No. 15-14035

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

Appeal from the United States District Court
for the Southern District of Georgia
No. 2:15-cv-00079

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION, INC.; GEORGIA AGRIBUSINESS COUNCIL, INC.; AND GREATER ATLANTA HOMEBUILDERS ASSOCIATION, INC.

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellant Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Petitioners make the following disclosure:

Southeastern Legal Foundation, Inc. ("SLF") is a non-profit Georgia corporation and constitutional public interest law firm and policy center that advocates limited government, individual economic freedom, and the free enterprise system in the courts of law and public opinion. SLF has no parent companies and no publicly-held corporation has 10% or greater ownership interest in SLF.

Georgia Agribusiness Council, Inc. ("Georgia Agribusiness Council") is a Georgia corporation whose mission is to advance the business of agriculture and promote environmental stewardship to enhance the quality of life for all Georgians. The Georgia Agribusiness Council has no parent company. No publicly-held company has a 10% or greater ownership in the Georgia Agribusiness Council.

Greater Atlanta Homebuilders Association, Inc. ("GAHBA") is a non-profit Georgia corporation dedicated to promoting, protecting and preserving the homebuilding industry as a viable economic force in the Atlanta area. GAHBA has no parent company. No publicly-held company has a 10% or greater ownership in GAHBA.

The following is a complete list of the trial judge(s), attorneys, persons, associations of persons, firms, partnerships, or corporations known to Petitioners that have an interest in the outcome of this particular case or appeal:

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Rule 29(c)(5) Statement

No party's counsel authored this brief in whole or in part. No party or a party's counsel contributed money that was intended to fund preparing or submitting this brief. No person – other than the Southeastern Legal Foundation, Inc.; Georgia Agribusiness Council, Inc.; and Greater Atlanta Homebuilders Association, Inc. ("Amici"), their members, or their counsel – contributed money that was intended to fund preparing or submitting this brief.

Rule 29(a) Statement

All parties have consented to the filing of this brief.

Statement of Identity of Amici

Southeastern Legal Foundation, Inc. ("SLF") is a non-profit Georgia corporation and constitutional public interest law firm and policy center that advocates limited government, individual economic freedom, and the free enterprise system in the courts of law and public opinion. In this litigation SLF represents the interests of individuals and companies affected by the "Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed. Reg. 37,053-37,127 (Jun. 29, 2015) ("WOTUS Rule") and its unlawful promulgation.

Georgia Agribusiness Council, Inc. ("Georgia Agribusiness Council") is a Georgia corporation whose mission is to advance the business of agriculture and promote environmental stewardship to enhance the quality of life for all Georgians. The Georgia Agribusiness Council represents farmers and other agricultural businesses engaged in the production of food and fiber in Georgia. Agribusiness in Georgia has been harmed by the WOTUS Rule, because the WOTUS Rule increases the number of federally jurisdictional waters and adds to the permitting costs of agricultural operations or precludes those operations altogether.

Greater Atlanta Homebuilders Association, Inc. ("GAHBA") is a non-profit Georgia corporation dedicated to promoting, protecting and preserving the homebuilding industry as a viable economic force in the Atlanta area. GAHBA represents homebuilders and related companies in greater Atlanta. Greater Atlanta homebuilding has been harmed by the WOTUS Rule, because the WOTUS Rule

increases the number of federally jurisdictional waters and adds to the permitting costs of homebuilding or precludes that construction altogether.

Amici filed suit against Defendants-appellees in the United States District Court for the Northern District of Georgia under the Administrative Procedure Act, contending the WOTUS Rule is unlawful and seeking an injunction against its enforcement. *See* S*outheastern Legal Foundation, Inc.; Georgia Agribusiness Council, Inc.; Greater Atlanta Homebuilders Association, Inc. v. EPA, et al.*, Case No. 1:15-cv-02488 (N.D. Ga.). That case is currently stayed pending Defendants' attempts to consolidate it with other actions pursuant to the multidistrict litigation statute. *See* In Re: Clean Water Rule: Definition of "Waters of the United States," MDL No. 2663.

