

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.

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

If a court lacks subject-matter jurisdiction, it “must dismiss the action.” Fed. R. Civ. P. 12(h)(3). Here, the Sixth Circuit Court of Appeals has ruled that it has jurisdiction to review the Clean Water Rule under 33 U.S.C. § 1369(b)(1). *In re U.S. Dep't. of Def. and U.S. Env'tl. Protection Agency Final Rule: Clean Water Rule*, 817 F.3d 261 (6th Cir. 2016). Plaintiffs' petition for review of the Rule is before the Sixth Circuit, pursuant to 28 U.S.C. § 2112. Plaintiffs do not dispute that where § 1369(b)(1) applies, it is the “exclusive means” of challenging EPA action. *Decker v. Northwest Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013); 2013); *accord, e.g., In re EPA and Dep't. of Def. Final Rule*, 817 F.3d at 266 (McKeague, J.); *id.* at 280 (Griffin, J.). Moreover, review of agency action under the Administrative Procedure Act (“APA”) is unavailable when there is an “other adequate remedy in a court.” 5 U.S.C. § 704.

- I. **The Sixth Circuit's holding that it has jurisdiction under 33 U.S.C. § 1369(b)(1) divests this Court of jurisdiction over the States' APA claims.**
 - A. **Jurisdiction under § 1369(b)(1) precludes review in this Court under the APA and federal question statute.**

Plaintiffs do not dispute that they have a remedy in the Sixth Circuit, having filed a petition for review of the Clean Water Rule in the Eighth Circuit that was transferred to the Sixth

Circuit, and that review under the APA is available only where “there is no other adequate remedy in a court.” 5 U.S.C. § 704. Indeed, Plaintiffs’ response is notable for its complete silence on this point. The Sixth Circuit has confirmed its jurisdiction, and Plaintiffs’ challenges to the Rule will be heard in that court. On June 14, 2016, the Sixth Circuit established a briefing schedule for the consolidated challenges to Clean Water Rule: briefing will begin in July 2016, and conclude no later than February 17, 2017. *In re EPA and Dep’t. of Def. Final Rule*, Doc. No. 99-1, at 1-2.

Because Plaintiffs have an “adequate remedy” in the Sixth Circuit, this case brought pursuant to the APA must be dismissed.

B. The Sixth Circuit’s ruling on jurisdiction to review the Clean Water Rule is controlling nationwide.

Where § 1369(b)(1) applies, “it is the *exclusive* means of challenging actions covered by the statute.” *Decker*, 133 S. Ct. at 1334 (emphasis added); *TRAC v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) (“a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute”) (citations omitted). Plaintiffs do not dispute that jurisdiction under § 1369(b)(1) is exclusive, nor do they address the effect of 28 U.S.C. § 2112(a), the mechanism Congress enacted to further streamline judicial review when multiple petitions of the same EPA action are filed in different courts of appeals. Section 2112(a)(3) sets forth a neutral process to designate a single circuit in which all petitions will be consolidated, and § 2112(a)(5) mandates that all other courts of appeals transfer petitions for review of the same action to the designated circuit. Because the Sixth Circuit is the court designated to hear the challenges to the Clean Water Rule, including Plaintiffs’ own petition, the Sixth Circuit’s ruling that § 1369(b)(1) applies to review of the Clean Water Rule is controlling.

If this Court were to disregard the Sixth Circuit's ruling, it would nullify the streamlined process that Congress mandated under § 1369(b)(1) and § 2112(a). Any party not wanting to be bound by the result in a consolidated action could simply file a district court action outside of the designated circuit. Congress clearly intended a different result when it required consolidation of multi-circuit petitions in a single court of appeals. Section 1369(b)(1) and § 2112(a) reflect Congress's judgment that in these circumstances the interests of judicial efficiency, national uniformity, and prompt resolution of challenges to agency action outweigh the benefits that flow from allowing issues to "percolate" through the judicial system, as is the case under the traditional rules of precedent.

