UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 0:15-cv-3058 (DWF/LIB)

Washington Cattlemen's Ass'n, et al.,

Plaintiffs,

v.

United States Environmental Protection Agency, et al.,

Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

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ISSUE PRESENTED AND APPLICABLE STANDARD OF REVIEW

The Clean Water Act, 33 U.S.C. § 1369(b)(1), provides exclusive appellate jurisdiction for review of certain actions by the Administrator of the United States Environmental Protection Agency. The Sixth Circuit Court of Appeals has ruled that it has exclusive jurisdiction under § 1369(b)(1) over 22 consolidated petitions for review of the Clean Water Rule—the rule at issue in this case—including Plaintiffs' petitions originally filed in the Eighth Circuit. The issue presented here is whether this Court must dismiss the complaint for lack of subject-matter jurisdiction.

Federal Rule of Civil Procedure 12(h)(3) requires dismissal if subject-matter jurisdiction is lacking. Federal courts are courts of limited jurisdiction and may hear cases only to the extent expressly provided by statute. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) ("jurisdiction [must] be established as a threshold matter"). It is "to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (citations omitted); *see also Arkansas Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A.*, 551 F.3d 812, 816 (8th Cir. 2009). Because the Sixth Circuit has confirmed its jurisdiction to review the Clean Water Rule, Plaintiffs cannot establish jurisdiction in this Court under the Administrative Procedure Act and these cases must be dismissed.

STATEMENT OF THE CASE

I. Statutory and regulatory background

A. The Clean Water Act and the Clean Water Rule

The Clean Water Act ("CWA") prohibits the discharge of any "pollutant" into "navigable waters" except as specifically allowed. 33 U.S.C. §§ 1311(a), 1362(7), (12). The Act broadly defines "navigable waters" as "the waters of the United States, including the territorial seas." *Id*. § 1362(7). Congress used this broad definition because applying the federal protections 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), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3742-43. The scope of "waters of the United States" is a critical component of the Act, defining, for example, where regulated parties must obtain permits to discharge pollutants. 33 U.S.C. §§ 1311, 1341, 1342, 1344; *see also* J.M. Gross & L. Dodge, *Clean Water Act* § 3.1 (2005) (stating that whether a body of water is a water of the United States is "pivotal" in determining whether the CWA's basic prohibition applies).

The Clean Water Rule ("Rule") amends the definition of "waters of the United States" to provide clarity and certainty to the regulated community about what waters are within federal CWA jurisdiction and what waters fall outside of CWA protection. 80 Fed. Reg. 37,054 (June 29, 2015). As the Sixth Circuit has observed, the United States Environmental Protection Agency and the United States Department of Defense ("Agencies") "conscientiously endeavored, within their technical expertise and experience, and based on reliable peer-reviewed science, to promulgate new standards to

protect water quality that conform to the Supreme Court's guidance." *In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804, 808 (6th Cir. 2015).

B. Judicial review under the Clean Water Act and 28 U.S.C. § 2112

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 EPA actions. As relevant here, actions originally reviewable in the courts of appeals include the Administrator's action

> (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), (F). Where review under § 1369(b)(1) is available, "it is the exclusive means of challenging actions covered by the statute." *Decker v. NEDC*, 133 S. Ct. 1326, 1334 (2013). Petitions for review generally must be filed within 120 days after the challenged EPA action. 33 U.S.C. § 1369(b)(1).

When multiple petitions for review are filed to challenge a single EPA action under 33 U.S.C. § 1369(b)(1), those petitions are by statute consolidated in one court of appeals. 28 U.S.C. § 2112(a)(3); *see, e.g., Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 741, 747 (5th Cir. 2011); *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 932 (6th Cir. 2009). Specifically, § 2112(a)(3) provides that the Judicial Panel on Multidistrict Litigation "shall, by means of random selection, designate one court of appeals" in which review of the agency action "shall" be consolidated, and § 2112(a)(5)

provides that all other courts of appeals "shall" transfer petitions for review of the agency action to the designated circuit.

Final agency action under the CWA that falls outside the categories enumerated in 33 U.S.C. § 1369(b)(1), but that is reviewable under general principles of administrative law, may generally be challenged in federal district court under the Administrative Procedure Act ("APA"). 5 U.S.C. § 701 et seq. An APA suit must be brought within six years of the challenged agency action, 28 U.S.C. § 2401(a), rendering actions reviewable under the APA rather than under § 1369(b)(1) subject to challenge for much longer.