Amici seek to participate in this appeal by filing this brief as *amici curiae*, because their interests may be significantly affected by the outcome of this appeal. Any decision of this Court as to jurisdiction in the United States District Court for the Southern District of Georgia may be binding on Amici's case in the Northern District of Georgia.

Section 509(b)(1) of the Clean Water Act, 33 U.S.C. § 1369(b)(1), vests the United States Circuit Courts of Appeals with jurisdiction to review only certain enumerated actions. The WOTUS Rule is not one of those actions. Therefore, the only means of challenging the WOTUS Rule is through the Administrative Procedure Act in district court. The *State of Georgia, et al.* lawsuit was properly filed in the United

States District Court for the Southern District of Georgia. Likewise, Amici's lawsuit was properly filed in the Northern District of Georgia.

Amici request this Court find the WOTUS Rule subject to challenge in district court and overturn the trial court decision denying Plaintiffs' motion for preliminary injunction on jurisdictional grounds.

Statement of the Issues

Whether the district court erred in denying Plaintiffs' motion for preliminary injunction on jurisdictional grounds. Specifically, whether the district court erred in deciding that "the original subject matter jurisdiction over this case is proper in the Courts of Appeal, given that the Rule, as drafted, constitutes a limitation promulgated under section 1311 of the Clean Water Act, and the Court does not have jurisdiction in this case. *See* 33 U.S.C. § 1369(b)(1)(E)." Order Denying Plaintiffs' Motion for Preliminary Injunction (Doc. 77), p. 1.

Summary of the Argument

The Clean Water Act's judicial review provision covers only a specific set of agency actions, including effluent limitations and similar "other limitations" on entities' discharges. The WOTUS Rule is not such an action. It is a definitional rule with no regulatory requirements. Because the WOTUS Rule does not fall under the Clean Water Act's judicial review provision, any challenge must be in district court pursuant to the Administrative Procedure Act.

This interpretation of the Clean Water Act is consistent with this Court's decision in *Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012), which found that circuit court review was only for certain specifically enumerated actions. A review of the Clean Water Act's legislative history confirms this interpretation. Even outside this Circuit, courts have not read the Clean Water Act's judicial review provision to cover rules containing no regulatory requirements with any potential for violation. Indeed, every other instance of the term "other limitation" in the Clean Water Act contemplates an affirmative requirement that places a direct obligation on the regulated entity or a state or other administering agency.

This analysis of the case law, statute and legislative history demonstrates the WOTUS Rule must be challenged in district court. Amici join Plaintiffs-appellants in asking this Court to overturn the trial court's determination that it lacks jurisdiction, and to remand this case back to the trial court for consideration of the merits of Plaintiffs' preliminary injunction motion.

Argument

The Clean Water Act's judicial review provision, § 509(b) (33 U.S.C. § 1369(b)), identifies the actions challengeable in a circuit court of appeals:

> Review of the Administrator's 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, may be had by any interested person in the Circuit Court of Appeals of the United States…

The listed action the district court identified as relevant to this action is § 509(b)(1)(E) ("approving or promulgating any effluent limitation or other limitation under section 301 [effluent limitations], 302 [Water quality related effluent limitations], 306 [National standards of performance], or 405 [Disposal or use of sewage sludge]"). Although EPA cites to several of these provisions as its authority for promulgating the WOTUS rule, EPA's citation is not dispositive. *See, e.g., Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 266 F. Supp. 2d 1101, 1117 (N.D. Cal. 2003) ("The fact that EPA generally cited section 301 for its authority to promulgate the CPRs does not lead to the conclusion that the silvicultural regulation was then based on such authority.").

