Nos. 15-3799, 15-3822, 15-3853, 15-3887

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF OHIO, *ET AL.*, Petitioners, v. U.S. ARMY CORPS OF ENGINEERS, *ET AL.*, Respondents.	No. 15-3799
STATE OF OKLAHOMA, Petitioner, v. U.S. E.P.A., *ET AL.*, Respondents.	No. 15-3822
STATE OF TEXAS, *ET AL.*, Petitioners, v. U.S. E.P.A., *ET AL.*, Respondents.	No. 15-3853
STATE OF GEORGIA, *ET AL.*, Petitioners, v. U.S. E.P.A., *ET AL.*, Respondents.	No. 15-3887

STATE PETITIONERS' MOTION TO DISMISS
FOR LACK OF SUBJECT-MATTER JURISDICTION

The Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") (the "Agencies") issued a Final Rule purporting to establish a uniform definition of "waters of the United States" for the entire Clean Water Act. 80 Fed. Reg. 37,054 (June 29, 2015) ("the Rule"). With that Rule, the Agencies attempt to broadly *expand* their power, but narrowly *restrict* the judicial review available for those challenging it. In both respects, the Agencies' actions are par for the course. As for the Agencies' power, the Supreme Court has twice rejected efforts to enlarge their authority beyond what the Clean Water Act allows. *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001). As for the judiciary's review, the Court has rejected the EPA's effort to prohibit courts from reviewing its decision that lands were subject to its regulatory authority, even while substantial penalties accrued. *Sackett v. E.P.A.*, 132 S. Ct. 1367 (2012).

While the 18 State Petitioners who join in this motion to dismiss have filed four petitions for review challenging the Agencies' view of their authority, this specific motion challenges only their position on the available judicial review. The Agencies argue that the broad Rule falls within a narrow class of specific EPA actions listed in 33 U.S.C. § 1369(b)(1) that are reviewable *only* by circuit courts. But a finding of "[r]eviewability under section 1369 carries a peculiar sting" for challengers: it bars challenges in later litigation. *Longview Fibre Co. v.*

Rasmussen, 980 F.2d 1307, 1313 (9th Cir. 1992). So the Agencies' broad view of § 1369 could insulate the Rule from future challenges in enforcement proceedings like those at issue in *Rapanos* or *Sackett*. *See* 33 U.S.C. § 1369(b)(2). This result has previously led courts to read § 1369 narrowly, leaving most issues for litigation in district courts under the Administrative Procedure Act (APA). *Longview*, 980 F.2d at 1313; *Am. Paper Instit., Inc. v. E.P.A.*, 882 F.2d 287, 289 (7th Cir. 1989).

The Court should follow that course here. Under the plain text of the provisions on which the Agencies rely, Subsections (E) and (F) of § 1369(b)(1), the Rule is neither an action "approving or promulgating any effluent limitation or other limitation under [33 U.S.C. §§ 1311, 1312, 1316, or 1345]," nor an action "issuing or denying any permit under [33 U.S.C. § 1342]." The Rule itself notes that it "does not establish any regulatory requirements," 80 Fed. Reg. at 37,054, and "appl[ies] to all provisions of the Act," not just those identified in Subsections (E) and (F), *id.* at 37,104. In addition, many canons of interpretation support this plain-text reading. The Agencies' broad view of Subsections (E) and (F), for example, makes other subsections in § 1369(b)(1) entirely superfluous, and creates the kind of vague jurisdictional standards that courts are loathe to adopt.

STATEMENT OF CASE

A. *Relevant Provisions of the Act*. The Clean Water Act, as relevant here, bans any unauthorized "discharge of any pollutant by any person" into waters

within the Agencies' reach. 33 U.S.C. § 1311(a). It defines "pollutant" broadly to include many ordinary substances. *Id*. § 1362(6). It defines "discharge of a pollutant" broadly to cover "any addition of any pollutant to navigable waters from any point source," such as a pipe or ditch. *Id.* §§ 1362(12), (14). And it defines "person" broadly to include individuals, corporations, and States. *Id.* § 1362(5).

For a person to discharge a pollutant into "navigable waters," the Act generally requires an EPA-issued, State-issued, or Corps-issued permit. Under § 1342(a), *the EPA* issues permits allowing persons to discharge pollutants under the "National Pollutant Discharge Elimination System" ("NPDES"). A permit holder must abide by several EPA limits set under other statutory sections. *Id.* Among others, § 1311 directs the EPA to set "effluent limitations" tied to the available technology; § 1312 directs it to set limitations tied to water quality; § 1316 directs it to set limitations for new sources; § 1317 directs it to set limitations for "toxic pollutants"; and § 1345 directs it to set limitations for "sewage sludge." Under § 1342(b), *the States* may create programs under which they issue the NPDES permits for waters within their borders. Under § 1344, *the Corps* issues permits for discharges of "dredged or fill material."