II. The Clean Water Rule litigation

A. Petitions for review in the courts of appeals

More than 100 parties filed 22 petitions for review of the Clean Water Rule under 33 U.S.C. § 1369(b)(1), in multiple circuit courts of appeals. The Sixth Circuit was randomly selected as the court of appeals where the petitions would be consolidated under 28 U.S.C. § 2112(a)(3). *In re Final Rule: Clean Water Rule: Definition of "Waters of the United States,"* MCP No. 135 (J.P.M.L. July 28, 2015), Doc. 3. Plaintiffs in this case filed a petition in the Eighth Circuit, which has been transferred to the Sixth Circuit. *See Wash. Cattlemen's Ass'n v. EPA*, No. 15-3419 (8th Cir.); No. 15-4188 (6th Cir.).

On September 9, 2015, a group of State petitioners filed a motion in the Sixth Circuit for a nationwide stay of the Clean Water Rule pending judicial review. On October 9, 2015, that court issued a stay of the Rule pending further order of the court. *In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804 (6th Cir. 2015). That stay remains in place.

The same State petitioners also moved to dismiss their own petitions, claiming a lack of subject-matter jurisdiction. Seven other motions to dismiss were filed in the Sixth Circuit. On February 22, 2016, the Sixth Circuit issued a decision denying all the motions to dismiss, confirming that court's exclusive jurisdiction to hear challenges to the Clean Water Rule. *In re Dep't of Def. & EPA Final Rule*, 817 F.3d 261 (6th Cir. 2016).

In the lead opinion, Judge McKeague concluded that the Rule is an EPA action within both subsections (E) ("other limitation") and (F) ("issuing or denying any permit") of § 1369(b)(1). *Id. at* 265, 267. Judge Griffin disagreed but nevertheless concurred in the judgment based upon the Sixth Circuit's decision in *National Cotton Council of America v. EPA*, which he found to be controlling with respect to subsection (F). *Id.* at 275. Judge Keith dissented, agreeing with Judge Griffin's substantive analysis but disagreeing that *National Cotton Council* is controlling. *Id.* at 283.

Numerous petitioners sought rehearing of the Sixth Circuit's jurisdictional order, including Plaintiffs in this case. On April 21, 2016, the Sixth Circuit denied panel and *en banc* rehearing, stating that the petitions "were circulated to the full court" and "[n]o judge has requested a vote on the suggestion for rehearing en banc." *In re Dep't of Def. & EPA Final Rule*, No. 15-3751 (lead) (6th Cir.) Doc. 92-1. (Attachment 1).

B. Proceedings in this Court

In this Court, Plaintiffs filed a complaint seeking review of the Clean Water Rule under the APA, alleging that the Rule violates the APA, the CWA, and the Constitution. Doc. 1, ¶¶ 1, 45, 48, 52, 55, 62, 66, 69. Plaintiffs assert jurisdiction under the federal

question statute, 28 U.S.C. § 1331, the Little Tucker Act, 28 U.S.C. § 1346(a)(2), the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and the APA, 5 U.S.C. § 702.

On August 4, 2015, the Court granted the Agencies' motion to stay proceedings in this case pending a ruling from the Judicial Panel for Multidistrict Litigation. Doc. 14. The stay of proceedings in this case was continued, once at the request of the Agencies while the Sixth Circuit resolved the jurisdictional motions pending in that court, Doc. 26, and later at the request of Plaintiffs while the Sixth Circuit considered petitions for rehearing of its jurisdictional order, Doc. 31. Now that the Sixth Circuit has denied the petitions for rehearing, the stay of proceedings in this case has expired. Doc. 31 at 5.

C. Other district court challenges

Nearly all of the petitioners in the Sixth Circuit have also filed challenges to the Clean Water Rule in district courts. In August 2015, two district courts held that subject-matter jurisdiction lies in the Sixth Circuit under 33 U.S.C. § 1369(b)(1), *Murray Energy Corp. v. EPA*, No. 1:15-cv-110, 2015 WL 5062506 (N.D. W.Va. Aug. 26, 2015); *Georgia v. McCarthy*, No. 2:15-cv-79, 2015 WL 5092568 (S.D. Ga. Aug. 27, 2015) (appeal pending). A single district court ruled in an interlocutory order that jurisdiction to review the Rule lies in the federal district courts. *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015).[1]

[1] After the Sixth Circuit issued its jurisdictional ruling, the Agencies filed a motion asking the *North Dakota* court to reconsider its decision on jurisdiction. The motion is fully briefed and pending before that court.

