IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

AMERICAN FARM BUREAU FEDERATION, et al., *Plaintiffs*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Defendants*.	Civil Action No. 3:15-cv-165

PLAINTIFFS' OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS

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SUMMARY & STATEMENT OF ISSUES

The question presented by the defendants' motion to dismiss is whether the Court has jurisdiction over this action under 28 U.S.C. § 1331 and 5 U.S.C. § 704, or if instead jurisdiction lies exclusively in the U.S. Court of Appeals for the Sixth Circuit under 33 U.S.C. § 1369(b)(1)(F) or (E). The answer to that question turns, in the main, on how the Court decides to treat the Sixth Circuit's recent holding in *In re Clean Water Rule: Definition of Waters of U.S.*, 817 F.3d 261 (6th Cir. 2016) (hereinafter *CWR*), in which a splintered 1-1-1 panel of the Sixth Circuit denied the motions to dismiss 22 original petitions for review of the same agency rule at issue in this case.

Defendants say that the Sixth Circuit's decision is binding on this Court. But their only support for that remarkable assertion is a question-begging citation to 28 U.S.C. § 2112(a)—a provision that, by its own terms, applies only if one assumes the answer to the question presented, that jurisdiction lies in the courts of appeals under Section 1369(b)(1). Defendants insinuate (but do not expressly contend) that *CWR* might instead be binding under the law-of-the-case doctrine, similar to the way that decisions of an MDL court bind an original transferee court once a case is returned to the transferee court for trial. It is unsurprising that defendants do not fully develop that argument, however, because—as we demonstrate more fully below—the analogy is wholly inapt.

In the end, defendants cannot dodge the fundamental rule that this Court bears an independent obligation to determine its jurisdiction for itself. In the court's exercise of that obligation, the Sixth Circuit's decision in *CWR* serves

only as persuasive authority; but it persuasively supports *our* position, not defendants'. A majority of the judges in that case *agreed* that the Sixth Circuit *lacks* jurisdiction under Section 1369(b)(1). The sole reason that Judge Griffin voted with Judge McKeague to deny the motions to dismiss was his belief that the Sixth Circuit's decision in *National Cotton Council v. EPA*, 553 F.3d 927 (6th Cir. 2009)—a decision that has been rejected by the Eleventh Circuit (*Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012)) and that Judge Griffin himself criticized as "incorrect" and "[not] correctly decided" (*CWR*, 817 F.3d at 280, 283)—required him to do so. Had it not been for *National Cotton*, he would have cast his lot with Judge Keith, who voted to dismiss the petitions for review for lack of jurisdiction. *Id.* at 280. Because this Court (unlike Judge Griffin) is not bound by *National Cotton*, deference to two of the three opinions from *CWR* means *denying* the government's motion.

More fundamentally, defendants' position finds no support in the statute's plain language. Defendants say that jurisdiction belongs in the court of appeals under Sections 1369(b)(1)(E) and (F). But, as we explain below, that contention runs afoul several canons of statutory construction and would mean subjecting virtually every agency action under the Clean Water Act to original review in the courts of appeals. In arguing otherwise, defendants expound at length upon Congress's supposed purpose, despite that—if Congress had wanted all agency action reviewed in the courts of appeal—it could easily have said so, as it did in the Clean Air Act. The clear language of the statute gives *this* court jurisdiction, and so the motion to dismiss should be denied.

BACKGROUND

Legal background. The Clean Water Act (CWA) prohibits discharging pollutants without a Section 402 permit for discharges covered by the National Pollution Discharge Elimination System (NPDES) or a Section 404 permit for discharges of dredged or fill material. *See* 33 U.S.C. § 1311(a). The CWA defines the term "discharge of a pollutant" as the "addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A). "Navigable waters," in turn, are defined to mean "the waters of the United States, including the territorial seas." *Id.* § 1362(7).

Section 509(b) of the CWA (codified at 33 U.S.C. § 1369(b)(1)) establishes a special scheme of judicial review for CWA permitting decisions and related agency rulemaking. In particular, Congress conferred original jurisdiction on the courts of appeals to review challenges to agency actions:

> (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.

33 U.S.C. § 1369(b)(1).

Separately, the Administrative Procedure Act provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action" may bring suit in district court for judicial review of any "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. §§ 702, 704. Thus, when judicial review of a final agency action under the Clean Water Act is not available in the courts of appeals under 33 U.S.C. § 1369(b)(1), the APA provides a cause of action in district court under 5 U.S.C. §§ 702, 704 and 28 U.S.C. § 1331.

The courts of appeals are in disarray over the meaning of Section 1369-(b)(1), and in particular the meaning of subsections (E) and (F). At the heart of the confusion is the Sixth Circuit's decision in *National Cotton*, in which that court held that Section 1369(b)(1)(F) provides for broad original jurisdiction in the courts of appeals to review rules "regulat[ing] . . . permitting procedures" under the Clean Water Act. 553 F.3d at 933. The Eleventh Circuit, in *Friends of the Everglades*, rejected *National Cotton*, dismissing it as "an opinion that provided no analysis of the [relevant] provision." 699 F.3d at 1288. Thus, in seeking further review before the Supreme Court in *Friends of the Everglades*, the United States acknowledged that the Eleventh Circuit's holding "conflicts with the Sixth Circuit's decision in *National Cotton Council*." U.S. Pet'n at 18, No. 13-10, 2013 WL 3291803 (U.S. June 28, 2013).