On top of this source-by-source permitting, § 1313 directs States to set and update "water quality standards." "These state water quality standards provide 'a supplementary basis . . . so that numerous point sources, despite individual

compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.'" *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994) (citation omitted). As part of these standards, the States must adopt "individual control strateg[ies]" for certain "toxic pollutants." 33 U.S.C. § 1314(l)(1)(D). If the EPA rejects a State's control strategy, the EPA may promulgate its own for the relevant waters. *Id.* § 1314(l)(3).

The definition of "navigable waters" "applies to the entire statute," and so is critical for nearly all of its sections. *Rapanos*, 547 U.S. at 742 (plurality op.). The Act defines "navigable waters" to "mean[] the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The Supreme Court has rejected the Agencies' attempts to broadly construe this definition. *Rapanos*, 547 U.S. at 786 (Kennedy, J., concurring in judgment); *SWANCC*, 531 U.S. at 162.

B. *The Rule*. The Rule is another attempt by the Agencies to define "waters of the United States." The 18 State Petitioners' consolidated motion for a stay shows why the Rule encompasses many waters that fall outside the Clean Water Act. More relevant to this Motion, however, the Rule purports *only* to define those waters of the United States. It does not change any of the Act's mechanisms, set any standards or limitations, exempt or include any sources or pollutants, or issue or deny any permits. Indeed, the Rule expressly notes that it "does not establish any regulatory requirements.'" 80 Fed. Reg. at 37,054.

C. *Judicial Review*. The Act sets up "a bifurcated jurisdictional scheme." *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 755 (5th Cir. 2011). For most actions, challengers may sue in district courts under the APA. *Id.* The Act also identifies seven *specific* actions by the EPA's Administrator that are subject to circuit review. 33 U.S.C. § 1369(b)(1). It requires circuit review for EPA action:

> (A) in promulgating any standard of performance under section 1316 of this title,
>
> (B) in making any determination pursuant to section 1316(b)(1)(C) of this title,
>
> (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title,
>
> (D) in making any determination as to a State permit program submitted under section 1342(b) of this title,
>
> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title,
>
> (F) in issuing or denying any permit under section 1342 of this title, and
>
> (G) in promulgating any individual control strategy under section 1314(l) of this title.

Id. Such suits must be filed "within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day." *Id*. And if a party could have brought suit under § 1369, that party cannot later assert the challenge in individual enforcement proceedings. *Id*. § 1369(b)(2).

D. *Petitioners' Challenges*. The State Petitioners believe that the circuit courts lack jurisdiction over the Rule under § 1369(b)(1) because it is not one of

the seven listed actions. So they filed four district-court suits challenging the Rule. Yet, given the Agencies' jurisdictional position, 80 Fed. Reg. at 37,104, and § 1369(b)'s grant of exclusive jurisdiction, the State Petitioners filed protective petitions in the circuit courts. *Inv. Co. Inst. v. Bd. of Governors of Fed. Reserve Sys.*, 551 F.2d 1270, 1280 (D.C. Cir. 1977) ("If any doubt as to the proper forum exists, careful counsel should file suit in both the court of appeals and the district court."). All such petitions were consolidated here. 28 U.S.C. § 2112(a). The State Petitioners now seek an immediate dismissal for lack of jurisdiction.

ARGUMENT

I. SECTION 1369(B)(1) DOES NOT GRANT SUBJECT-MATTER JURISDICTION OVER THE RULE TO THE CIRCUIT COURTS

Section 1369 does not grant circuit courts jurisdiction over the Rule. In district courts, the Agencies have relied on two subsections in § 1369(b)(1): Subsection (E), which grants jurisdiction for an action "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316 or 1345," and Subsection (F), which grants jurisdiction for an action "issuing or denying any permit under section 1342." The North Dakota district court has rejected the Agencies' arguments, *North Dakota v. EPA*, 2015 WL 5060744, at *1-3 (D.N.D. Aug. 27, 2015), whereas two others have accepted them, *Georgia v. McCarthy*, 2015 WL 5092568, at *2-3 (S.D. Ga. Aug. 27, 2015); *Murray Energy Corp. v. EPA*, 2015 WL 5062506, *3-6 (N.D. W. Va. Aug. 26, 2015). The plain text of

Subsections (E) and (F) and many canons of construction both show that the North Dakota court correctly held that the Rule falls outside those subsections.

A. The Rule Falls Outside The Plain Text Of Subsections (E) And (F)

Subsections (E) and (F) have parallel language: a verb describing a specific EPA action, a direct object of that action, and a prepositional phrase identifying the section authorizing the action. Each requirement must be satisfied to create jurisdiction. The Rule cannot satisfy all of the requirements for either subsection.

