

**WATERS OF THE UNITED STATES  
AND THE CLEAN WATER ACT:  
IMPLICATIONS FOR AGRICULTURE**

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**CHAPTER 13**



# CURRICULUM VITAE

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## WATERS OF THE UNITED STATES AND THE CLEAN WATER ACT: IMPLICATIONS FOR AGRICULTURE

*Water is the driving force of all nature.*

-Leonardo da Vinci

*The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act, and according to the Federal Government, if property owners begin to construct a home on a lot that the agency thinks possesses the requisite wetness, the property owners are at the agency's mercy. The EPA may issue a compliance order demanding that the owners cease construction, engage in expensive remedial measures, and abandon any use of the property. If the owners do not do the EPA's bidding, they may be fined up to \$75,000 per day (\$37,500 for violating the Act and another \$37,500 for violating the compliance order). And if the owners want their day in court to show that their lot does not include covered wetlands, well, as a practical matter, that is just too bad. Until the EPA sues them, they are blocked from access to the courts, and the EPA may wait as long as it wants before deciding to sue. By that time, the potential fines may easily have reached the millions. In a nation that values due process, not to mention private property, such treatment is unthinkable.*

-Justice Samuel Alito,  
concurring in *Sackett v. EPA*

*The Clean Water Act is unique in both being quite vague in its reach, arguably unconstitutionally vague, and certainly harsh in the civil and criminal sanctions it puts into practice.*

-Justice Anthony Kennedy, in Oral Argument for  
*U.S. Army Corps of Engineers v. Hawkes*

### I. INTRODUCTION

Water. It is a resource that is both powerful and serene, finite yet essential. Water cuts a dominant path through the landscape of environmental law, policy, and advocacy. Whether discussing water usage, water scarcity, water rights, or water quality, one thing remains clear—the issues that face humankind today concerning water are anything but simple. Nowhere is this complexity more evident than in the current battles

being waged over the ever-changing and amorphous “Waters of the U.S.” and what constitutes jurisdictional waters.

The impact of this uncertainty is perhaps felt most acutely by agricultural operators and producers. Knowing what waters are subject to regulation under the Clean Water Act is critical to agricultural businesses in the twenty-first century as unpermitted discharges of pollutants into Waters of the U.S. are unlawful and carry large penalties. Although the law and policy concerning jurisdictional waters is far from certain, agriculture can take stock of what is known, stay on the forefront of the litigation and rulemakings driving regulatory change, and manage their operations to avoid compliance issues with the Clean Water Act.

### II. REGULATING WATER UNDER THE CLEAN WATER ACT

Two agencies are primarily responsible for regulating jurisdictional waters in the United States: the Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (the Corps). The EPA focuses regulatory efforts on discharges of pollutants into Waters of the U.S. while the Corps regulates the discharge of dredged or fill material into Waters of the U.S. Both EPA and the Corps have promulgated regulations to define “Waters of the U.S.” See 40 C.F.R. § 230.3(s) (EPA regulations); 33 C.F.R. § 328.3(a) (Corps regulations).

#### A. Historical Waters of the U.S.

While the true breadth and scope of Waters of the U.S. is far from clear, some types of water have historically been and remain Waters of the U.S. These waters include interstate waters (including interstate wetlands), navigable waters (subject to the ebb and flow of the tide, used in interstate or foreign commerce, and generally can float a canoe most of the year), territorial seas, and impoundments of interstate or navigable waters. See 40 C.F.R. § 230.3(s)(1)-(4); 33 C.F.R. § 328.3(a)(1)-(4). Jurisdiction over non-navigable waters, however, is where the real debate and risk arises.