After the Sixth Circuit ruled that it had jurisdiction over the Clean Water Rule challenges, the Northern District of Oklahoma court dismissed two district court challenges *sua sponte*, concluding that because jurisdiction under 33 U.S.C. § 1369(b)(1) is exclusive, the Sixth Circuit's jurisdictional ruling "divests this Court of jurisdiction to hear a challenge to a final agency action." *Oklahoma v. EPA*, No. 4:15-cv-381 (N.D. Okla. Feb. 24, 2016), Doc. 36; *Chamber of Commerce of the United States v. EPA*, No. 4:15-cv-386 (N.D. Okla. Feb. 24, 2016) Doc. 49 (Attachment 2) (citing *Maier v. EPA*, 114 F.3d 1032, 1036-37 (10th Cir. 1997)) (appeal pending). Following the Sixth Circuit's denial of the rehearing petitions, the Southern District of Ohio dismissed the complaint filed in that court, *Ohio v. EPA*, No. 2:15-cv-2467 (S.D. Ohio April 25, 2016) Doc. 54 (Attachment 3), and plaintiffs in the District of Arizona and the District of Columbia have voluntarily dismissed their complaints, *Az. Mining Ass'n v. EPA*, No. 2:25-cv-1752 (D. Az. May 2, 2016) Doc. 28 (Attachment 4); *Natural Res. Def. Council v. EPA*, No. 1:15-cv-1324 (D.D.C. May 5, 2016) (Attachment 5). Presently, eleven complaints remain pending in eight district courts, including the complaint in this case.

SUMMARY OF ARGUMENT

The complaint should be dismissed. First, the Sixth Circuit's decision that it has exclusive jurisdiction over the Clean Water Rule challenges is controlling. Second, availability of review in that court under 33 U.S.C. § 1369(b)(1) deprives this Court of authority to grant relief under the APA. Third, review of the Rule in multiple courts would be contrary to prudential limits on duplicative litigation. Finally, the Sixth Circuit and two other district courts have correctly concluded that the Rule is exclusively

reviewable in the courts of appeals under 33 U.S.C. § 1369(b)(1), and if this Court were to independently consider that question, it should reach the same conclusion.

ARGUMENT

I. The Sixth Circuit's decision that it has exclusive subject-matter jurisdiction means that this Court lacks subject-matter jurisdiction.

A. The Sixth Circuit's decision on subject-matter jurisdiction is controlling because that is the choice that Congress made by requiring consolidation of multi-circuit petitions under 28 U.S.C. § 2112(a).

The Sixth Circuit's decision that it has exclusive jurisdiction to review the Clean Water Rule is binding on this Court because the Sixth Circuit is the court designated by statute to hear the consolidated petitions for review of the Rule, including the petitions filed in the Eighth Circuit by these Plaintiffs and transferred to the Sixth Circuit by the Judicial Panel for Multidistrict Litigation. By operation of 28 U.S.C. § 2112(a), one court of appeals is authorized to decide all petitions for review of the same agency action. The agency must file the administrative record in that court, *id.* § 2112(a)(3), and all other courts of appeals "shall" transfer petitions for review of the agency action to the designated circuit, *id.* § 2112(a)(5). This mandatory transfer provision ensures that all challenges to the same agency action are reviewed by a single court randomly selected by the Judicial Panel for Multidistrict Litigation.

Several statutes provide for judicial review of certain agency actions in a single circuit. *E.g.*, 42 U.S.C. § 7607(b)(1) (actions under the Clean Air Act); 47 U.S.C. § 402(j) (actions under the Federal Communications Act); 15 U.S.C. § 21 (certain orders under anti-trust law). The multi-circuit consolidation process in 28 U.S.C. § 2112 similarly

reflects Congress's intent that petitions for review of the same agency action filed in multiple circuits be reviewed in a consolidated proceeding in one court of appeals.