Subsection E. Subsection (E) grants jurisdiction over EPA action (1) "approving or promulgating" (2) "any effluent limitation or other limitation" (3) "under section 1311, 1312, 1316, or 1345." The verbs cover actions that accept something developed *by another* (approving), and actions that issue something developed *by EPA* (promulgating). *Lake Cumberland Trust, Inc. v. E.P.A.*, 954 F.2d 1218, 1224 (6th Cir. 1994); *Boise Cascade Corp. v. E.P.A.*, 942 F.2d 1427, 1431 (9th Cir. 1991). The direct objects initially cover effluent limitations. Those are "'restriction[s] . . . on quantities, rates, and concentrations . . . discharged from point sources,'" *Longview*, 980 F.2d at 1310 (quoting § 1362(11)), which include general regulations limiting discharges from categories of point sources, *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 136 (1977). The direct objects also reach "other limitations." Those are restrictions that are "directly related to effluent limitations" in that they "direct[] . . . point sources to engage in specific

types of activity," *Am. Paper*, 890 F.2d at 877, such as limits on a source's cooling water intake structures, *Va. Elec. & Power Co. v. Costle*, 566 F.2d 446, 450 (4th Cir. 1977). Finally, these limits must originate from §§ 1311, 1312, 1316, or 1345.

The Rule, while it promulgates something, does not meet Subsection (E)'s other requirements. To begin with, it does not announce any "effluent limitation or other limitation." It cannot be considered an "effluent limitation" because it nowhere "dictate[s] in specific and technical terms the amount of each pollutant that a point source may emit." *Am. Paper*, 890 F.2d at 876. Nor can it be considered an "other limitation" because it does not propose limits on points sources that are "closely related" to effluent limitations, *Va. Elec.*, 566 F.2d at 450, or even "direct[] . . . point sources to engage in specific types of activity," *Am. Paper*, 890 F.2d at 877. The Rule disclaims doing so: It "does not establish any regulatory requirements," 80 Fed. Reg. at 37,054, and "imposes no enforceable duty" on "governments" or "the private sector," *id.* at 37,102. Indeed, it would be strange if the relative breadth of a regulatory definition of "navigable waters"—*e.g.*, whether it was defined narrowly or expansively—altered where a suit must be brought to challenge the regulation. *See North Dakota*, 2015 WL 5060744, at *2.

In addition, no limitations arise "under" §§ 1311, 1312, 1316, or 1345. The Rule does not set technology-based limits under § 1311, water-quality-based limits under § 1312, new-source limits under § 1316, or sewage-sludge limits under

§ 1345. Far from tailored to those subsections, the Rule's "definition will apply to all provisions of the Act." 37 Fed. Reg. at 37,104. That is why both Agencies, not just the EPA, issued the Rule; it also covers provisions within the Corps' domain. Yet § 1369(b)(1) limits jurisdiction to *EPA* actions, not actions of *both Agencies*, confirming that the Rule is not an EPA-specific effluent or other limitation.

Subsection (F). Subsection (F) grants jurisdiction over EPA action (1) "issuing or denying" (2) "any permit" (3) "under section 1342." 33 U.S.C. § 1369(b)(1)(F). "By its plain terms, this provision conditions the availability of judicial review on the issuance or denial of a permit" under the NPDES program in § 1342 (not the Corps' permitting program in § 1344). *Rhode Island v. E.P.A.*, 378 F.3d 19, 23 (1st Cir. 2004); *Appalachian Energy Grp. v. E.P.A.*, 33 F.3d 319, 321 (4th Cir. 1994); *Cent. Hudson Gas & Elec. Corp. v. E.P.A.*, 587 F.2d 549, 557 (2d Cir. 1978). The Supreme Court has read the phrase "issuing or denying" functionally to encompass an EPA action that had the "precise effect" of a denial because it exercised the EPA's then-existing power to *veto* a state-issued permit. *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196 (1980).

The circuit courts, however, have made clear that this functional approach extends only so far. As this Court has noted, while Subsection (F) "provides for review of the EPA's 'issuance' of, or 'refusal to issue', an NPDES permit," the term "issuance" cannot be read so broadly as to reach the EPA's failure to object

to, and thus silent approval of, a state-issued permit. *Lake Cumberland*, 954 F.2d at 1221 & nn.7, 12; *Shell Oil Co. v. Train*, 585 F.2d 408, 417 (9th Cir. 1978); *Save the Bay, Inc. v. Adm'r of E.P.A.*, 556 F.2d 1282, 1290-92 (5th Cir. 1977); *Mianus River Pres. Comm. v. Adm'r, E.P.A.*, 541 F.2d 899, 906-09 (2d Cir. 1976). Instead, at its outer limits, the phrase "issuing a permit" may cover particular EPA decisions to exempt a pollutant or source from the NPDES permitting requirements because that exemption allows discharges to occur. *Compare Nat'l Cotton Council of Am. v. E.P.A.*, 553 F.3d 927, 929, 933 (6th Cir. 2009) (interpreting Subsection (F) to reach rules exempting pollutants from permitting requirements), *with Friends of the Everglades v. E.P.A.*, 699 F.3d 1280, 1288 (11th Cir. 2012) (rejecting *Cotton Council*'s suggestion that "issuance" covers exemptions).