The WOTUS rule is not an "effluent limitation or other limitation." It does not directly establish any effluent or performance standards or even any requirements

whatsoever but rather is a definitional rule. *See* 80 Fed. Reg. at 37,054 ("This final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of 'waters of the United States' consistent with the Clean Water Act (CWA), Supreme Court precedent, and science."). It "imposes no enforceable duty" on "governments" or "the private sector." *Id.* at 37,102.

Therefore, according to the applicable case law, legislative history and statutory interpretation principles, review of the WOTUS Rule must be in district court as in EPA's previous attempt at enacting a "navigable waters" definition. *See American Petroleum Ins. v. Johnson*, 541 F. Supp. 2d 165 (D. D.C. 2008). Where the statute is clear, this Court's role is to apply the statute as written. The trial court's determination it lacks jurisdiction must be reversed.

I. The case law supports jurisdiction in district court.

Although courts disagree whether to interpret Section 509(b) somewhat expansively or whether to limit it to its express terms, no court has interpreted § 509(b) to apply to any rule that does not contain requirements for the regulated community or administering agencies. And in the Eleventh Circuit, the issue has significantly less ambiguity, because this Court has consistently applied a narrow interpretation of § 509(b). Therefore, according to any court's test, but particularly within the Eleventh Circuit, the challenge of the WOTUS Rule should be heard in district court.

The leading case in this Circuit is *Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012). That challenge was to the "water transfer rule," which created a permanent exemption from the permit program for pollutants discharged from water transfers. This Court applied a narrow interpretation of § 509(b), explaining, "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." 699 F.3d at 1286 (quoting *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). This Court applied that principle to the rule and concluded that "[b]ecause the water-transfer rule is neither an effluent limitation nor a limitation promulgated under section 1311, 1312, 1316, or 1345, section 1369(b)(1)(E) cannot be the basis for our jurisdiction in this action." *Id.*[1]

Previous Eleventh Circuit cases held similarly. *See, e.g., City of Sarasota v. EPA*, 813 F.2d 1106 (11th Cir. 1987) (reasoning that "Section 1369 provides for review in the courts of appeals of specified EPA actions," which did not include review of an EPA decision denying funding for construction of a land-based spray irrigation sewage treatment plant); *Alcoa, Inc. v. EPA*, No. 02-13562-II, 2002 WL 32310392

[1] Similar cases finding no circuit court jurisdiction over rule challenges involving an exemption from permitting requirements include *Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1017-18 (9th Cir. 2008) (exempting certain marine discharges from the CWA permitting scheme); *ONRC Action v. United States Bureau of Reclamation*, No. 97–3090, 2012 WL 3526833, *24-25 (D. Or. Jan. 17, 2012) (water transfer rule exemption); *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 266 F. Supp. 2d 1101, 1117-18 (N.D. Cal. 2003) (exempting silvicultural activities from certain permitting requirements).

(11th Cir. Oct. 16, 2002) (finding no jurisdiction to review challenge to EPA's approval of total maximum daily loads under section 303); *City of Baton Rouge v. EPA*, 620 F.2d 478 (5th Cir. 1980)[2] (dismissing challenge to EPA's administrative order to comply with permit issued under § 402 and explaining, "the Court of Appeals lack power to review actions of the EPA over which § 1369(b)(1) does not specifically grant review"). In these decisions, the Eleventh Circuit has interpreted § 509 similar to the D.C. Circuit, which concluded that "original jurisdiction over EPA actions not expressly listed in section 1369(b)(1) lies not with us, but with the district court." *Friends of Earth v. EPA*, 333 F.3d 184, 189 (D.C. Cir. 2003).[3]

Although some other circuits have adopted a more expansive view of the judicial review provision, circuit courts have not read it to include rules with no regulatory requirements capable of violation such as the WOTUS Rule. For example, in *Virginia Elec. & Power Co. v. Costle*, 566 F.2d 446, 450 (4th Cir. 1977), the court considered a regulation providing that "the location, design, construction, and capacity of cooling water intake structures [shall] reflect the best technology available

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[2] "[D]ecisions of the United States Court of Appeals for the Fifth Circuit…, as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit." *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981).

