injunction, I would assume.

MS. MANN: Well, at this time, your Honor, there are motions to stay the rule pending in the Sixth Circuit. There is also jurisdictional briefing that the Court in the Sixth Circuit has ordered tomorrow. All of the parties who oppose jurisdiction will be filing their briefing there and then we will be -- the United States and any parties --

JUDGE BREYER: It seems this process you are suggesting under the guise of simplifying is actually going to complicate it.

MS. MANN: Not at all. If we were able to put this in one Court we would have the parties be able to brief -- and all the parties I should also mention that I have been advised by two of the later filed plaintiff groups in the Norther District of California, the Water Keeper Group and in the Western District of Washington -- excuse me, not in the northern District of California but in the Western District of Washington, the Puget Sound Water Keeper group and in the District of Columbia the national resource defense council group, they both support consolidation and would support it in

the District of Columbia.

What consolidation would do is allow all the parties, not only the parties that are already engaged but people who are waiting to see what this panel does before they seek intervention would be able to brief before one Judge what should be the evidence in the record considered by the Court, whether there should be a preliminary injunction and, if so, is it one of nationwide application, what kind of jurisdiction should be briefed, and it would be not more complicated but --

JUDGE VANCE: It would be nice but it is not what Section 1407 --

MS. MANN: I disagree, your Honor. This Court's precedence shows that there are APA cases where the Panel has found the circumstances to be sufficiently complex in the prerequisites of the statute to have been met. If any case -- if any APA case should be heard and centralized in one court, this is one of those cases.

JUDGE VANCE: I think you have done a great job on an uphill argument and I commend you but time is up. Thank you.

MS. MANN: Thank you very much.

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