The Rule does not satisfy Subsection (F), under either a plain-text or functional approach. Nobody claims that it actually "issues" or "denies" a permit. Even under a functional approach, the Rule does not "issue" or "deny" a permit. As for "issuance," unlike in *Cotton Council*, the Rule does not exempt a source or pollutant from § 1342's permit rules and thereby allow pollutant discharges. 553 F.3d at 929. As for "denial," unlike in *Crown Simpson*, the Rule does not have the "precise effect" of denying a particular entity's permit request. 445 U.S. at 196.

In sum, this case is straightforward under a plain-text reading of Subsections (E) and (F). The Rule neither promulgates discharge limitations under §§ 1311,

1312, 1316, or 1345, nor issues or denies permits under § 1342. That is why a district court, not a circuit court, considered the Agencies' initial regulations on the definition of navigable waters. *See Rapanos*, 547 U.S. at 724 (plurality op.) (citing *Natural Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975)).

B. Several Canons Of Statutory Interpretation Confirm That The Circuit Courts Lack Jurisdiction Over The Rule

This plain-text reading of § 1369 is reinforced by two textual canons (the rule against superfluity and the rule requiring statutes to be read as a whole) and two substantive canons (the specific presumption of review of agency action and the general presumption that jurisdictional statutes be read to set clear rules).

Rule Against Superfluity. Courts must read § 1369(b) so as not to "'render[] other provisions of [the section] inconsistent, meaningless or superfluous.'" *Lake Cumberland*, 954 F.2d at 1222 (citation omitted). *Lake Cumberland*, for example, asked whether this Court had jurisdiction over the EPA's action to *approve* a State's individual control strategy under Subsection (G), which grants jurisdiction for actions "promulgating any individual control strategy." *Id.* at 1221. The Court found jurisdiction lacking. *Id*. at 1222-24. Subsection (E), unlike Subsection (G), *does* identify both "approving" and "promulgating" certain limitations, and the Court refused to write the verb "approving" out of Subsection (E) by reading the verb "promulgating" in Subsections (E) and (G) broadly to cover both actions.

This logic applies here: To cover the Rule, Subsections (E) and (F) would have to be read in a way that makes other subsections superfluous. Subsection (A), for example, grants jurisdiction over an action "promulgating any standard of performance under section 1316" for new sources. If Subsection (E)'s "other limitation" covers anything that could restrict discharges, it would make Subsection (A)'s jurisdictional grant over § 1316 standards of performance superfluous. Those standards (more than the Rule) are designed "for the control of the discharge of pollutants." *Id.* § 1316(a)(1). A broad reading of subsection (E) thus "allow[s] the term 'other limitation' to swallow up distinctions that Congress made between effluent limitations and other types of EPA regulations" in § 1369(b)(1). *Am. Paper*, 890 F.2d at 876-77; *Friends of Earth v. E.P.A.*, 333 F.3d 184, 190-91 & n.14 (D.C. Cir. 2003) (same).

Similarly, Subsection (C) grants jurisdiction over an action "promulgating any effluent standard, prohibition, or pretreatment standard under section 1317" (for toxic pollutants). If Subsection (F)'s "issuing or denying any permit" reaches any regulation *affecting* permits, it would make Subsection (C)'s jurisdictional grant over § 1317's toxic-pollutant limits superfluous. After all, § 1342 expressly identifies those limits as a "condition" for a permit's issuance. *Id.* § 1342(a)(1).

Reading Statutes As A Whole. Reading § 1369(b)(1) as a whole confirms that Subsections (E) and (F) do not reach regulations that "apply to all provisions

of the Act." 80 Fed. Reg. at 37,104. Section 1369(b)(1) precisely identifies seven specific actions—down to the subsections under which they are authorized—in a comprehensive statute that authorizes many actions. As one example, Subsections (A), (B), and (E) each reference a different action under § 1316. "No sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions, while meaning to imply a more general and broad coverage than the statutes designated." *Longview*, 980 F.2d at 1313; *Bethlehem Steel Corp. v. E.P.A.*, 538 F.2d 513, 518 (2d Cir. 1976) (same).