The Rule. On June 29, 2015, the Environmental Protection Agency and U.S. Army Corps of Engineers (the Agencies) published the so-called Clean Water Rule (the Rule), which purports to "clarif[y]" the Agencies' definition of

"waters of the United States" within the meaning of the CWA—*i.e.*, the scope of the Agencies' regulatory jurisdiction under the CWA. The Rule separates waters into three jurisdictional groups under the CWA: waters that are categorically jurisdictional, waters "that require a case-specific significant nexus evaluation" to determine if they are jurisdictional, and waters that are categorically excluded from jurisdiction.

Six types of waters qualify as categorically jurisdictional under the Rule: (1) traditional navigable waters, (2) interstate waters, (3) territorial seas, (4) impoundments of any water deemed to be a "water of the United States," (5) certain tributaries, and (6) certain waters that are "adjacent" to the foregoing five categories of waters. 33 C.F.R. § 328.3(a).

- "Traditional navigable waters" are "waters that are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." 80 Fed. Reg. 37, 054, 37,074; *see The Daniel Ball*, 10 Wall. 557, 563 (1871).
- "Interstate waters" are waters that cross state borders, "even if they are not navigable" and "do not connect to [navigable] waters." 80 Fed. Reg. at 37,074.
- "Territorial seas" are "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles." 33 U.S.C. § 1362(8).
- A "tributary" is defined as any water that flows "directly or through another water or waters to a traditional navigable water, interstate water, or territorial sea." 80 Fed. Reg. at 37076. To count as a jurisdictional water, the tributary (A) must "contribute flow" directly or through any other water—such as ditches or wetlands—to a traditional navigable water, interstate water, or territorial sea, and (B) must be "characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark." 33 C.F.R. § 328.3(c)(3).

- An "adjacent water" is defined as any water bordering, contiguous to, or "neighboring" the first four kinds of jurisdictional waters. 33 C.F.R. § 328.3(c)(1). A water is "neighboring" another water when any part of it is: (A) within 100 feet of the ordinary high water mark of the water, (B) within the 100-year floodplain of the water but not more than 1,500 feet from the ordinary high water mark, or (C) within 1,500 feet of the high tide line of a traditional navigable water, interstate water, or territorial sea or the ordinary high water mark of the Great Lakes. *Id.* § 328.3(c)(2).

In the second group are waters "that require a case-specific significant nexus evaluation" to determine if they are jurisdictional. 80 Fed. Reg. at 37,073. As a general matter, waters that are subject to the Agencies' regulatory jurisdiction based on a case-specific significant nexus determination include: (A) waters, any part of which are within the 100-year floodplain of a traditional navigable water, interstate water, or territorial sea, or (B) waters, any part of which are within 4,000 feet of the high tide line or ordinary high water mark of any of those jurisdictional waters, any impoundment of those jurisdictional waters, or any covered tributary. 33 C.F.R. § 328.3(a)(8). The methods and standards for conducting significant nexus analyses are vague and unclear.

In the third group are waters always excluded from jurisdiction when certain criteria are met. These include swimming pools; puddles; ornamental waters; prior converted cropland; waste treatment systems; certain kinds of drainage ditches; farm and stock watering ponds; settling basins; water-filled depressions incidental to mining or construction activity; subsurface drainage systems; and certain wastewater recycling structures. 33 C.F.R. § 328.3(b).

Procedural background. Following promulgation of the Rule, public and private parties filed APA challenges in federal district courts throughout the

country, including the four challenges filed in this Court. The eighteen plaintiffs here joined in a single action seeking a declaration that (1) the agencies' actions violated the procedural requirements of the APA, (2) the Rule departs from the plain text of the CWA, and (3) the Rule violates certain provisions of the U.S. Constitution, including the Commerce and Due Process Clauses.

Motions for preliminary injunctions against enforcement of the Rule were filed in three of the district court lawsuits: *North Dakota v. EPA*, No. 3:15-cv-59 (D.N.D.), *Murray Energy Corp v. EPA*, No. 1:15-cv-110 (N.D. W. Va.), and *Georgia v. McCarthy*, No. 2:15-cv-79 (S.D. Ga.). The district court in the North Dakota action held that Section 1369(b)(1) is inapplicable and that it therefore has jurisdiction to hear the action, and it entered a preliminary injunction. Order, *North Dakota v. EPA*, No. 3:15-cv-59 (D.N.D. Aug. 27, 2015), Dkt. 70. The district courts in *Georgia* and *Murray Energy* held otherwise and dismissed the actions for want of jurisdiction, reasoning that exclusive original jurisdiction lies in this Court under Section 1369(b)(1). The state plaintiffs in the *Georgia* case noticed an appeal in the Eleventh Circuit. *See Georgia v. McCarthy*, 11th Cir. No. 15-14035. Initial briefing before the Eleventh Circuit was completed in September 2015; supplemental briefing in the wake of the decision in *CWR* is underway; oral argument has not yet been held.