Plaintiffs cite no persuasive authority or reason to disregard Congress's intent in § 2112(a). Section 2112(a) applies when petitions for review of the same agency action are filed in multiple circuits. The Sixth Circuit has confirmed its jurisdiction. Applying the Sixth Circuit's holding on jurisdiction nationwide does not enlarge its jurisdiction; it merely effectuates Congress's intent that a single circuit court selected under the neutral procedures in § 2112 render judgment on the merits of all petitions for review of the same agency action.

Recognizing this principle, the Northern District of Oklahoma District Court *sua sponte* dismissed two complaints for lack of subject-matter jurisdiction upon receiving notice of the Sixth Circuit's decision. *Oklahoma v. EPA*, Case 4:15-cv-381-CVE-FHM, Doc. 36 at 3 (N.D. Okla. Feb. 24, 2016); *Chamber of Commerce of the U.S. v. EPA*, No. 4:15-cv-386, Doc. 49 at 3 (N.D. Okla. Feb. 24, 2016) (appeal pending). Additional cases cited in the Agencies' opening brief show that courts generally defer to the decisions of the court of appeals selected under § 2112(a). *See, e.g., North Carolina 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. Def. Council v. EPA*, 673 F.2d 392 (D.C. Cir. 1980).

While these early cases do not expressly address the controlling effect of the § 2112(a) court’s judgment, they do reflect the general assumption that the court selected to review consolidated challenges is authorized to make all nationally-controlling determinations on the merits of the case (so long as it was clear that all the petitions in the various circuits were, in fact, challenging the same order). *Virginia Elec. Power Co. v. EPA*, 655 F.2d at 537, is particularly instructive because parties to that case questioned the court of appeals’ jurisdiction under § 1369(b)(1), but the Fourth Circuit deferred on that question to the D.C. Circuit, the transferee court that was to hear the consolidated petitions. *See Natural Res. Def. Council v. EPA*, 822 F.2d 104, 109 n.1 (D.C. Cir. 1987).

The plain and logical reading of § 2112 is that Congress intended to alter the usual rules that limit the precedential effect of a court of appeals’ decision to courts within that circuit.

C. Even if it were not controlling, this Court should follow the Sixth Circuit’s holding that § 1369(b)(1) applies to the Clean Water Rule because that conclusion is consistent with the statute and the prevailing case law.

Contrary to Plaintiffs’ assertion, *see* ECF No. 42 at 3, the Sixth Circuit’s jurisdictional decision is persuasive and is owed deference. The Sixth Circuit thoroughly analyzed the prevailing precedent interpreting § 1369(b)(1), including Supreme Court and Eighth Circuit precedent, and concluded that the Clean Water Rule is reviewable under § 1369(b)(1) because it is an action that falls within the text of § 1369(b)(1)(E) and (F). *See* Agencies’ Memo. in Support of Mot. to Dismiss, ECF No. 36 at 16-22. In defining “waters of the United States,” the Rule delimits an essential element of the prohibition on discharges in 33 U.S.C. § 1311, and thereby implements the most fundamental restriction in the Clean Water Act. *See* ECF No. 36 at 18-19. Because § 1369(b)(1)(E) expressly encompasses a limitation under § 1311 as an “other

limitation,” the Rule fits within the plain text of § 1369(b)(1)(E). Moreover, because the Clean Water Rule is a restriction on where discharges require a permit, States and “entities subject to the CWA’s permit requirements face new restrictions on their discretion with respect to discharges or discharge-related processes,” and therefore the Rule falls within § 1369(b)(1)(E) as interpreted by the Eighth Circuit in *Iowa League of Cities v. EPA*, 711 F.3d 844, 866 (8th Cir. 2013). See *In re EPA and Dept. of Def. Final Rule*, 817 F.3d at 269; see also *Georgia v. EPA*, CV215-79, 2015 WL 5092568, at *2 (S.D. Ga. Aug. 27, 2015), *appeal filed*, No. 15-14035 (11th Cir. Sept. 10, 2015); *Murray Energy Corp. v. EPA*, No. 1:15-cv-110, 2015 WL 5062506, at *4, 6 (N.D.W. Va. Aug. 26, 2015) (noting that the Eighth Circuit in *Iowa League of Cities* adopted Fourth Circuit reasoning, and dismissing the district court complaint challenging the Clean Water Rule).