In this respect, the Rule applies to many actions over which circuits lack jurisdiction. For example, § 1313—the section requiring States to adopt water-quality standards—refers to "navigable waters." *Id.* § 1313(c)(2)(A), (4), (e)(3). But Subsection (E)'s jurisdictional grant for "other limitation" does not extend to those standards. *Friends of Earth*, 333 F.3d at 188-91. Likewise, § 1344—the section requiring the Corps to issue permits—governs discharges into "navigable waters." *Id.* § 1344(a). But Subsection (F)'s jurisdictional grant applies only to NPDES permits. *Cf. Sackett*, 132 S. Ct. at 1372. In sum, "[i]f the exceptionally expansive view advocated by the government is adopted, it would encompass virtually all EPA actions under the" Act. *North Dakota*, 2015 WL 5060744, at *2.

More broadly, comparing § 1369(b)(1) to the jurisdictional grant in the Clean Air Act, the Clean Water Act's sister statute, confirms that § 1369 does not

extend to statute-wide rules. Both Acts have judicial-review provisions cataloging specific actions that circuits may review, but the Clean Air Act goes further by providing circuit jurisdiction over "any other final action of the Administrator." 42 U.S.C. § 7607(b)(1); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 (1980). The Clean Water Act contains no similar catch-all. The conclusion to be drawn could not be clearer: Congress knows how to provide for circuit review of all agency action as a class; it did so under the Clean Air Act but *not* under the Clean Water Act. *Cf. Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174-75 (2009).

Presumption of Review. The APA "creates a 'presumption favoring judicial review of administrative action." *Sackett*, 132 S. Ct. at 1373. When a law restricts APA review, therefore, courts construe the limitation narrowly: "'judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) (citation omitted).

This presumption applies here. When § 1369(b) requires circuit review, "it is the exclusive means of challenging" an action, and "an application for review must be lodged . . . within 120 days." *Decker v. Nw. Envtl. Defense Ctr.*, 133 S. Ct. 1326, 1334 (2013). Indeed, § 1369(b)(2) affirmatively bars "judicial review" of EPA action in later "civil or criminal proceeding for enforcement." This "120-day time limit is well-established, and . . . strictly enforced." *Nat'l Pork*

Producers, 635 F.3d at 754. Because circuit jurisdiction under § 1369(b)(1), unlike normal APA litigation, comes with § 1362(b)(2)'s strings, courts have interpreted § 1369(b)(1) narrowly. As Judge Easterbrook noted, the "review-preclusion proviso in [1369](b)(2) dissuades us from reading [1369](b)(1) broadly." *Am. Paper Instit.*, 882 F.2d at 289; *Longview*, 980 F.2d at 1313. It is particularly appropriate to apply this presumption to a *broad* regulation like the Rule. Because it purports to define the Act's scope, § 1369(b)'s 120-day deadline and broad ban on future challenges could be read equally broadly. Ordinary homeowners—who may be unaware of the Rule and who might have the common-sense intuition that their *local lands* are not subject to a federal law regulating *navigable waters*—may be barred from challenging it when the Agencies assert jurisdiction (a result similar to what the EPA sought in *Sackett*, 132 S. Ct. at 1372).

Jurisdictional Rules. That § 1369(b)(1) concerns subject-matter jurisdiction reinforces that it should be interpreted as written. "'[A]dministrative simplicity is a major virtue in a jurisdictional statute.'" *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 589 (6th Cir. 2013) (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010)). "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court." *Hertz*, 559 U.S. at 94. Conversely, "courts benefit from straightforward rules under which they can readily assure themselves of their

power to hear a case." *Id.* In short, "[t]he chief and often the only virtue of a jurisdictional rule is clarity." *In re Kilgus*, 811 F.2d 1112, 1117 (7th Cir. 1987).

This rings true here. An atextual, subjective approach to jurisdiction, one relying on policy arguments unmoored from the statute's text, sets the very "'sort of vague boundary that is to be avoided in the area of subject-matter jurisdiction wherever possible.'" *Hertz*, 559 U.S. at 94 (quoting *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in judgment)). Such vague rules are to be avoided because "the more [courts] pull within § [1369(b)(1)], . . . the more reason firms will have to petition for review of everything in sight." *Am. Paper Instit.*, 882 F.2d at 289; *Refrigerant*, 731 F.3d at 589. And those protective petitions will require the parties to "eat[] up time and money" not over the merits, but over where to sue over the merits. *Hertz*, 559 U.S. at 94. It is not a good thing that "careful counsel" have been forced to sue twice. *Inv. Co. Inst.*, 551 F.2d at 1280. A finding of jurisdiction here would greatly exacerbate that existing problem.

II. THE AGENCIES' CONTRARY ARGUMENTS FOR JURISDICTION LACK MERIT

The Agencies have offered two primary arguments, one for their view of Subsection (E) and the other for their view of Subsection (F). Both are mistaken.