Plaintiffs here filed a petition for review of the Clean Water Rule in the Eighth Circuit Court of Appeals. Under 28 U.S.C. § 2112(a)(5), that court was required to transfer the petitions to the Sixth Circuit. There can be no question but that the Sixth Circuit's judgment on those petitions, including its jurisdictional holding, is dispositive and binding on the Eighth Circuit. Thus, the Eighth Circuit would have to reverse any contrary decision by this Court. *Cf. In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987), *aff'd sub nom., Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989) (concluding that a decision by a 28 U.S.C. § 1407 transferee court should be treated as binding on return to the transferor court because, if it were not, "transfers under 28 U.S.C. § 1407 could be counterproductive"). The Agencies are bound nationwide by the Sixth Circuit's decisions in the consolidated challenges to the Clean Water Rule, win or lose, absent reversal by the Supreme Court. The same is true with respect to all other parties to the Sixth Circuit proceeding, including the Plaintiffs here. Any other result would render 33 U.S.C. § 1369(b)(1) and 28 U.S.C. § 2112(a) nullities.

Indeed, if parties unhappy with a circuit court randomly selected under § 2112(a) or wanting to hedge their bets against an adverse decision could simply file duplicative district court challenges, chaos would inevitably ensue. By means of § 2112(a), Congress clearly intended to avoid such inefficient, duplicative litigation and forum shopping. Worse yet, anyone dissatisfied with the designated circuit court's decision on the merits could file a district court action outside of that circuit anytime within six years of the

agency action being challenged in the hope of obtaining a different result. *See* 28 U.S.C. § 2401. That would be directly contrary to Congress's intent in § 2112(a), the judiciary's interest in preserving scarce resources, agencies' interest in efficient administration of Congress's statutory mandates, and the public's interest in regulatory certainty.

To be sure, a decision of a single court of appeals normally is binding only within that circuit. *See, e.g.*, *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 876 (D.C. Cir. 1992) (*en banc*). This serves the development of the law by allowing legal issues to "percolate" through the judicial system. However, Congress alters that traditional approach when it enacts a judicial-review provision that specifies a single court to decide multiple challenges to the same agency action. By providing in § 2112 for consolidation of multiple petitions for review of the same agency action in a single circuit, Congress determined that the interests in judicial economy, prompt resolution, and national uniformity override the interest in fostering multi-circuit development of the law. It follows that Congress intended that the reviewing court's holding as to that particular agency action be treated as binding nationwide. Indeed, consolidation would serve little purpose if the judgment reached by the designated circuit were not nationally applicable as to the action under review.

The legislative history of 33 U.S.C. § 1369(b)(1) further demonstrates that Congress intended that actions reviewable under that section be subject to judicial review in a single, consolidated proceeding. Under the CWA as amended in 1987, § 1369(b)(3) mandated a multi-circuit consolidation process functionally similar to that provided in the current version of 28 U.S.C. § 2112(a). Pub. L. No. 100-4, § 505(b), 101 Stat. 7, 75-76

(1987). When Congress amended § 2112(a) in 1988 to alter the consolidation mechanism from one based on the "first-to-file" to the current random-selection process, it rescinded § 1369(b)(3)'s by-then duplicative consolidation mechanism. Pub. L. No. 100-236, §§ 1-2, 101 Stat. 1731-32 (1988).

Court of appeals' decisions applying 28 U.S.C. § 2112 similarly reflect the fundamental presumption that the court selected to review all challenges to the same agency action is authorized to make nationally-binding determinations on the merits of the case. *See, e.g., North Carolina, Envtl. Policy Inst. v. EPA*, 881 F.2d 1250 (4th Cir. 1989); *City of Gallup v. Fed. Energy Reg. Comm'n*, 702 F.2d 1116 (D.C. Cir. 1983); *Virginia Elec. & Power Co. v. EPA*, 655 F.2d 534 (4th Cir. 1981); *Natural Res. Defense Council v. EPA*, 673 F.2d 392 (D.C. Cir. 1980).

Congress clearly expressed in § 2112(a) its objective of uniformity by centralizing multi-circuit petitions for review of agency action in a single circuit. Consistent with that intent, this Court must abide by the Sixth Circuit's determination that the Sixth Circuit has exclusive subject-matter jurisdiction to review challenges to the Clean Water Rule. *Cf. Oklahoma*, No. 4:15-cv-381 (N.D. Okla. Feb. 24, 2016), Doc. 36 at 3 (Attachment 2) (dismissing district court cases upon notice of Sixth Circuit's order confirming its exclusive jurisdiction).