#### B. Muddying the Water: *Rapanos* and Waters of the U.S.

In 2006, the question of EPA’s jurisdiction over certain types of non-navigable waters—namely wetlands and tributaries—was the subject of a split decision before the U.S. Supreme Court. In *Rapanos v. United States*, the Court held in a plurality opinion that the EPA does not have jurisdiction under the Clean Water Act over certain wetlands connected to non-navigable tributaries of traditional navigable waters. 547 U.S. 715 (2006). Out of *Rapanos* arose two possible tests for determining jurisdictional waters particularly as it pertains to tributaries and wetlands.

### 1. The Hydrologic Connection Test

The plurality opinion, authored by Justice Scalia, focused on the hydrologic connection and reasoned that jurisdiction attaches to non-navigable waters only if they exhibit a relatively permanent flow, such as a river, lake, or stream. *Id.* at 756. A wetland is included if there exists a continuous surface water connection between it and a relatively permanent waterbody such that it is difficult to determine where the waterbody ends and the wetland begins. *Id.* at 742.

### 2. The Significant Nexus Test

Under a concurring opinion, Justice Kennedy proposed a different test for determining jurisdiction over non-navigable waters. He concluded that a wetland or non-navigable waterbody can be jurisdictional if it bears a “significant nexus” to a traditional navigable waterway. *Id.* at 780. This test focuses on whether the wetland or water “either alone or in combination with similarly situated lands in the region, affects the chemical, physical and biological integrity of other covered waters more readily understood as navigable in a fashion that is not speculative or insubstantial.” *Id.* Under the significant nexus test, continuous connection is irrelevant—the environmental impact to other waters is key.

## C. In the Wake of *Rapanos*: A New Rule and a Broad Expansion of Jurisdiction

The result of *Rapanos* was anything but clarity for questions of jurisdiction over non-navigable waters. Following *Rapanos*, EPA informally adopted the “significant nexus” approach to jurisdiction in its regulation of activities. The case opened the door for EPA and the Corps to determine which test they would use in determining jurisdiction over Waters of the U.S. On May 27, 2015, EPA and the Corps jointly released a new rule to clarify the Clean Water Act’s protections over tributaries, streams, and wetlands. The bottom line: EPA and the Corps put forth a broad expansion of jurisdictional waters under the Clean Water Act while maintaining significant agency discretion in determining what can constitute a jurisdictional water under the Act.

### 1. Adoption of the Significant Nexus Test

The new rule adopts the more subjective “significant nexus” test, writing it into the definition of Waters of the U.S. *See* 40 C.F.R. § 230.3(o)(1)(vii); 33 C.F.R. § 328.3(a)(7). Specifically, the new rule includes certain non-navigable waters (prairie potholes, Carolina bays and Delmarva bays, Pocosins, Western vernal pools, and Texas coastal prairie lands) where “they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section [navigable waters, interstate waters, territorial seas].” *Id.* Choosing the

significant nexus test over the hydrologic connection test accords EPA and the Corps with significant discretion in determining what constitutes a jurisdictional water.

### 2. Bringing Adjacent Waters into the Fold

In addition to incorporating the significant nexus analysis, the new rule also includes “all waters adjacent to navigable waters, interstate waters (including wetlands), territorial seas, impoundments of waters of the U.S., or tributaries. 40 C.F.R. § 230.3(o)(1)(vi); 33 C.F.R. § 328.3(a)(6). The term “adjacent” is defined as “bordering, contiguous, or neighboring.” 40 C.F.R. § 230.3(o)(3)(i); 33 C.F.R. § 328.3(c)(1). It is not limited to waters that are located laterally to a water but may include waters connected by other water segments, whether or not those other segments themselves are jurisdictional waters. *Id.* Under previous versions of the rule, EPA only had jurisdiction over *wetlands* adjacent to jurisdictional waters. Now, the rule covers *all* waters adjacent to jurisdictional waters.

The new definition of adjacent waters has potentially significant impacts for agriculture. It can include riparian and flood plain areas, perennial and occasional wet areas, and playa lakes and potholes. Agricultural operators and producers stand to lose useable land as well as facing impacts to their ability to farm, build, dig, disturb, or move dirt.