With regard to § 1369(b)(1)(F), the Eighth Circuit has adhered to the Supreme Court’s pragmatic interpretation of the provision. *Iowa League of Cities*, 711 F.3d at 862. The Clean Water Rule directly governs the issuance or denial of permits because it specifies where the Act’s NPDES permitting requirements, 33 U.S.C. § 1342, apply and where they do not. Plaintiffs’ response that the Rule is definitional and establishes no regulatory requirements (ECF No. 42 at 3) simply ignores that, by defining “waters of the United States,” the Rule is central to § 1342 permitting. As such, the Clean Water Rule is similar to other rules governing permitting under § 1342 that have been found by the predominant body of case law to be reviewable under § 1369(b)(1)(F). ECF No. 36 at 19-22.

That the Sixth Circuit’s order confirming its jurisdiction contains concurring and dissenting opinions is of no moment. The Sixth Circuit was presented with petitions for rehearing (including a petition filed by these Plaintiffs), and no judge requested a vote on the

suggestion for rehearing en banc, including Judge Griffin, whose concurrence disagreed with portions of the majority opinion.¹ Moreover, Judge Griffin acknowledged “[a]s the lead opinion correctly notes, several courts have deviated from a strict reading of the jurisdictional language and toward a more ‘functional approach.’” 817 F.3d at 280.

As Judge McKeague observed in finding that § 1369(b)(1) applies, if “the [Sixth Circuit] exercises jurisdiction over petitioners’ instant challenges to the validity of the Rule in this nationwide multi-circuit case and upholds the Rule, then that determination *should* have preclusive effect.” *In re EPA and Dep’t. of Def. Final Rule*, 817 F.3d at 274 (emphasis in original). That court has the ability to decide *all* the challenges to the Rule in a single consolidated and streamlined proceeding. This Court should defer to the Sixth Circuit and dismiss the complaint.

II. Because the Court lacks subject-matter jurisdiction, the Complaint should be dismissed, not stayed.

Plaintiffs argue in the alternative that this case should be stayed pending potential review by the Supreme Court. ECF No. 42 at 4-6. For purposes of the present motion, it does not matter that the Supreme Court might ultimately address the jurisdictional questions. The Sixth Circuit

¹ Judge Griffin erred when he concluded that the definition of waters of the United States was not reviewable under §1369(b)(1)(E) because the Clean Water Rule “does not emanate from [§§ 1311, 1312, 1316, and 1345]” and “is not self-executing.” Like Judge McKeague, other district courts have correctly concluded that the Clean Water Rule “accomplishes significant limiting and significant restricting even if accomplished by way of defining” and noted that “EPA promulgated th[e] Rule under section 1311.” *Georgia v. McCarthy*, 2015 WL 5092568, at *2; *see also Texas Oil & Gas Ass’n v. EPA*, 161 F.3d 923, 928 (5th Cir. 1998) (observing that other limitations promulgated under the CWA and reviewable under §1369(b)(1)(E) “achieve their bite only after they have been incorporated into NPDES permits.”). And as Judge Griffin acknowledged, courts have read §1369(b)(1)(F) broadly, 817 F.3d at 280, including the Eighth Circuit in *Iowa League of Cities*.

performed a thorough jurisdictional review, concluded that it has jurisdiction, and then denied numerous petitions, from Plaintiffs and others, for rehearing en banc. Even if the Supreme Court were to ultimately reverse the Sixth Circuit with respect to subject-matter jurisdiction, Plaintiffs could then re-file their complaint in district court. But at present, as explained above, this Court lacks subject-matter jurisdiction over the Complaint. The Agencies do not seek to block Plaintiffs from having their day in court; Plaintiffs simply are not entitled to have two days in two different courts on the same issue at the same time. The Eighth Circuit articulated exactly this point in *Missouri ex rel. Nixon v. Prudential Health Care Plan Inc.*, 259 F.3d 949, 954 (8th Cir. 2001) when it held that there is a prudential limitation on jurisdiction: “Plaintiffs may not pursue multiple federal suits against the same party involving the same controversy at the same time.”