B. The availability of review of the Clean Water Rule in the Sixth Circuit precludes review in the district courts under the Administrative Procedure Act.

The Sixth Circuit has definitively held that the Clean Water Rule falls within 33 U.S.C. § 1369(b)(1)'s exclusive judicial review provision. *In re EPA & Dep't of Def.*,

803 F.3d 804 (6th Cir. 2015). Plaintiffs thus have an adequate remedy in a court and cannot pursue a duplicative challenge in this Court under the APA.

"[A] statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute." *TRAC v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) (citations omitted). The law of the Eighth Circuit is in accord—"[w]hen Congress has established a special statutory review procedure for administrative actions, we generally treat that procedure as the exclusive means of review." *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1299 (8th Cir. 1989) (Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") judicial review scheme provided exclusive mechanism for review of FIFRA registrations and cancellations); *see also Sw. Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901, 906 (8th Cir. 1984), *cert. granted, judgment vacated sub nom. Arkansas Pub. Serv. Comm'n v. Sw. Bell Tel. Co.*, 476 U.S. 1167 (1986) (a specific grant of exclusive jurisdiction takes precedence over a more general grant). With regard to the CWA, the Supreme Court has expressly stated that where § 1369(b)(1) applies, "it is the exclusive means of challenging actions covered by the statute." *Decker*, 133 S. Ct. at 1334; *see also Maier*, 114 F.3d at 1036-37 (recognizing same).

Although Plaintiffs assert jurisdiction in this Court under the APA, 5 U.S.C. § 702, the federal question statute, 28 U.S.C. § 1331, the Little Tucker Act, 28 U.S.C. § 1346(a)(2), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, none of those

statutes provides jurisdiction here.[2] By its terms, the APA limits judicial review to final agency actions where "there is no other adequate remedy in a court." 5 U.S.C. § 704; *Cathedral Sq. Partners Ltd. P'ship v. S.D. Hous. Dev. Auth.*, 679 F. Supp. 2d 1034, 1040 (D.S.D. 2009) *on reconsideration*, 875 F. Supp. 2d 952 (D.S.D. 2012). Thus, the APA "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988); *accord Cent. Platte Natural Res. Dist. v. USDA*, 643 F.3d 1142, 1149 (8th Cir. 2011) ("Congress did not mean for the APA[] . . . to duplicate existing review mechanisms.") (citation omitted); *Defenders of Wildlife*, 882 F.2d at 1302-03 (holding APA review precluded when specialized statutory review available).

Plaintiffs here are parties in the Sixth Circuit consolidated cases, and the Sixth Circuit has determined that it will adjudicate those challenges. Accordingly, Plaintiffs have "an adequate remedy in a court," and their APA claims may not go forward. *Cf.*

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[2] The APA is not a jurisdictional grant, but it provides a cause of action and a limited waiver of sovereign immunity; the federal question statute establishes subjects that are within the jurisdiction of federal courts to entertain ("civil actions arising under the Constitution, laws, or treaties of the United States"), but provides no waiver of sovereign immunity. For simplicity, we refer to the Plaintiffs' claims under the APA and the federal question statute as "APA claims."

The Declaratory Judgment Act creates a remedy but does not provide a basis for jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950); *First Fed. Sav. & Loan Ass'n of Harrison, Ark. v. Anderson*, 681 F.2d 528, 533 (8th Cir. 1982). The Little Tucker Act, which "has long been construed as authorizing only actions for money judgments and not suits for equitable relief against the United States," does not provide a cause of action or waiver of sovereign immunity for Plaintiffs' challenge to the Clean Water Rule. *Richardson v. Morris*, 409 U.S. 464, 465 (1973); *see also United States v. Bormes*, 133 S. Ct. 12, 17 (2012).

Central Platte Natural Res. Dist., 643 F.3d at 1149 (affirming dismissal of APA claim where plaintiff had sought to simultaneously pursue Freedom of Information Act claim seeking the same relief); *Turner v. Sec'y of the U.S. Dept. of Housing & Urban Dev.*, 449 F.3d 536, 540 (3d Cir. 2006) (affirming that APA claim against agency was precluded where plaintiff had "adequate remedy" in prior suits she brought against her landlord); *Schaeffer v. U.S. Dept. of Educ.*, No. 4:05 CV 641 SNL, 2005 WL 3008516, at *7 (E.D. Mo. Nov. 9, 2005) (dismissing APA claim where plaintiff had three times pursued an alternative remedy in other suits).[3]

C. Review of the Clean Water Rule in multiple courts would be contrary to prudential limits on unnecessary duplicative litigation.