### 3. A Model of Uncertainty: The New Definition of Tributaries

One of the biggest changes in the new rule is the inclusion of a definition of “tributary.” Unfortunately, the definition leaves more questions than answers. In short, the rule defines a tributary to include any land feature that has a bed, banks, and ordinary high water mark that contributes water flow to a downstream Water of the U.S. 40 C.F.R. § 230.3(o)(3)(iii); 33 C.F.R. § 328.3(c)(3). Under this definition, a tributary “can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded [by the rule].” *Id.* The flow requirement can now be met ephemeral flow (only after rainfall). Further, a tributary can be a water that is connected to a Water of the U.S. by a non-jurisdictional water. *Id.* Tributaries can also be waters that are connected to another jurisdictional water by groundwater. *Id.* Much like the significant nexus test, the definition of tributaries leaves tremendous discretion to EPA and the Corps to determine what meets the definition. In particular, the standard of “ordinary high water mark” is highly subjective and difficult to define.

Much of the dispute over the new rule centers around the inclusion of perennial, ephemeral, and intermittent streams. The new definition will undoubtedly capture many land features that previously were excluded from regulation and that only

occasionally convey water. The definition is so broad, in fact, it leaves many questioning what is not considered a jurisdictional water under the new rule. There is no comprehensive map of possible tributaries, and EPA itself has admitted it is impossible to map. For agricultural operators and producers, the definition of tributary creates a virtual minefield of potential regulation of previously unprotected or unregulated land features.

#### 4. What is *Not* a Water of the U.S.?

In the wake of the broad expansion under the new rule, what is not considered a jurisdictional water? Notwithstanding the addition of numerous categories of water, the rule maintains some exemptions, several of which are specifically applicable to agriculture. The rule excludes:

- waste treatment systems, including treatment ponds or lagoons;
- prior converted cropland;
- ditches excavated in dry land that don't flow to another downstream water (and that do not meet the definition of tributary);
- artificially irrigated areas that would revert to dry land without irrigation;
- farm ponds, stock ponds, irrigation ponds, and settling basins constructed in dry land (that do not meet the definition of tributary);
- erosional features (e.g., gullies) that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and
- waters adjacent to Waters of the U.S. if they are used for established normal farming or ranching activities (unless they have a significant nexus to interstate or navigable waters within 4000 feet).

40 C.F.R. § 230.3(o)(2); 33 C.F.R. § 328.3(b). While the new rule maintains this list of exemptions, it is important to note that several of the exemptions may evaporate if the feature meets the definition of "tributary" or falls within the "significant nexus" test. Further, persons relying on these exemptions remain at the mercy of EPA and the Corps and their respective interpretations and applications of the rule and exemptions, which can be and often are narrowly construed and highly subjective.

Operators and producers desiring clarity as to the jurisdictional status of features on their land can seek a "jurisdictional determination" from the Corps. Once sought, the Corps is required to complete the determination within sixty days, but delays are common.

There are many considerations to weigh before seeking a jurisdictional determination concerning impacts to land and operations, and as discussed below, there is some question as to the binding effect of these determinations, which is the topic of ongoing litigation.

Although the new rule was intended to bring clarity to what constitutes "Waters of the U.S.," the rule actually breeds greater uncertainty and allows EPA and the Corps to make subjective, case-by-case determinations of jurisdiction, creating a fertile field for litigation.

### III. THE FRONT LINES OF BATTLE: LITIGATION OVER WATERS OF THE U.S.

#### A. Challenging the Rule

The new rule proposed by EPA and the Corps took effect August 28, 2015. Since the rule was introduced in May 2015, numerous states sued EPA over the rule. North Dakota and twelve other states sued EPA and sought injunctive relief to prevent the rule from becoming effective. On August 27, 2015, the Federal District Court in North Dakota issued a preliminary injunction stopping implementation of the rule in the thirteen states that were party to the lawsuit, reasoning that EPA likely violated its congressional grant of authority in promulgating the rule.