[3] The Supreme Court also considered this issue in *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980), finding that EPA's decision to veto a state-issued permit was not an "effluent limitation" or "other limitation" under § 509(b)(1)(E), but it was an issuance or denial of a permit subject to circuit court review under § 509(b)(1)(F). Therefore, while this decision appears generally in line with the Eleventh Circuit's reasoning, it is not directly controlling here.

for minimizing adverse environmental impact." The construction of a cooling water intake structure not reflecting the best technology would be a violation of that regulation. Therefore, the court found the regulation to fall within the judicial review section of the Clean Water Act. Similarly, in *Iowa League of Cities v. EPA*, 711 F.3d 844, 864 (8th Cir. 2013), the court accepted jurisdiction to review guidance letters "establishing a new prohibition on bacteria mixing zones, one by which [permittees] must abide in the permit application process, [where] failure to conform will bring adverse consequences." Likewise, *Natural Res. Def. Council, Inc. v. EPA*, 673 F.2d 400 (D.C. Cir. 1982) considered the comprehensive "consolidated permit program requirements" for four separate environmental statutes. *See* 45 Fed. Reg. 33,290 (May 19, 1980) (emphasis added). The regulations established "basic permit requirements," "the requirements for state programs operated in lieu of EPA," and "the procedures to be followed in making permit decisions." *See id.*, at 33,291. The court in *Natural Res. Def. Council, Inc. v. EPA*, 656 F.2d 768, 773 (D.C. Cir. 1981) heard a challenge to regulations allowing for a variance from permitting requirements, but that required certain actions of the discharger to obtain that variance, including monitoring and a "schedule of activities" in addition to making certain showings. *See also, e.g., Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 181 (2d Cir. 2004) (requirements for cooling water intake systems); *Com. of Pa., Dep't of Envtl. Res. v. EPA*, 618 F.2d 991, 993 (3d Cir. 1980) (regulations establishing standards of performance for new point sources in the coal mining industry); *Appalachian Power Co. v. Train*, 566 F.2d 451, 454 (4th Cir.

1977) (requirements for cooling water intake systems); *California & Hawaiian Sugar Co. v. EPA*, 553 F.2d 280, 282 (2d Cir. 1977) (regulations requiring curtailment of water pollution by crystalline cane sugar refineries); *Am. Paper Inst. v. Train*, 543 F.2d 328, 335 (D.C. Cir. 1976) (final effluent limitations guidelines for existing sources and standards of performance and pretreatment standards for new sources); *Natural Res. Def. Council, Inc. v. EPA*, 537 F.2d 642, 643 (2d Cir. 1976) (effluent limitation guidelines); *E. I. du Pont de Nemours & Co. v. Train*, 528 F.2d 1136, 1137 (4th Cir. 1975) aff'd, 430 U.S. 112 (1977) (effluent limitations).

Even the Sixth Circuit decision this Court declined to follow in *Friends of the Everglades* – *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927 (6th Cir. 2009) – contained an implicit requirement. Although *Nat'l Cotton* involved an exemption from the Clean Water Act, that exemption was accomplished by incorporating the requirements of a related statute, the Federal Insecticide, Fungicide, and Rodenticide Act (the "FIFRA"). *See* 71 Fed. Reg. 68,483, 68,492 (Nov. 27, 2006), exempting "[t]he application of pesticides consistent with all relevant **requirements** under FIFRA." (emphasis added).

Most courts, and particularly the Eleventh Circuit, have adopted a more narrow reading of the judicial review provision, which we urge this Court to continue here. However, under no interpretation can a rule such as the WOTUS Rule, that contains no regulatory requirements capable of violation, fall within the judicial review provision of the Clean Water Act. *See* 80 Fed. Reg. at 37,054 ("This final rule does

not establish any regulatory requirements."). Because the WOTUS Rule is not an "other limitation," review of the WOTUS Rule must be in district court under the Administrative Procedure Act.