Sound prudential reasons also support dismissal of Plaintiffs' claims. Plaintiffs are parties in the consolidated Sixth Circuit proceedings and that court has determined that it has jurisdiction to review the Rule. Thus, if the present case were allowed to proceed, Plaintiffs would simultaneously be pursuing the very same claims and the same relief in two federal courts, which would waste judicial and party resources and create the possibility of inconsistent results. Principles of judicial economy and comity among the courts counsel in favor of avoiding such duplicative litigation.

[3] The American Farm Bureau Federation, American Petroleum Institute, National Association of Home Builders, and other petitioners before the Sixth Circuit conceded in their petition for rehearing *en banc* that where there is jurisdiction in the courts of appeals under § 1369(b)(1), "then it necessarily does *not* lie in the district courts under the APA." *In re EPA and Dep't of Def. Final Rule*, No. 15-3751(lead) Doc. 73 at 13-14 (emphasis in original).

The Eighth Circuit has followed the Supreme Court in recognizing "a general policy that duplicative litigation in *federal* courts should be avoided." *Missouri ex rel. Nixon v. Prudential Health Care Plan Inc.*, 259 F.3d 949, 953 (8th Cir. 2001) (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)) (emphasis in original). The Eighth Circuit stated that disallowing a party to pursue simultaneously pursue the same claims against the same party in more than one court promotes "wise judicial administration" and avoidance of "piecemeal litigation." 259 F.3d at 954. Based on these principles, the Eighth Circuit "discern[ed] a prudential limitation on the exercise of federal jurisdiction" and stated in no uncertain terms: "Plaintiffs may not pursue multiple federal suits against the same party involving the same controversy at the same time." *Id*. The court further found that the principles underlying avoidance of duplication apply even when the pending suits are in circuit and district courts:

> It makes little sense to proscribe district-district duplication but not district-circuit duplication, as both forms of duplication require the unnecessary expenditure of scarce federal judicial resources. Any form of duplication requires the federal judicial system (broadly speaking) to adjudicate two actions when one action will resolve the parties' controversy.

Id.

Moreover, the Sixth Circuit Court of Appeals is the only forum that can provide a "comprehensive disposition of [the] litigation." *Colorado River*, 424 U.S. at 817. Over 100 parties have petitions for review pending in the Sixth Circuit. Thus, even if this Court were to conclude that the Sixth Circuit's jurisdictional decision is not controlling per se, the Court should dismiss the complaint because it is duplicative of Plaintiffs' petition for

review of the Clean Water Rule, which will be litigated in the Sixth Circuit with the 21 other petitions for review of the Rule.

II. The opinions of the Sixth Circuit and other district courts holding that the Clean Water Rule is reviewable under 33 U.S.C. § 1369(b)(1) should at least be given highly persuasive effect.

As explained above, the Sixth Circuit's decision is controlling on this Court both in order for 28 U.S.C. § 2112(a) to function as designed and because APA review is not available where there is an adequate remedy in another court. In addition, the Eighth Circuit in *Prudential,* 259 F.3d at 954, clearly proscribed duplicative litigation. The Court should dismiss the complaint on those grounds, and its analysis need not proceed any further. But even if the Sixth Circuit's decision were not binding, this Court should conclude, as did the Sixth Circuit and the district courts for the Northern District of West Virginia and Southern District of Georgia, that Clean Water Rule is an action subject to judicial review exclusively in the court of appeals under § 1369(b)(1).

A. The Clean Water Rule falls squarely within § 1369(b)(1)(E) because it is an "other limitation" promulgated under 33 U.S.C. § 1311.