Subsection (E). For Subsection (E), the Agencies (and the district courts accepting their position) rely on the Supreme Court's holding in *du Pont* that Subsection (E) reached general regulations adopting effluent limitations for

categories of point sources. *Murray*, 2015 WL 5062506, at *4; *Georgia*, 2015 WL 5092568, at *2. But *du Pont*'s reasoning supports the States. While the category-wide effluent limitations at issue in *du Pont* fell within Subsection (E)'s core, the industry argued for an atextually *narrow* reading, one that permitted review *only* "of the grant or denial of an individual variance" under § 1311(c). 430 U.S. at 136. The Court explained that Subsection (E)'s text referenced all of § 1311, not just § 1311(c). *Id*. Reading Subsections (E) and (F) together, it added that the contrary reading "would produce the truly perverse situation" in which circuits review "numerous individual actions issuing or denying permits" under Subsection (F), but not "the basic regulations governing those individual actions" under Subsection (E). *Id.* This language reinforced the plain text of Subsection (E); it did not grant circuits a freewheeling license to depart from that text whenever they felt that initial circuit review would be more efficient.

Further, there is nothing "perverse" about the States' reading. Congress adopted § 1369(b)(1) because of the "number and complexity of administrative determinations" arising from *individual* permitting or limitation regulations. H.R. Rep. No. 92-911 (1972), FWPCA72-LH 9-D at *26. Sending each decision through the traditionally layered judicial-review process would be inefficient. *Id*. That rationale does not justify exempting a *statute-wide* rule from the normal process; the Agencies will issue such a rule less frequently and the rule will often

have more importance than a source-specific decision. In that context, "the primary review of the case by the lower court [can be] of invaluable assistance" to the circuits. *Cent. Hudson*, 587 F.2d at 557. Regardless, given the "sting" that comes with § 1369(b)(1), *Longview*, 980 F.2d at 1313, it bears remembering that "[t]he APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all," *Sackett*, 132 S. Ct. at 1374.

Finally, the district courts that have read Subsection (E)'s "other limitation" language broadly to cover the Rule (or anything else that could reduce discharges) have overlooked that their reading "allow[s] the term 'other limitation' to swallow up distinctions that Congress made between effluent limitations and other types of EPA regulations" identified in § 1369(b)(1). *Am. Paper*, 890 F.2d at 876-77. In doing so, they overread the main case on which they rely—the Fourth Circuit's decision in *Virginia Electric & Power Co*. *See Murray*, 2015 WL 5062506, at *6. That case found jurisdiction over regulations governing point sources' cooling water intake structures. 566 F.2d at 450. Those regulations, the court noted, were "closely related" to effluent limitations. *Id.*; *cf. Am. Paper*, 890 F.2d at 876-77. The Rule, by contrast, is no more "closely related" to effluent limitations than it is to any other section that uses the definition of "waters of the United States."

Subsection (F). For Subsection (F), the Agencies primarily rely on a statement from this Court 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'" § 1342. *National Cotton*, 553 F.3d at 933 (quoting *Am. Mining Cong. v. E.P.A.*, 965 F.2d 759, 763 (9th Cir.1992), and citing *NRDC v. EPA*, 966 F.2d 1292, 1296-97 (9th Cir. 1992)). But *National Cotton* addressed an EPA action that granted an *exemption* for pollutant discharges. 553 F.3d at 929. Like a permit, the exemption allowed for discharges to occur and so, it could be argued, qualified as the equivalent of "issuing" a permit. The Agencies assert a much broader argument. Unlike in *National Cotton*, the Rule does *not* allow the discharge of pollutants (and so cannot qualify as an "issuance"). It instead implicates threshold questions about the entire Act. Thus, the question here is not whether *National Cotton* applies but whether it should be *extended* to reach *anything* "'relating to permitting.'" *Georgia*, 2015 WL 5092568, at *1.

It should not. That approach reads out the verbs "issuing or denying" in Subsection (F)—in stark conflict with this Court's razor-sharp focus on verb usage in other subsections. *Lake Cumberland*, 954 F.2d at 1221-23. It also reads out most of § 1369(b)(1)'s other subsections, all of which address EPA actions that "relate" to permitting in some way. *Cf.* 33 U.S.C. § 1342(a) (requiring permits to abide by §§ 1311, 1312, 1316, and 1317). There is a wide gap between a "functional approach" to what "issuing or denying" means, *Murray*, 2015 WL

5062506, at *6, and simply rewriting Subsection (F). The *Murray* court wrongly accepted the Agencies' argument here because the Agencies seek to do the latter.