II. The legislative history reveals Congress intended circuit court review for only a narrow subset of agency actions, and the WOTUS Rule is not among them.

The convoluted judicial review section of the Clean Water Act is the result of a compromise between the original Senate and House of Representatives versions of the Federal Water Pollution Control Act amendments of 1972. This provision changed many times throughout the amendments' drafting, but consistent throughout was an intent to subject only certain specific agency actions to the Clean Water Act's judicial review rules and to preserve the unencumbered right of judicial review for all other actions. Because the WOTUS Rule does not fall within one of the specifically identified provisions, any challenge to its unlawful promulgation is not constrained by the Clean Water Act's judicial review section. This Court cannot rewrite the law to enlarge the scope of that section. It must follow the law as drafted and find that review of the WOTUS Rule lies in district court.

The original Senate bill, S. 2770, had an even more narrow judicial review section that divided review of certain actions between the United States Circuit Court of Appeals for the District of Columbia Circuit and the various regional United States Circuit Courts of Appeals. *See* S. 2770 (Oct. 28, 1971), pp. 179-80, attached as Exhibit A. The D.C. Circuit was to review standards of performance under Section 306,

effluent or treatment standards under Section 307, and state permit programs under Section 402. The regional circuits were to review effluent limitations under Sections 301 or 302 and the issuance or denial of a permit under Section 402. *See id.* Nowhere in the text does the phrase "other limitation" appear.

The phrase "other limitation" appears in the House amendment to the Senate bill, which also changed the provision's language to place judicial review in the district courts. The House version included the following text: "in approving or promulgating any effluent limitation or other limitation under sections 301, 302, or 306 … judicial review may be brought by any interested person in the district court of the United States for the district in which the person resides or transacts business." H. Comm. R. No. 92-911 (Mar. 11, 1972), p. 823, attached as Exhibit B. The committee then emphasized that this provision was not intended to cover all possible agency actions and that it wished to preserve the otherwise existing right to judicial review under other provisions and laws. *See id.* ("The Committee further notes that the inclusion of section 509 is not intended to exclude judicial review under other provisions of the legislation that are otherwise permitted by law.").

Under the House version, review of all agency actions would fall in district court, but only some of those actions would be subject to the various restrictions of § 509(b), including a very tight window for initiating suit and challenging the agency action. The more liberal Administrative Procedure Act would govern the timing and procedures for challenging all other agency actions.

The combined version preserved the enumeration of specific agency actions subject to the judicial review provision, but placed the review of those actions in the various regional circuit courts. *See* 33 U.S.C. § 1369(b). As the legislative history shows, both branches of Congress intended this list to be specific and narrow rather than to cover the universe of agency actions. And actions not in that list were to be challenged according to the otherwise applicable avenues of judicial review. Because Congress did not include in § 509(b) definitional rules bearing no regulatory requirements, these rules are not subject to that provision.

The legislative history makes clear that § 509(b) should be interpreted according to its express terms. Any challenge to the WOTUS Rule's unlawful promulgation must be in district court pursuant to the Administrative Procedures Act.

III. Other provisions of the statute reveal "other limitations" to include only affirmative requirements.

The term "other limitation" appears elsewhere in the Clean Water Act, and in every case, it clearly does not encompass the WOTUS Rule. Though the Clean Water Act does not define "other limitation," these other contexts for its use reveal the drafters' understanding of the term. In each instance, the term means an express requirement of either the regulated community or an administering agency. Because the WOTUS Rule, according to Defendants' own explanation, "does not establish any regulatory requirements," it is not an "other limitation" as the Clean Water Act drafters intended that term.

For example, the Clean Water Act section addressing agency inspections and monitoring references a "determin[ation] whether any person is in violation of any such effluent limitation, or other limitation." 33 U.S.C. § 1318(a). The WOTUS Rule is not such an "other limitation," because it is not capable of being violated.