Meanwhile, various parties filed 22 petitions for review of the Rule in various courts of appeals under Section 1369(b)(1). Those petitions were later transferred to the Sixth Circuit pursuant to 28 U.S.C. § 2112(a)(1). *See In re: Murray Energy Corporation v. EPA*, 6th Cir. No. 15-3751.

Although plaintiffs here are firmly of the view that jurisdiction lies in this Court and not in the Sixth Circuit, they—with the exception of the National Association of Manufacturers (NAM)—were among those to file a protective petition for review in the Sixth Circuit. At the same time, plaintiffs intervened in the first eleven petitions for review transferred to the Sixth Circuit and moved as respondents to dismiss each for lack of subject matter jurisdiction. The NAM moved as an intervenor to dismiss plaintiffs' own petition.[1]

The Sixth Circuit denied the motions to dismiss in a deeply divided 1-1-1 decision. "[T]he court's authority to conduct direct review of the Agencies' challenged action," Judge McKeague explained in the lead opinion, "must be found, if at all," in subsections (E) and (F), which "are the only two provisions of § 1369(b)(1) that potentially apply." *CWR*, 817 F.3d at 265-266.

As to subsection (E), Judge McKeague admitted that the government's textual arguments are "not compelling." *CWR*, 817 F.3d at 266. He concluded that jurisdiction lies in the court of appeals under subsection (E), not because the statutory text requires it, but because (in his view) the Supreme Court's decision in *E.I. du Pont de Nemours Co. v. Train*, 430 U.S. 112 (1977), does. That case, according to Judge McKeague, "eschewed a strict, literal reading" of Section 1369(b)(1) and "license[d]" a "more generou[s]" interpretation "than [the statute's] language would [otherwise] indicate." *Id.* at 266-267. "Viewing the

[1] Defendants assert that we filed a protective petition in the Fifth Circuit, which was transferred to the Sixth Circuit. MTD 8-9. *That is incorrect.* Plaintiffs voluntarily dismissed the petition originally filed in the Fifth Circuit and filed a new and separate protective petition directly in the Sixth Circuit.

[Rule] through the lens created in *E.I. du Pont* reveals a regulation whose practical effect will be to *indirectly* produce various limitations"; thus, according to Judge McKeague, "although the Rule does not itself impose any limitation," it is covered by subsection (E) as though it did. *Id.* at 270.

Judge McKeague found jurisdiction under subsection (F) as well, relying on *National Cotton*, which he described as holding that "subsection (F) authorizes direct circuit court review not only of actions issuing or denying particular permits, but also of regulations governing the issuance of permits" and "'relating to permitting.'" 817 F.3d at 271. Because the Rule "expands regulatory authority and impacts the granting and denying of permits," Judge McKeague concluded that it falls within subsection (F). *Id.* at 272. No other judge joined Judge McKeague's opinion in either respect.

Judge Griffin concurred in judgment only. His reluctance to deny the motions to dismiss could not have been clearer: "[W]hile I agree that *National Cotton* controls this court's conclusion, I disagree that it was correctly decided. But for *National Cotton*, I would find jurisdiction lacking." 817 F.3d at 280.

Beginning with subsection (E), Judge Griffin concluded that the "plain and unambiguous text . . . makes clear that this court does not have jurisdiction [under subsection (E)] to hear a challenge to a regulation that does not impose any limitation as set forth by the Act." 817 F.3d at 277-278. Judge Griffin noted that the agencies "have not promulgated an effluent limitation," and he "decline[d] to read *E.I. du Pont*" as "shoehorning an exercise in jurisdictional line-drawing into subsection (E)'s 'other limitation' provision." *Id.* at 278.

Concerning subsection (F), Judge Griffin recounted the statutory text and relevant Supreme Court precedents and concluded that the subsection "simply does not apply here." 817 F.3d at 281. He nevertheless concurred in the judgment because "*National Cotton* dictates [the] conclusion" that subsection (F) encompasses the Rule; indeed, under *National Cotton*, subsection (F)'s "jurisdictional reach . . . has no end" at all. *Id.* at 282. "Although, in [his] view, the holding in *National Cotton* is incorrect," Judge Griffin concluded that "[the] panel [was] without authority to overrule it." *Id.* at 282-283.