The Clean Water Rule is an EPA action "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 [of the CWA]." 33 U.S.C. § 1369(b)(1)(E). 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 type of limitation to "effluent limitation," both of which are governed by the judicial review provision of § 1369(b)(1)(E). As a matter of sound statutory construction, the term "other limitation" refers to restrictions under the specified CWA sections that are *not* effluent limitations. *Virginia Elec. & Power Co. v. EPA ("VEPCO")*, 566 F.2d 446, 449 (4th Cir. 1977) ("[W]e cannot assume that [§ 1369(b)(1)(E)'s] inclusion [of the phrase 'other limitation'] was meaningless or inadvertent."); *see also Friends of the Everglades v. EPA*, 699 F.3d 1280, 1286 (11th Cir. 2012) (citing Black's Law Dictionary, 1012 (9th ed. 2009), in recognizing that an "other limitation" is a "restriction").

"Other limitation" has also long been recognized as including restrictions other than numerical limitations. In *VEPCO*, one of the foundational cases interpreting § 1369(b)(1)(E), the Fourth Circuit concluded that because cooling water intake regulations "require[d] certain information to be considered in determining the best available technology for intake structures," they constituted "a limitation on point sources and permit issuers, for we construe that term as a restriction on the untrammeled discretion of the industry which was the condition prior to the passage of the statute." 566 F.2d at 450.

The Eighth Circuit followed *VEPCO* in asserting jurisdiction under § 1369(b)(1)(E) over EPA's correspondence with a United States Senator addressing certain regulatory requirements governing water treatment processes. In *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), the court of appeals explained that EPA's statement "regarding the use of blending is an 'other limitation' because, as in *VEPCO*, it

restricts the discretion of municipal sewer treatment plants in structuring their facilities." 711 F.3d at 866. The Eighth Circuit further observed that "[m]any of our sister circuits have adopted the *VEPCO* approach," by construing § 1369(b)(1)(E) to apply to new restrictions on the discretion of dischargers. *Id.* (citations omitted).

The regulatory definition of waters of the United States in the Clean Water Rule qualifies as an "other limitation" under § 1311 in two respects: it restricts the ability of property owners who are operating a potential point source to discharge pollutants into covered waters, and it requires authorized states to process permits for covered waters.

First, as to property owners, the CWA prohibits the "discharge of any pollutant"—defined as "any addition of any pollutant to *navigable waters* from any point source"—unless conducted in compliance with the Act's provisions. 33 U.S.C. §§ 1311(a), 1362(12) (emphasis added). "[N]avigable waters" is defined to include the "waters of the United States," *id*. § 1362(7), but "waters of the United States" is not further defined in the statute. The scope of waters of the United States is central to the prohibition in § 1311(a) and, as a result, to the National Pollutant Discharge Elimination System ("NPDES") permit program and other CWA programs that regulate point source discharges. *See, e.g.*, 33 U.S.C. §§ 1311(a), 1342(a), 1344(a).

The Rule defines the term "waters of the United States," with some waters falling within the definition and some falling outside the definition. 80 Fed. Reg. at 37,055-60. For point sources discharging pollutants to the defined waters, the Rule operates as a restriction. Thus, property owners who are operating a point source are restricted in their ability to discharge pollutants to waters without constraint as a direct result of the Clean

Water Rule and the requirements of the CWA. *See In re Dep't of Def. & EPA*, 817 F.3d at 269 ("These restrictions, of course, are presumably the reason for petitioners' challenges to the Rule.").

Second, NPDES permitting regulations impose limitations on States that are permit issuers. *Natural Res. Def. Council*, 673 F.2d at 405; *VEPCO*, 566 F.2d at 450. States that have received authorization for the NPDES permitting program *must* process permits in accordance with the Rule's definition of "waters of the United States." As the Sixth Circuit recognized, the Rule "alter[s] permit issuers' authority to restrict point-source operators' discharges into covered waters." *In re Dep't of Def. & EPA*, 817 F.3d at 269; *see also Georgia*, 2015 WL 5092568, at *2 ("Indeed, that is, in part, why the Plaintiffs are suing, and it is part of the harm of which they complain.").

The Rule is thus reviewable under § 1369(b)(1)(E). To rule otherwise, *i.e.*, to hold "that Congress . . . intended to exclude from [circuit court] review the definitional Rule on which the process [of individual permitting decisions] is based, would produce, per *E.I. du Pont*, 'a truly perverse situation.'" *In re Dep't of Def. & EPA*, 817 F.3d at 269 (citing *E.I. du Pont de Nemours Co. v. Train*, 430 U.S. 112, 136 (1977)).