The section regarding state certification requires states to certify any regulated entities' "activit[ies] for which there is not an applicable effluent limitation or other limitation." 33 U.S.C. § 1341(a)(1). The WOTUS Rule does not itself regulate any activities, so it would never be an "other limitation" in the context of this section.

After the state has provided its certification but "[p]rior to the … activity which may result in any discharge into the navigable waters …, the licensee or permittee shall provide an opportunity for … [agency] review … for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated." 33 U.S.C. § 1341(a)(4). Here, "navigable waters" and "other limitations" are entirely separate concepts. The threshold question of whether navigable waters are implicated precedes the question of whether "other limitations" might be violated. Therefore, they have no definitional overlap. And again, "other limitations" under this section must be capable of violation, which the WOTUS Rule is not.

Finally, "[a]ny certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any

applicable effluent limitations and other limitations." 33 U.S.C. § 1341(d). Here again, "other limitations" must be some standard or requirement with which an entity can comply. The WOTUS Rule is not.

In the definitions section, "[t]he term 'schedule of compliance' means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard." 33 U.S.C. § 1362(17). "Other limitations" must be something achievable through a schedule of compliance, remedial measures and other actions. The WOTUS Rule is not a requirement or standard with which an entity can comply. It merely states a definition. The rules for what can and cannot be discharged into "navigable waters" and under what conditions appear elsewhere. Those rules are "limitations," not the WOTUS Rule.

In the employee protections section, the statute provides that "[t]his section shall have no application to any employee who … deliberately violates any prohibition of effluent limitation or other limitation under section 1311 or 1312 of this title." 33 U.S.C. § 1367(d). Here is yet another instance of "other limitation" necessarily being some requirement that can be violated. The WOTUS Rule cannot be violated, because it contains no requirements.

The Clean Water Act's drafters understood "other limitation" to mean an express requirement. Nowhere in the act does "other limitation" have any other meaning. Therefore, the judicial review section only encompasses "effluent

limitations," standards of practice and other similar overt requirements. Because the WOTUS Rule "does not establish any regulatory requirements," it is not subject to the Clean Water Act's judicial review section and the trial court in this case erred in finding it lacks jurisdiction over Plaintiffs' suit.

IV. Because the statute is clear, this Court must enforce it as written.

Because the confines of the term "other limitation" are clear under this Court's precedent, under the language of the statute and under the statute's legislative history, this Court should not rewrite the Clean Water Act according to its preference. Although there may be compelling reasons for circuit courts to review nationally-applicable rules like the WOTUS Rule, there are even more compelling countervailing policy arguments. Small farmers and homebuilders should not be bound by the severely limiting judicial review provisions that would preclude them from future challenges to the WOTUS Rule, because many of these small businesses would have no way of knowing the WOTUS Rule applies to them until EPA makes such a determination in the future. Nevertheless, those policy arguments on both sides should be secondary to the straight-forward application of the clear statute. As the Supreme Court has explained, "these always-fascinating policy discussions are beside the point. The role of this Court is to apply the statute as it is written – even if we think some other approach might accord with good policy." *Burrage v. United States*, 134 S. Ct. 881, 892 (2014).

As written, the Clean Water Act provides for the judicial review by circuit courts of only certain agency actions. Of these, "other limitation" at a minimum means some standard or requirement capable of being violated. The WOTUS Rule states it does not establish any requirements whatsoever. Therefore, it is incapable of violation and is not a "limitation." It does not fall within the set of agency actions subject to the Clean Water Act's judicial review provision. Therefore, judicial review of the WOTUS Rule falls under the Administrative Procedure Act, which places jurisdiction in district court.

Conclusion

The case law, legislative history and statutory analysis all show that circuit court review is only for certain specific agency actions. Defendants' attempts to isolate one phrase – "other limitation" – and expand it beyond reason is contrary to this Court's precedent and all applicable principles of statutory interpretation. Amici join with Plaintiffs in asking this Court to overturn the trial court's determination it lacks jurisdiction over this matter. This Court should remand this case with instructions to consider the merits of Plaintiffs' motion for preliminary injunction.