Judge Keith dissented. He "agree[d] with Judge Griffin's reasoning and conclusion that, under the plain meaning of the statute, neither subsection (E) nor subsection (F) . . . confers original jurisdiction on the appellate courts." 817 F.3d at 283. But unlike Judge Griffin, Judge Keith declined "to read *National Cotton* in a way that expands the jurisdictional reach of subsection (F) in an all-encompassing, limitless fashion." *Id.* at 284. In the belief that "*National Cotton*'s holding is not as elastic as the concurrence suggests" and should not be read to authorize "original subject-matter jurisdiction over all things related to the [CWA]," Judge Keith would have granted the motions. *Id.*

ARGUMENT

I. THE SIXTH CIRCUIT'S DECISION DOES NOT SUPPORT DISMISSAL

A. The Sixth Circuit's jurisdictional holding has no binding effect outside that court's own territory

1. It is a bedrock principal of the federal judicial system that "decisions from other circuit courts are not controlling" on district courts in this circuit; such decisions are, instead, "persuasive authority." *United States v. Johnson*,

619 F.3d 469, 473 n.3 (5th Cir. 2010). *Accord, e.g.*, *Doleac ex rel. Doleac v. Michalson*, 264 F.3d 470, 488 (5th Cir. 2001) ("precedent . . . [arising] in other circuits . . . is not binding on" courts in this circuit). And it is equally foundational that "federal courts have an *independent* obligation to determine their own subject-matter jurisdiction." *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 392 (5th Cir. 2014) (emphasis added) (citing cases). It follows that this Court must decide for itself whether it has jurisdiction over the complaint in this case and is not bound by any decision of the Sixth Circuit.

Defendants nevertheless lead off with the startling proposition that the Sixth Circuit's fractured 1-1-1 decision in *CWR* is "binding nationwide," on this Court and every other lower federal court throughout the country. MTD 10-11. In support of that unprecedented assertion, they point to Section 2112(a), which (in their view) has conferred super-circuit status on the Sixth Circuit, authorizing it to determine not only its own jurisdiction over the petitions pending before it, but the jurisdiction of all federal district courts throughout the Nation over challenges to the Rule under the APA.

Defendants' reasoning is faulty in several respects. To begin with, it is irreparably circular. Section 2112(a) provides that "[i]f within ten days after issuance of [a reviewable] order [an] agency" receives "petition[s] for review . . . in at least two courts of appeals," the agency shall "notify the judicial panel on multidistrict litigation," which "shall, by means of random selection, designate one court of appeals" to hear all of the petitions for review together. That is all. From there, the government concludes that, "[b]y providing in § 2112 for con-

solidation of multiple petitions for review of the same agency action in a single circuit, . . . Congress intended that the reviewing court's holding as to that particular agency action be treated as binding nationwide." MTD 10-11.

So far as the merits are concerned, we agree. That is, *when* jurisdiction lies in the courts of appeals under Section 1369(b)(1) and petitions for review are filed in more than one circuit, we agree that Section 2112(a) requires the petitions to be transferred to, and decided by, a single circuit.

But that is not the question presented here; the question, instead, is whether the petitions for review belong in the court of appeals under Section 1369(b)(1) *in the first place*. As to that issue, it obviously begs the question to say that Section 2112(a) precludes this Court (and every other district court in the Nation) from deciding *whether* the challenges to the Rule belong in the court of appeals under Section 1369(b)(1). Section 2112(a) comes into play only assuming that the challenges to the Rule *are* covered by Section 1369(b)(1). Defendants' contrary assertion simply assumes away the dispute.[2]

2. Defendants appear to imply, as an alternative, that *CWR* binds this Court under the law-of-the-case doctrine, similar to the way the doctrine applies in MDL proceedings. *See* MTD 9. That approach likewise rests on flawed logic.

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[2] Defendants proclaim that, if each court is allowed to decide the jurisdictional question for itself, "chaos would inevitably ensue." MTD 10. But any chaos here is of the Agencies' own making. Not a single one of the petitioners in the Sixth Circuit believes that the Rule is actually covered by Section 1369(b)(1), and none would have filed in the courts of appeals had it not been for the Agencies' own statement in the preamble to the Rule that the *Agencies* believe that Section 1369(b)(1) applies. It is the Agencies' own incorrect interpretation of Section 1369(b)(1) that has invited these "duplicative" challenges. MTD 10.

"The law-of-the-case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issue in subsequent stages *in the same case*." *Med. Ctr. Pharmacy v. Holder*, 634 F.3d 830, 834 (5th Cir. 2011) (emphasis added) (quoting *United States v. Castillo*, 179 F.3d 321, 326 (5th Cir. 1999) (in turn quoting *Arizona v. California*, 460 U.S. 605, 618 (1983))). In the MDL context, that means that rulings by an MDL court will generally bind all original transferor courts after the MDL proceedings conclude and the cases are remanded to the transferor courts. *See, e.g.*, *McKay v. Novartis Pharm. Corp.*, 751 F.3d 694, 703-704 (5th Cir. 2014); *In re Ford Motor Co.*, 591 F.3d 406, 411 (5th Cir. 2009).