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

Section 1369(b)(1)(F) provides for exclusive review in the courts of appeals of EPA action "in issuing or denying any [NPDES] permit under section 1342." 33 U.S.C. § 1369(b)(1)(F). In *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196 (1980) (*per curiam*), the Supreme Court held that judicial review of actions "functionally similar" to

the issuance or denial of an NPDES permit should be in the courts of appeals. 445 U.S. at 196.[4]

Courts of appeals have long recognized their jurisdiction under § 1369(b)(1)(F) to review EPA-promulgated rules that regulate the issuance or denial of NPDES permits. *See, e.g.*, *Iowa League of Cities*, 711 F.3d at 862; *Friends of the Everglades*, 699 F.3d at 1288. In *National Cotton Council*, for example, the Sixth Circuit held that it had original jurisdiction to review a CWA regulation defining the scope of the term "pollutant" under, "at a minimum, § 1369(b)(1)(F)." 553 F.3d at 933. In its recent decision confirming its jurisdiction to review the Clean Water Rule, the Sixth Circuit followed its earlier precedent in *National Cotton Council* and held that the Rule is an underlying permitting regulation. *In re Dep't of Def. & EPA*, 817 F.3d at 270-73, 275.

Like the Sixth Circuit, the Eighth Circuit in *Iowa League of Cities* implemented a broad interpretation of 33 U.S.C. § 1369(b)(1). 711 F.3d at 862 (stating "the Supreme Court has interpreted broadly the direct appellate review provision in CWA section 509(b)(1)(F)[, 33 U.S.C. § 1369(b)(1)(F)]."). *Iowa League of Cities* and *National Cotton Council* are just two examples of circuit courts giving 33 U.S.C. § 1369(b)(1) a "practical

[4] The EPA action at issue in *Crown Simpson* was "den[ial of] a variance and disapprov[al of] effluent restrictions contained in a permit issued by an authorized state agency." 445 U.S. at 194. In reversing the court of appeals, the Court rejected a narrow reading of § 1369(b)(1)(F), ruling instead that because "the precise effect of [EPA's] action is to 'den[y]' a permit within the meaning of § [1369(b)(1)(F)]," that provision applied and jurisdiction was exclusively in the courts of appeals. *Id*. at 196.

rather than a cramped construction." *Natural Res. Def. Council*, 673 F.2d at 405.[5] *See also National Pork Producers Council*, 635 F.3d at 747 n.19, 749-51; *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 495-98, 504-506 (2d Cir. 2005); *American Mining Congress v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992); *Natural Res. Def. Council v. EPA*, 526 F.3d 591, 601 (9th Cir. 2008); *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 843 (9th Cir. 2003); *Natural Res. Def. Council v. EPA*, 966 F.2d 1292, 1296-97, 1304-06 (9th Cir. 1992). *But see Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1018 (9th Cir. 2008) (finding pure exemptions from the CWA permit program not to be within 33 U.S.C. § 1369(b)(1)); *Friends of the Everglades*, 699 F.3d at 1284 (same).

As these circuit court decisions demonstrate, applying a practical construction to § 1369(b)(1)(F) allows for the "clear and orderly process for judicial review" intended by Congress, *see* H.R. Rep. No. 92-911, at 136 (1972), where parties may challenge not only the grant or denial of a permit, but also EPA's rules that govern the NPDES permitting process under 33 U.S.C. § 1342.

Here, the Clean Water Rule defines what aquatic features fall within, and outside, the statutory term "waters of the United States," and thereby identifies the circumstances in which some would-be dischargers must, or need not, obtain a NPDES permit under the

[5] As both the *Murray* and *Georgia* courts noted, *National Cotton Council* is consistent with the Supreme Court in "constru[ing] the appellate jurisdiction provided by § [1369(b)(1)(F)] broadly." *Murray*, 2015 WL 5062506, at *5; *see also Georgia*, 2015 WL 5092568, at *1. *See also In re Dep't of Def. & EPA*, 817 F.3d at 283 n.2 (stating that *Nat'l Cotton Council* is neither unique nor divergent from the predominant view of other circuits) (Griffin, J., concurring).

CWA. The Rule is thus reviewable under § 1369(b)(1)(F).

CONCLUSION

This Court lacks subject matter jurisdiction. Accordingly, the complaint must be dismissed.

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Respectfully submitted,

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