Respectfully submitted this 22nd day of September, 2015.

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Certificate of Compliance

The undersigned hereby certifies, pursuant to Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(C), that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,436 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Garamond 14-point font.

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Certificate of Service

I HEREBY CERTIFY that I electronically filed the BRIEF OF AMICI CURIAE SOUTHEASTERN LEGAL FOUNDATION, INC.; GEORGIA AGRIBUSINESS COUNCIL, INC.; AND GREATER ATLANTA HOMEBUILDERS ASSOCIATION, INC. with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the attorneys of record.

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EXHIBIT A

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Calendar No. 411

92D CONGRESS
1ST SESSION

S. 2770

[Report No. 92–414]

IN THE SENATE OF THE UNITED STATES

OCTOBER 28, 1971

Mr. MUSKIE (for himself, Mr. RANDOLPH, Mr. BAKER, Mr. BAYH, Mr. BENTSEN, Mr. BOGGS, Mr. BUCKLEY, Mr. COOPER, Mr. DOLE, Mr. EAGLETON, Mr. JORDAN of North Carolina, Mr. MONTOYA, Mr. STAFFORD, Mr. TUNNEY, and Mr. WEICKER) introduced the following bill; which was read twice and referred to the Committee on Public Works

OCTOBER 28, 1971

Reported by Mr. RANDOLPH, without amendment

A BILL

To amend the Federal Water Pollution Control Act.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Federal Water Pollu-
4 tion Control Act Amendments of 1971".
5 SEC. 2. The Federal Water Pollution Control Act is
6 amended to read as follows:

II

1 ment, or information may be disclosed to other officers, em-
2 ployees, or authorized representatives of the United States
3 concerned with carrying out this Act, or when relevant
4 in any proceeding under this Act. Witnesses summoned shall
5 be paid the same fees and mileage that are paid witnesses
6 in the courts of the United States. In case of contumacy or
7 refusal to obey a subpena served upon any person under this
8 subsection, the district court of the United States for any
9 district in which such person is found or resides or transacts
10 business, upon application by the United States and after
11 notice to such person, shall have jurisdiction to issue an order
12 requiring such person to appear and give testimony before
13 the Administrator, to appear and produce papers, books, and
14 documents before the Administrator, or both, and any failure
15 to obey such order of the court may be punished by such
16 court as a contempt thereof.

17 "(b) (1) A petition for review of action of the Admin-
18 istrator in promulgating any standard of performance under
19 section 306 of this Act, or any determination made pursuant
20 to subsection (b) (1) (C) of section 306 of this Act, or any
21 effluent standard prohibition or treatment standard under
22 section 307 of this Act or any determination as to a State
23 permit program submitted under subsection (b) of section
24 402 of this Act may be filed by any interested per-
25 son only in the United States Court of Appeals for the

1 District of Columbia. A petition for review of the Adminis-
2 trator's action in approving or promulgating any effluent
3 limitation under sections 301 or 302 of this Act, or issuing
4 or denying any permit under section 402 of this Act, may
5 be filed by any interested person only in the United States
6 court of appeals for the appropriate circuit. Any such
7 petition shall be within thirty days from the date of such
8 determination, approval, promulgation, issuance, or denial,
9 or after such date if such petition is based solely on grounds
10 arising after such thirtieth day.
11 "(2) Action of the Administrator with respect to which
12 review could have been obtained under paragraph (1) of
13 this subsection shall not be subject to judicial review in civil
14 or criminal proceedings for enforcement.
15 "(c) In any judicial proceeding in which review is
16 sought of a determination under this Act required to be made
17 on the record after notice and opportunity for hearing, if any
18 party applies to the court for leave to adduce additional evi-
19 dence, and shows to the satisfaction of the court that such
20 additional evidence is material and that there were reason-
21 able grounds for the failure to adduce such evidence in the
22 proceeding before the Administrator, the court may order
23 such additional evidence (and evidence in rebuttal thereof)
24 to be taken before the Administrator, in such manner and
25 upon such terms and conditions as the court may deem