This Court should not look to the District of North Dakota as an example of how to proceed in this case. The District of North Dakota stands alone as the only court to conclude (through an interlocutory order) that jurisdiction to review the Clean Water Rule lies in district court rather than in the court of appeals. While that court denied the Agencies’ subsequent motion to dismiss, it did not address the arguments presented in the Agencies’ motion.

In marked contrast to the proceedings in the District of North Dakota, nine district court cases challenging the Clean Water Rule have now been dismissed. The Northern District of West Virginia dismissed the complaint challenging the Clean Water Rule in that district on August 26, 2015. *Murray Energy*, 2015 WL 5062506. The Northern District of Oklahoma dismissed two challenges sua sponte, concluding that 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, Doc. 36 (N.D. Okla. Feb. 24, 2016); *Chamber of Commerce of the U.S. v. EPA*, No. 4:15-cv-386,

Doc. 49 (N.D. Okla. Feb. 24, 2016) (appeals pending). Following the Sixth Circuit's denial of the rehearing petitions, the Southern District of Ohio dismissed the complaint filed there. *Ohio v. EPA*, No. 2:15-cv-2467, Doc. 54 (S.D. Ohio Apr. 25, 2016) (appeal pending). Plaintiffs in the District of Arizona, the District of Columbia, and the Northern District of California have voluntarily dismissed their complaints. *Az. Mining Ass'n v. EPA*, No. 2:25-cv-1752, Doc. 28 (D. Ariz. May 2, 2016); *Nat. Res. Def. Council v. EPA*, No. 1:15-cv-1324, Doc. 21 (D.D.C. May 5, 2016); *Waterkeeper Alliance, Inc. v. EPA*, No. 3:15-cv-3927, Doc. 20 (N.D. Cal. June 9, 2016). The Agencies have also moved to dismiss four complaints in the Southern District of Texas, *Texas v. EPA*, No. 3:15-cv-162, Doc. 54 (S.D. Tex.) (lead case). The motion was unopposed in one case and has been granted. *Tex. Alliance for Responsible Growth, Env't & Transp. v. EPA*, No. 3:15-cv-322, Doc. 27 (S.D. Tex.).

Plaintiffs have failed to meet their burden of demonstrating that this Court has subject-matter jurisdiction. *See VS Ltd. P'ship v. Dep't of Hous. & Urban Dev.*, 235 F.3d 1109, 1112 (8th Cir. 2000). Plaintiffs will have a full opportunity to pursue their challenges to the Clean Water Rule in the Sixth Circuit; but they are not entitled to a simultaneous second bite of the apple in district court. This case should therefore be dismissed.

CONCLUSION

Because the Sixth Circuit has exclusive jurisdiction to review the Clean Water Rule, this Court lacks jurisdiction. Moreover, Plaintiffs have an adequate remedy in the Sixth Circuit Court of Appeals. Accordingly, the Court should dismiss the complaint.

Dated: June 21, 2016

Respectfully submitted,

JOHN C. CRUDEN

Assistant Attorney General
Environment and Natural Resources Division

ANDREW M. LUGER
United States Attorney

/s/ Amy J. Dona
DANIEL R. DERTKE
AMY J. DONA
Environmental Defense Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044
Telephone: (202) 514-0223 (Dona)
Fax: (202) 514-8865
Email: amy.dona@usdoj.gov

FRIEDRICH A. P. SIEKERT
Assistant U.S. Attorney
Attorney ID No. 142013
300 South Fourth Street
Minneapolis, MN 55415
(612) 664-5600
(612) 664-5788 Facsimile
fred.siekert@usdoj.gov

Counsel for Defendants

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

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

**LR 7.1(f) & LR 72.2(d)
CERTIFICATE OF COMPLIANCE**

Plaintiff(s)

Case Number: 0:15-cv-3058

v.

United States Environmental
Protection Agency, et al.,

Defendant(s)

I, Amy J. Dona, certify that the

× Memoranda titled: MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION and REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION complies with Local Rule 7.1(f).