But there are clear differences between the MDL context and the situation here. Most notably, the APA cases currently pending before this Court cannot possibly be understood to be a "subsequent stage[] in the same case" (*Med. Ctr.*, 634 F.3d at 834) as the petitions for review pending before the Sixth Circuit in *CWR*. Those petitions were filed separately from the complaint that initiated this lawsuit, in a different court, under a different jurisdictional provision. At no point will the Sixth Circuit "remand" the petitions for review to this Court or issue a mandate to this Court. The circumstances here—involving two entirely distinct actions proceedings in parallel in different courts—thus have little in common with an MDL proceeding in which the transferee court ultimately *returns* a single, continuing lawsuit to the transferor court.

Even with respect to the transfer of the 22 petitions for review, the analogy to MDL proceedings falls apart. Unlike in the MDL context, the peti-

tions filed by various parties in courts of appeals across the country will never be returned from the Sixth Circuit to the other circuits from whence they came. All of the petitions—no matter their origin—will remain in the Sixth Circuit. Thus there will never be a circumstance in which the question of whether *CWR* is "dispositive and binding on the Fifth Circuit" (MTD 9) will arise.

Perhaps defendants mean to suggest instead that *CWR* will be "dispositive and binding on the Fifth Circuit" in a subsequent appeal from the final judgment in *this* action. If so, they are surely wrong. As we have explained, neither Section 2112(a) nor law-of-the-case doctrine confers any special status on the Sixth Circuit's determination of its own jurisdiction. Thus, if the Fifth Circuit is later presented with an appeal in this case, it will have to decide for itself whether this Court has jurisdiction, de novo. Defendants have effectively acknowledged as much to this Court[3] and to the Eleventh Circuit.[4]

B. The Sixth Circuit's fractured decision supports denying the motion, not granting it

Insofar as *CWR* serves as persuasive authority, it counsels in favor of denying defendants' motion, not granting it. Judge McKeague's atextual conclusion that the Rule is covered by subsection (E) because it is an "other limitation" (817 F.3d at 266-270) did not receive the support of either of his colleagues.

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[3] *See* 12/4/2015 Hrg. Tr. 6:22-24 (discussing the *Catskill Mountains* litigation and stating that the court of appeals' decision "will not necessarily be binding but [will] at a minimum be highly instructive").

[4] *See* U.S. Br. at 47-48, *Georgia v. EPA*, 11th Cir. No. 15-14035 (filed 9/28/2016) (conceding that the Eleventh Circuit "has appellate jurisdiction to consider the issue of subject-matter jurisdiction under the Clean Water Act" and must only "consider the Sixth Circuit's *reasoning* in deciding [the] appeal" (emphasis added)).

Judge Griffin unambiguously rejected the notion that "the Clean Water Rule is any 'other limitation' within the meaning of § 1311" (*id.* at 276-280), and Judge Keith agreed (*id*. at 283).

As for subsection (F), Judge Griffin agreed with Judge McKeague "that *National Cotton* controls" and that the case required finding jurisdiction under Section 1369(b)(1)(F), but he "disagree[d] that [*National Cotton*] was correctly decided." *Id*. at 280. "But for *National Cotton*," Judge Griffin "would [have found] jurisdiction lacking." *Id*. Judge Keith, for his part, "agree[d] with Judge Griffin's reasoning and conclusion that, under the plain meaning of the statute, neither subsection (E) nor subsection (F) of 33 U.S.C § 1369(b)(1) confers original jurisdiction on the appellate courts." *Id*. at 283.

Thus, the sole explanation for Judge Griffin's vote in favor denying the motions to dismiss was a suspect Sixth Circuit decision that does not bind this court—a decision that has been rejected by the Eleventh Circuit (*Friends of the Everglades*, 699 F.3d at 1288), that Judge Griffin declared to have been wrongly decided, and that Judge Keith declared to be distinguishable. Against this background, the Court would have to close its eyes to reality to conclude that *CWR* provides persuasive support for granting defendants' motion to dismiss.[5]

II. THE COURT HAS JURISDICTION OVER THE COMPLAINT

In arguing that Section 1369(b)(1) vests exclusive jurisdiction in the court of appeals, defendants do not seriously grapple with the statutory language; they instead offer lengthy arguments concerning prudence and congressional

[5] Without extension, a certiorari petition in *CWR* is due on July 20, 2016.

goals and purposes, supported by a barrage of stale, out-of-circuit precedents. But few rules are better settled than that the "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). That is the case here.

A. Neither subsection (E) nor subjection (F) covers the Rule

1. Subsection (E) does not apply

Defendants say that jurisdiction is lacking in this Court because jurisdiction belongs in the Sixth Circuit under 33 U.S.C. § 1369(b)(1)(E). In their view, the Rule qualifies as an "other limitation" because "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." MTD 17. That is plainly mistaken; in fact, the Rule is not a "limitation" in any ordinary sense of that word.

To begin with, the Rule does not restrict the use to which property owners put their land. The Rule purports only to define the phrase "waters of the United States." That definition is not the promulgation of an independent limitation in its own right; it simply describes the waters to which *other* limitations may apply. As Judge Griffin put it, the Rule "is not self-executing" but merely "operates in conjunction with other sections scattered throughout the Act to define when [the Act's other, independently-defined] restrictions . . . apply." *CWR*, 817 F.3d at 276.