For these reasons, other circuits have been hesitant to go even as far as *National Cotton*. The Eleventh Circuit rejected *National Cotton* because it "provided no analysis" of § 1369(b)(1)(F). *Friends of the Everglades*, 699 F.3d at 1288. It limited jurisdiction to actions "issuing or denying" a permit. *Id.*; *see also Rhode Island*, 378 F.3d at 23; *Appalachian*, 33 F.3d at 321. Even the Ninth Circuit clarified the narrow scope of the Ninth Circuit cases on which *National Cotton* had relied, noting that Subsection (F) does not "authorize original jurisdiction" in the circuits except for challenges to "the issuance or the denial of a permit or a functionally similar action." *Nw. Envtl. Advocates v. E.P.A.*, 537 F.3d 1006, 1018 (9th Cir. 2008). That was for good reason. Its earlier cases had mistakenly relied on *du Pont* to interpret Subsection (F) *broadly*, *see Am. Mining*, 965 F.2d at 763, even though *du Pont* had invoked Subsection (F)'s *narrow* scope to adopt a plain-text view of Subsection (E), *see* 430 U.S. 136. Like the Ninth Circuit (which refused to expand the Ninth Circuit cases on which *National Cotton* relied), this Court too should not now greatly expand the reach of that decision to new areas.

CONCLUSION

For the foregoing reasons, the State Petitioners respectfully request that the Court dismiss their petitions for lack of subject-matter jurisdiction.

Respectfully Submitted,

Case No. 15-3799

/s/ Daniel P. Bock
BILL SCHUETTE
Michigan Attorney General

S. PETER MANNING
Division Chief
DANIEL P. BOCK
Assistant Attorney General
Environment, Natural Resources, and
Agriculture Division
525 W. Ottawa Street
P.O. Box 30755
Lansing, MI 48909
517-373-7540; 517-373-1610 fax
manningp@michigan.gov

Counsel for State of Michigan

/s/ Eric E. Murphy
MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY
State Solicitor
LEE ANN RABE
Assistant Attorney General
PETER T. REED
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, OH 43215
614-466-8980; 614-466-5087 fax
eric.murphy@ohioattorneygeneral.gov

Counsel for State of Ohio

/s/ Elizabeth P. McCarter
HERBERT H. SLATERY III
Tennessee Attorney General and Reporter

BARRY TURNER
Deputy Attorney General
ELIZABETH P. McCARTER
Senior Counsel
Office of the Attorney General and Reporter
Environmental Division
P.O. Box 20207
Nashville, Tennessee 37202
615-532-2582; 615-741-8724 fax
lisa.mccarter@ag.tn.gov

Counsel for State of Tennessee

Case No. 15-3822

/s/ P. Clayton Eubanks
E. SCOTT PRUITT
Oklahoma Attorney General

P. CLAYTON EUBANKS
Deputy Solicitor General
SARAH A. GREENWALT,
Assistant Solicitor General
Office of the Oklahoma Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 522-8992;
(405) 522-0608 fax
Clayton.Eubanks@oag.ok.gov
Sarah.Greenwalt@oag.ok.gov

Counsel for State of Oklahoma

Case No. 15-3853

/s/ Megan K. Terrell
JAMES D. "BUDDY" CALDWELL
Attorney General of Louisiana

TREY PHILIPS
First Assistant Attorney General
MEGAN K. TERRELL
Deputy Director – Civil Division
Chief – Environmental Section
Assistant Attorney General
Office of the Louisiana Attorney General
1885 N. Third Street
Baton Rouge, Louisiana 70802
(225) 326-6020; (225) 326-6099 fax

Counsel for State of Louisiana

/s/ Mary Jo Woods
JIM HOOD
Attorney General of Mississippi

MARY JO WOODS
Special Assistant Attorney General
Mississippi Attorney General's Office
Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3020; (601) 359-2003 fax
mwood@ago.state.ms.us

Counsel for the State of Mississippi

/s/ Richard B. Farrer
KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General
BERNARD L. McNAMEE
Chief of Staff
SCOTT A. KELLER
Solicitor General
RICHARD B. FARRER
Assistant Solicitor General
JAMES E. DAVIS
Deputy Attorney General for Civil Litigation
JON NIERMANN
Chief, Environmental Protection Division
MATTHEW B. MILLER
Assistant Attorney General
Texas Bar No. 24074722
matt.miller@texasattorneygeneral.gov
Southern District Bar No. 2638649
LINDA B. SECORD
Assistant Attorney General
Texas Bar No. 17973400
linda.secord@texasattorneygeneral.gov
Southern District Bar No. 1850549
Office of the Attorney General of Texas
Environmental Protection Division
P.O. Box 12548, MC-066
Austin, Texas 78711-2548
Tel. (512) 463-2012
Fax. (512) 320-0911