I further certify that, in preparation of the above document, I:

X Used the following word processing program and version: MS WORD 2013 and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above documents contains the following number of words: 8,330

Date: June 21, 2016

s/ Amy J. Dona

AMY J. DONA

Environmental Defense Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044
Telephone: (202) 514-0223 (Dona)
Fax: (202) 514-8865
Email: amy.dona@usdoj.gov
DC Bar No. 999219

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2016, I electronically filed the foregoing filing with the Clerk of the Court using the CM/ECF system, which will cause a copy to be served upon counsel of record.

/s/ Amy J. Dona

Amy J. Dona
United States Department of Justice
Environment and Natural Resources
Division
P.O. Box 7611
Washington, DC 20044
T: (202) 514-0223
F: (202) 514-8865
amy.dona@usdoj.gov

Counsel for Defendant

Laura Reich

From: ecf-notice@mnd.uscourts.gov
Sent: Tuesday, June 21, 2016 9:46 AM
To: mndecfnotifications@mnd.uscourts.gov
Subject: Activity in Case 0:15-cv-03058-DWF-LIB Washington Cattlemen's Association et al v. United States Environmental Protection Agency et al Reply to Response to Motion

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

*****NOTE TO PUBLIC ACCESS USERS***** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

U.S. District of Minnesota

Notice of Electronic Filing

The following transaction was entered by Dona, Amy on 6/21/2016 at 11:45 AM CDT and filed on 6/21/2016

Case Name: Washington Cattlemen's Association et al v. United States Environmental Protection Agency et al
Case Number: [0:15-cv-03058-DWF-LIB](#)
Filer: Jo Ellen Darcy
Gina McCarthy
United States Army Corps of Engineers
United States Environmental Protection Agency

Document Number: [46](#)

Docket Text:

[Reply to Response to Motion re \[34\] MOTION to Dismiss for Lack of Jurisdiction filed by Jo Ellen Darcy, Gina McCarthy, United States Army Corps of Engineers, United States Environmental Protection Agency. \(Attachments: # \(1\) LR7.1/LR72.2 Word Count Compliance Certificate, # \(2\) Certificate of Service\)\(Dona, Amy\)](#)

0:15-cv-03058-DWF-LIB Notice has been electronically mailed to:

Amy J. Dona amy.dona@usdoj.gov

Anthony L. Francois tfrancois@pacificlegal.org

Daniel R Dertke daniel.dertke@usdoj.gov, EFILE_EDS.ENRD@USDOJ.GOV

Friedrich A. P. Siekert fred.siekert@usdoj.gov, deb.kapinos@usdoj.gov, Isaac.McGurran-Hanson@usdoj.gov, usamn.ecfcivil@usdoj.gov

Gregory R Merz gregory.merz@gpmlaw.com, amy.milbradt@gpmlaw.com

Malcolm Reed Hopper rhopper@pacificlegal.org, incominglit@pacificlegal.org, kg@pacificlegal.org

Nancy Quattlebaum Burke nancy.burke@gpmlaw.com, linda.robertson@gpmlaw.com

0:15-cv-03058-DWF-LIB Notice has been delivered by other means to:

Coalition of Arizona/New Mexico Counties for Stable Economic Growth

Oregon Cattlemen's Association

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1051215216 [Date=6/21/2016] [FileNumber=5549622-0] [256e7c73713f226182f05faf9217d313ca302807c71e0cd4ea53d3f4acca6636a8ff69e020183ecebff533e38570701c7549b15c90a9c5d9b435559232741229]]

Document description:LR7.1/LR72.2 Word Count Compliance Certificate

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1051215216 [Date=6/21/2016] [FileNumber=5549622-1] [a30a6e160bf45dd8c48c23c838a390d188ec15f113d4cd5c3e5cca368017c4fdc18a02102b9a9f2b54cf34f23d38317fb00259b2b3c4976bbf2ce9a9845f1dd4]]

Document description:Certificate of Service

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1051215216 [Date=6/21/2016] [FileNumber=5549622-2] [179ad5baf87a60085115d1d09bc37967bafb35ff6db3413b565952663c4bd57c29f8fceb9d438ad896a387f78f56eadc30de2a5a92f56953c0828ca19915b823]]