Nor does the Rule limit permitting agencies—indeed, it does the opposite. The phrase that the Rule defines, "waters of the United States," *grants* jurisdic-

tion to state and federal agencies over the Nation's waters. It gets matters backwards to call the definition of a phrase that *confers* jurisdiction a "limit" on officials' authority. By analogy, it would not make sense to think of 28 U.S.C. § 1331—which confers jurisdiction on this Court over federal questions—as a "limitation" on the Court's power to hear cases that do not involve federal questions. Neither does it make sense to think of the Rule as a "limitation" on agencies' power to regulate waters that are not "waters of the United States."

The Agencies said so themselves in the preamble to the Rule: Their definition of "waters of the United States" "imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments." 80 Fed. Reg. at 37,102. The agencies now take an about face. This litigation-motivated change of position (*compare* MTD 17) assumes that *any* regulation defining *any* statutory term in *any* way affecting the reach of the CWA qualifies as an "other limitation" within paragraph (E). It is hard to imagine, according to that logic, what would not qualify as an "other limitation."

And that is precisely the problem: The government's boundless reading of the words "other limitation" is squarely at odds with the *ejusdem generis* canon, which provides that "the words 'other' or 'any other' following an enumeration of particular classes ought to be read as 'other such like' and to include only those of like kind or character." *United States v. Mackay*, 757 F.3d 195, 197-198 (5th Cir. 2014) (quoting *In re Bush Terminal Co.*, 93 F.2d 659, 660 (2d Cir. 1938)). Put another way, the rule requires reading a general term following a specific

term as "embrac[ing] only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001) (internal quotation marks omitted).

Application of that canon here means reading the words "other limitation" as embracing an object similar in nature to an "effluent limitation." *See Circuit City*, 532 U.S. at 114. Effluent limitations are not just *any* limitation; rather, they "dictate in specific and technical terms the amount of each pollutant that a point source may emit." *Am. Paper Inst. v. EPA*, 890 F.2d 869, 876 (7th Cir. 1989). The Rule, which sets a regulatory definition for "waters of the United States," is very plainly not "of like kind or character" (*Mackay*, 757 F.3d at 197) to an effluent limitation.

Defendants rejoin that the words "other limitation" must be read as embracing "restrictions under the specified CWA sections that are *not* effluent limitations." MTD 16. That is true, but it misses the point. If the words "other limitation" were interpreted to cover any limitation of any kind—as defendants urge—the general term (other limitation) would render the specific term (effluent limitation) "'meaningless.'" *Mackay*, 757 F.3d at 197 (quoting *CSX Transp., Inc. v. Ala. Dep't of Rev.*, 562 U.S. 277, 295 (2011)). That would defeat the animating purpose of the *ejusdem generis* canon, which "'is based on the theory that, if [Congress] had intended the general words to be used in their unrestricted sense, it would have made no mention of the particular classes'" preceding them. *Id.* (quoting *Bush Terminal*, 93 F.2d at 660). Defendants'

reading of the term "other limitation" is precisely the kind of "unrestricted" reading that the *ejusdem generis* canon forbids.

The conclusion that paragraph (E) must be read narrowly finds powerful support not only in the words that immediately precede "other limitation," but also in the words that immediately *follow*: "under section 1311, 1312, 1316, or 1345 of [the Act]." 33 U.S.C. § 1369(b)(1)(E). Each of these sections provides for the issuance of effluent limitations or effluent limitation-like rules. Sections 1311 governs "effluent limitations," and Section 1312 governs "water quality related effluent limitations," which are additional effluent limitations that may be imposed where ordinary limitations fail to achieve water quality standards. Section 1316 provides for effluent limitation-like reductions on new dischargers. And Section 1345, added in 1987, restricts the discharge of sewage sludge.

As we already have demonstrated, it would be a mistake to think of the agencies' definition of "waters of the United States" as a limitation at all; it would be downright absurd to say that, *as* a limitation, it has a purpose similar in nature to an effluent limitation describing the technical measures of pollutants allowed under a permit—much less that it was promulgated under any of the specifically identified statutory provisions. *See CWR*, 817 F.3d at 276 (Griffin, J., concurring) (the Rule "does not emanate from these sections" and is not "related to the statutory boundaries set forth in [them]"); *cf. Friends of the Everglades*, 699 F.3d at 1286 ("even if [a regulation can] be classified as a limitation," Section 1369(b)(1) is inapplicable if "it was not promulgated under section 1311, 1312, 1316, or 1345").

Defendants' contrary proposal reads "other limitation" as covering every agency rule that might, in any conceivable respect, be understood as a "limitation" on any stakeholder's conduct, without regard for the preceding or following text. That cannot be what Congress had in mind.[6]

2. Subsection (F) does not apply

Defendants fare no better under subsection (F), which grants the courts of appeals original jurisdiction in cases involving the "issuing or denying [of] any permit under section 1342 of this title." 33 U.S.C. § 1369(b)(1)(F). In *Crown Simpson Pulp v. Costle Co.*, 445 U.S. 193 (1980), the Supreme Court held that subsection (F) covers not only technical grants and denials of permits by the agencies, but also other agency actions that have the "precise effect" of accomplishing those ends. *Id.* at 196. At issue in that case was "EPA's veto of a state-issued permit," which the Court held to be "functionally similar" to a permit denial and thus sufficient to support original appellate jurisdiction under subsection (F). *Id.* None of that is any help to EPA here: The agencies' definition of "waters of the United States" bears no plausible resemblance to a decision to grant or deny a permit to discharge.