Counsel for State of Texas

Case No. 15-3887

/s/ Britt C. Grant
Samuel S. Olens
Attorney General
Britt C. Grant
Solicitor General
Timothy A. Butler
Deputy Solicitor General
James D. Coots
Sr. Asst. Attorney General
OFFICE OF THE ATTORNEY GENERAL
40 Capitol Square, S.W.
Atlanta, Georgia 30334
bgrant@law.ga.gov
(404) 651-9453
Counsel for State of Georgia

/s/ Elbert Lin
Patrick Morrisey
Attorney General
Elbert Lin
Solicitor General
Misha Tseytlin
General Counsel
Erica N. Peterson
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
State Capitol
Building 1, Rm 26-E
Charleston, West Virginia 25305
Elbert.Lin@wvago.gov
(304) 558-2021
Counsel for State of West Virginia

/s/ Andrew Brasher
Luther Strange
Attorney General
Andrew Brasher
Solicitor General
OFFICE OF THE ATTORNEY GENERAL
501 Washington Ave.
Montgomery, Alabama 36130
abrasher@ago.state.al.us
(334) 353-2609
Counsel for State of Alabama

/s/ Allen Winsor
Pamela Jo Bondi
Attorney General
Allen Winsor
Solicitor General
OFFICE OF THE ATTORNEY GENERAL
PL-01, The Capitol
Tallahassee, Florida 32399-1050
Allen.winsor@myfloridalegal.com
(850) 414-3300
Counsel for State of Florida

/s/ Thomas M. Fisher
Gregory F. Zoeller
Attorney General
Thomas M. Fisher
Solicitor General
OFFICE OF THE ATTORNEY GENERAL
302 West Washington Street

/s/ Craig A. Bromby
Sam M. Hayes
General Counsel
Craig A. Bromby
Deputy General Counsel
Andrew J. Norton
Deputy General Counsel

Indiana Government Center - South,
Fifth Floor
Indianapolis, Indiana 46204
(317) 232-6255
Tom.Fisher@atg.in.gov
Counsel for State of Indiana

NORTH CAROLINA DEPARTMENT OF
ENVIRONMENT AND NATURAL RESOURCES
215 W. Jones Street
Raleigh, North Carolina 27603
sam.hayes@ncdenr.gov
craig.bromby@ncdenr.gov
andrew.norton@ncdenr.gov
(919) 707-8600
Counsel for Petitioner North Carolina Department Of Environment and Natural Resources

/s/ Jeffrey A. Chanay
Derek Schmidt
Attorney General
Jeffrey A. Chanay
Chief Deputy Attorney General
Burke W. Griggs
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
120 SW 10th Ave., 3d Floor
Topeka, Kansas 66612
jeff.chanay@ag.ks.gov
burke.griggs@ag.ks.gov
(785) 368-8435
Counsel for State of Kansas

/s/ James Emory Smith
Alan Wilson
Attorney General
Robert D. Cook
Solicitor General
James Emory Smith, Jr.
Deputy Solicitor General
OFFICE OF THE ATTORNEY GENERAL
1000 Assembly Street, Room 519
Columbia, South Carolina 29201
bcook@scag.gov
(803) 734-3680
Counsel for State of South Carolina

/s/ Sean J. Riley
Jack Conway
Attorney General
Sean J. Riley
Chief Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
700 Capitol Avenue, Suite 118
Frankfort, Kentucky 40601
sean.riley@ag.ky.gov
(502) 696-5650
Counsel for State of Kentucky

/s/ Parker Douglas
Sean D. Reyes
Attorney General
Parker Douglas
Chief of Staff & Federal Solicitor
OFFICE OF THE UTAH ATTORNEY GENERAL
Utah State Capitol Complex
350 North State Street, Suite 230
Salt Lake City, Utah 84114-2320
pdouglas@utah.gov
(801) 538-9600
Counsel for State of Utah

/s/ Karla Z. Keckhaver
Brad D. Schimel
Attorney General
Karla Z. Keckhaver
Assistant Attorney General
WISCONSIN DEPARTMENT OF JUSTICE
17 West Main Street
Madison, Wisconsin 53707
keckhaverkz@doj.state.wi.us
(608) 264-6365
Counsel for State of Wisconsin

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2015, I caused the foregoing Motion to Dismiss to be served via the Court's CM/ECF system on all registered counsel.

No. 15-3822

/s/ P. Clayton Eubanks
P. CLAYTON EUBANKS
Counsel for State of Oklahoma

No. 15-3799

/s/ Eric E. Murphy
ERIC E. MURPHY
Counsel for State of Ohio

No. 15-3887

/s/ Elbert Lin
ELBERT LIN
Counsel for State of West Virginia

I hereby certify that on September 10, 2015, I plan to file the foregoing Motion to Dismiss to be served via the Court's CM/ECF system on all registered counsel.

No. 15-3853

/s/ Richard B. Farrer
RICHARD FARRER
Counsel for State of Texas