EXHIBIT B

92D CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPORT No. 92-911

FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

MARCH 11, 1972.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BLATNIK, from the Committee on Public Works, submitted the following

REPORT

together with

ADDITIONAL AND SUPPLEMENTAL VIEWS

[To accompany H.R. 11896]

The Committee on Public Works, to whom was referred the bill (H.R. 11896) to amend the Federal Water Pollution Control Act, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

* * * * * * *

BACKGROUND

America's waters are in serious trouble, thanks to years of neglect, ignorance and public indifference. Almost from its inception in 1946 the Committee on Public Works has been trying to bring to reality an effective properly funded program to restore and enhance the quality of our waters and to insure their future as a lasting national asset.

Prior to the Reorganization Act of 1946 there had been some legislation enacted in this general field—The Refuse Act of 1899, the Public Health Service Act of 1912 and the Oil Pollution Act of 1924. However, it was not until after the Committee on Public Works was established and considered the problem of water pollution control to be sufficiently serious for national attention that, in 1948, the first comprehensive measure aimed specifically at that problem was enacted. This landmark legislation was Public Law 80-845.

Public Law 80-845 essentially had a five-fold purpose:

1. Authorized the Surgeon General to assist in and encourage State studies and plans, interstate compacts, and creation of uniform State laws to control pollution.

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under section 301(b)(3)—(extensions of the 1976 date for point source effluent limitations)—or to obtain information under section 305 (water quality inventory).

Subsection (b) provides for judicial review of the Administrator's action in promulgating any standard of performance under section 306; in making any determination under section 306 (b)(1)(C), in promulgating an effluent standard, prohibition, or treatment standard under section 307; in making any determination as to a State permit program submitted under section 402 (b)(5); in approving or promulgating any effluent limitation or other limitation under sections 301, 302, or 306; and in issuing or denying any permit under section 402. The judicial review may be brought by any interested person in the district court of the United States for the district in which the person resides or transacts business. Application for review must be filed within 30 days from the date of the Administrator's action, or after that date only if the application is based solely on grounds which arose after the 30th day.

Subsection (c) provides that in any judicial proceeding brought under subsection (b) in which review is sought of a determination of the Administrator required to be made on the record after notice and opportunity of hearing, if any party applies to the court for permission to bring forward additional evidence and satisfies the court that the additional evidence is pertinent and there were reasonable grounds for failure to offer the evidence during the administrative proceedings, the court may order the Administrator to take the evidence into consideration in reevaluating his determination. The Administrator may subsequently modify his findings as to the facts or make new findings, and he shall file the modified or new findings, and his recommendations for the modification or setting aside of his original determination.

The Committee believes with the number and complexity of administrative determinations that the legislation requires there is a need to establish a clear and orderly process for judicial review. Section 509 will ensure that administrative actions are reviewable, but that the review will not unduly impede enforcement.

The Committee further notes that the inclusion of section 509 is not intended to exclude judicial review under other provisions of the legislation that are otherwise permitted by law.

Section 510—State authority

Section 510 retains the right of any State or interstate agency to adopt or enforce any standard or limitation as to discharges of pollutants or any requirement as to control or abatement of pollution which is not less stringent than those required or established under the Federal Water Pollution Control Act, except as otherwise expressly provided in the Act.

The Committee considers section 510 to be of extreme importance in assuring the States of the right to adopt or enforce provisions at least as strict as those established in this legislation. Thus, the Committee rejected in most instances suggestions for preemption by the Federal Government and preempted the States only where the situation warranted it based upon the urgent need for uniformity such as in section 312(f) relating to marine sanitation devices.

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