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[6] Neither *ConocoPhillips Co. v. EPA*, 612 F.3d 822 (5th Cir. 2010) (MTD 15), nor *Texas Oil & Gas Association v. EPA*, 161 F.3d 923 (5th Cir. 1998) (MTD 20) suggest otherwise. The jurisdictional question was not raised, and the Fifth Circuit conducted no independent analysis of Section 13269(b)(1), in either of those cases.

Nor does *Virginia Electric & Power Co. v. Costle*, 566 F.2d 446 (4th Cir. 1977), help the defendants. There, the Fourth Circuit approved jurisdiction under (F) over a challenge to agency regulations that, unlike the Rule, were "closely related to the effluent limitations." *Id.* at 450. Although *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), lends some support to defendants' position, that decision is out of step with Judge Griffin's and Judge Keith's opinions in *CWR* and the Eleventh Circuit's opinion in *Friends of the Everglades*.

Defendants nevertheless insist that the courts of appeals have broad jurisdiction "under § 1369(b)(1)(F) to review EPA-promulgated rules that regulate the issuance or denial of NPDES permits." MTD 22. That approach might have some force if Congress had written a different statute—if it had drafted subsection (F) to apply to EPA actions "regulating permit decisions" or "affecting when permits are or are not required." But it cannot be squared with the statute that Congress *actually* wrote, which applies to agency actions that *themselves* amount to "issuing or denying any permit under section 1342 of this title." It is again difficult to imagine any case in which defendants' expansive redrafting of subsection (F) would not confer jurisdiction. It was for just that reason that the Eleventh Circuit rejected the same argument in *Friends of the Everglades*, that subsection (F) applies "to any 'regulations *relating to* permitting.'" 699 F.3d at 1288 (emphasis added).

Defendants assert that "the Fifth Circuit has implemented a broad and inclusive interpretation of 33 U.S.C. § 1369(b)(1)." MTD 23. But the only case they cite for that proposition—*National Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011)—stands for no such thing. As in *ConocoPhillips* and *Texas Oil & Gas* (*see supra* note 6), the jurisdictional question wasn't raised in that case, and the Fifth Circuit conducted no analysis of Section 1369(b)(1). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

3. The government's interpretations of subsections (E) and (F) violate the expressio unius *canon*

There is another fundamental reason to reject defendants' (and Judge McKeague's) interpretation of subsections (E) and (F) as effectively limitless grants of original jurisdiction on the courts of appeals over all agency rule-making: the *expressio unius est exclusio alterius* canon, which provides that the expression of one thing implies the exclusion of another.

Section 1369(b)(1) meticulously catalogues seven narrow categories of agency actions subject to original review in the courts of appeals. Under the *expressio unius* maxim, the careful selection of those seven, spare categories "justif[ies] the inference" that a general grant of court-of-appeals jurisdiction over all agency decisionmaking was "excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (citing *United States v. Vonn*, 535 U.S. 55, 65 (2002)).

That conclusion takes on special force when considered alongside other statutes demonstrating that, when Congress wishes to confer broad jurisdiction on the courts of appeals to hear petitions for review challenging general agency rulemaking, it does so expressly. Congress took that approach, for example, when it drafted the CWA's older-cousin statute, the Clean Air Act. There, it provided for original jurisdiction in the courts of appeals over challenges not only to particular agency actions, but to "any other nationally applicable regulations promulgated, or final action taken, by the Administrator" under the act. 42 U.S.C. § 7607(b)(1).

That is compelling evidence that Congress knows how to "ma[ke] express provisions" for expansive original jurisdiction in the courts of appeals when it wants to, and that its "omission of the same [language]" from Section 1369(b)(1) "was purposeful." *Zadvydas v. Davis*, 533 U.S. 678, 708 (2001). "Congress could easily have provided . . . a general jurisdiction provision in the Act" but instead "specified [a limited range of] EPA activities that were directly reviewable by the court of appeals." *Am. Paper Inst.,* 890 F.2d at 877.

For just that reason, other circuits have rejected the government's limitless approach to Section 1369(b)(1): "[S]ince some but not all of the actions that the EPA can take under the CWA are listed with considerable specificity in [S]ection 1369(b)," it follows that "not all EPA actions taken under the CWA are directly reviewable in the courts of appeals." *Narragansett Elec. Co. v. EPA*, 407 F.3d 1, 5 (1st Cir. 2005). And "the complexity and specificity of [33 U.S.C. § 1369(b)(1)] in identifying what actions of EPA under the [CWA] would be reviewable in the courts of appeals suggests that not all such actions are so reviewable." *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 517 (2d Cir. 1976). Those (unanimous) decisions are entitled to at least equal deference and consideration as the Sixth Circuit's (deeply divided) decision in *CWR*.

B. The Sixth Circuit's erroneous assertion of jurisdiction provides no reason for this Court to decline review

Finally, in an attempt to dodge the Section 1369(b)(1) question altogether, defendants assert that, because "[t]he Sixth Circuit has definitively held that the Clean Water Rule falls within 33 U.S.C. § 1369(b)(1)'s exclusive judicial review

provision," plaintiffs here "have an adequate remedy in a court and cannot pursue a duplicative challenge in this Court under the APA." MTD 12.

That, again, assumes away the dispute. In order for a court remedy to be "adequate," the court must in fact be "capable of affording full relief as to the very subject matter in question." *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 768 (5th Cir. 2011). That naturally requires that the court be "competent to take cognizance of [the dispute]" and that it "[have] the power to proceed to a judgment which affords a plain, adequate, and complete remedy." *Root v. Lake Shore & Mich. S. Ry.*, 105 U.S. 189, 212 (1881).[7] It is precisely our point that the Sixth Circuit does *not* have the power to grant relief from the Rule. Plaintiffs cannot be said to have an "adequate" remedy simply because the Sixth Circuit is acting despite its lack of power to do so.[8]

What is more, even if another court's erroneous assertion of jurisdiction were capable of providing an "adequate" remedy, it would have no bearing on plaintiffs' invocation of the Declaratory Judgment Act. *See* Compl. ¶¶ 5-6. As to that statute, plaintiffs need show only that "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Zwickler v. Koota*,

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[7] Both *Randall* and *Root* are mandamus cases; courts have treated the mandamus and APA adequate-remedy requirements interchangeably. *See, e.g.*, *Rimmer v. Holder*, 700 F.3d 246 (6th Cir. 2012).

[8] Defendants' invocation of *Colorado River* abstention (MTD 14-15) is, for the same reason, unpersuasive. That doctrine applies only assuming that two federal courts have "concurrent jurisdiction" over a single controversy. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-818 (1976). Our point is that the Sixth Circuit lacks jurisdiction altogether.

389 U.S. 241, 244 n. 3 (1967). Anticipating that argument, defendants broadly assert that "a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute." MTD 12 (quoting *TRAC v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984)). But the question presented here is *whether* Section 1369(b)(1) vests jurisdiction in the Sixth Circuit. If, as we have argued, Section 1369(b)(1) does not apply, then the D.C. Circuit's rationale in *TRAC* is simply inapplicable.[9]

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss should be denied.

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[9] We do not concede that Section 1369(b)(1), even if truly applicable to the Rule, divests this court of jurisdiction to entertain a challenge under the Declaratory Judgment Act. *Cf.* MTD 12-13 & n.4. Although it is true in most cases that a statute's conferring of original jurisdiction on the court of appeals to review an agency action will exclude the exercise of jurisdiction by the district courts over challenges to the same agency action, Congress ordinarily establishes such exclusivity expressly. That was the case with respect to the jurisdictional statutes at issue in *TRAC* (review of FCC action under 28 U.S.C. § 2342(1)) and in *Ligon v. LaHood*, 614 F.3d 150, 154 (5th Cir. 2010) (review of FAA action under 49 U.S.C. § 46110(c)), and *Leal v. Szoeke*, 917 F.2d 206, 207 (5th Cir. 1990) (review of Railroad Retirement Board decision under 45 U.S.C. § 355(f)).

Section 1369(b), by contrast, has a conspicuously limited exclusivity provision, which provides that "[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review *in any civil or criminal proceeding for enforcement*." 33 U.S.C. § 1369(b)(2) (emphasis added). That is a reference to Section 1365, which provides that "[t]he district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce . . . an effluent standard or limitation." 33 U.S.C. § 1365(a)(2). Express reference solely to Section 1365 and not to the Declaratory Judgment Act "justif[ies] the inference" that that statute was omitted from the exclusivity effect of Section 1369 "by deliberate choice, not inadvertence." *Barnhart*, 537 U.S. at 168.

Dated: May 13, 2016

Respectfully Submitted,

/s/ *Timothy S. Bishop*

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May, 2016, I electronically filed the foregoing opposition and proposed order with the Clerk of the Court using the CM/ECF system, which will cause copies of each to be served upon all counsel of record.

/s/ *Timothy S. Bishop*

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

AMERICAN FARM BUREAU FEDERATION, et al., *Plaintiffs*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Defendants*.	Civil Action No. 3:15-cv-165

[PROPOSED] ORDER

Having considered Defendants' Motion to Dismiss (ECF No. 44), Plaintiffs' opposition thereto (ECF No. 48), and the arguments of the parties presented at the hearing of May 17, 2016, the Court hereby **DENIES** the motion.

SIGNED at Galveston, Texas, this ____ day of _____, 2016.

_____
George C. Hanks Jr.
United States District Judge