Texas, Louisiana, Mississippi and various Texas state agencies also sued EPA over the rule by filing suit in both the Federal District Court in Galveston and also before the Fifth Circuit, but they did not seek injunctive relief until after the rule became effective on August 28, 2015.<sup>1</sup> Other related lawsuits followed suit, filing in both district court and before the courts of appeals, and several of the circuit cases (including the Texas case) were consolidated under the Sixth Circuit Court of Appeals for a determination of jurisdiction while other motions were made to consolidate pretrial proceedings in the district court cases to the U.S. District Court for the District of Columbia.

Many of the States opposed such consolidation or recommended consolidation in other jurisdictions. The Judicial Panel for Multi-District Litigation held a hearing on the district court consolidation on October 1, 2015. On October 9, 2015, the Sixth Circuit Court of Appeals issued a stay of the new rule on a nationwide basis until further notice and to allow it time to make a determination on jurisdiction. Then on October 13, 2015, the Judicial Panel for Multi-District Litigation denied the request for consolidation of the district court proceedings under the D.C. District Court, finding it inappropriate and problematic.

The Sixth Circuit ruled in February 2016 by a split decision that it has exclusive jurisdiction to hear the

<sup>1</sup> Jurisdictional questions abound in these lawsuits by the States as there is some indication that if the lawsuit pertains to an effluent limitation or is of or pertaining to a permit, the

Circuit Court of Appeals have exclusive jurisdiction. To preserve their claims, the States filed in both federal district courts and their respective Circuit Courts of Appeals.

cases. Multiple Motions for Rehearing En Banc have been filed and the Court has requested additional briefing, which is due to be filed by the parties in March and April 2016. The Texas district court case, along with the other State actions, remain in abeyance pending a final determination on jurisdiction by the Sixth Circuit, and the rule remains stayed pending the outcome of litigation.

### **B. *U.S. Army Corps of Engineers v. Hawkes***

Another recent case to deal with the determination of jurisdictional waters under the Clean Water Act is a case out of Minnesota concerning the finality of certain agency determinations as to jurisdictional waters. Landowners who are unsure of how the Clean Water Act and the “Waters of the U.S.” jurisdiction applies to their land can seek a “jurisdictional determination” from the Corps. This determination amounts to a document issued by the Corps stating whether a particular piece of land includes Waters of the U.S. Although not addressed by the Clean Water Act, Corps regulations and agency guidance specify that jurisdictional determinations are final for purposes of appeal within the agency, may be based on numerous factual findings, and are valid for five years. *See* 33 C.F.R. § 331.2. It is within this landscape that the *Hawkes* case arose.

#### 1. The Background

The *Hawkes* company wanted to mine peat on a property in Minnesota that contained wetlands. The nearest traditional navigable water to the property is the Red River of the North, which is 120 miles from the property. Miriam Seifter, *Argument preview: Diving into finality issues under the Clean Water Act*, SCOTUSBLOG (Mar. 24, 2016, 1:53 PM), <http://www.scotusblog.com/2016/03/argument-preview-diving-into-finality-issues-under-the-clean-water-act/>. *Hawkes* nonetheless applied for a permit with the Corps. Initially, the Corps issued a preliminary determination finding that the property contained jurisdictional waters notwithstanding the distance from the Red River of the North. The Corps reasoned that the wetlands at issue were connected to the Red River of the North by a series of culverts, streams and a river. *Id.* After further review, the Corps issued an “approved jurisdictional determination” concluding that the property contained Waters of the U.S. *Hawkes* appealed within the agency. The reviewer ruled in *Hawkes* favor finding that the record did not support the jurisdictional determination of waters of the U.S. on the property. *Id.* The Corps thereafter revised the jurisdictional determination finding that the wetlands have a significant nexus with the Red River of the North, among other findings. *Id.*

*Hawkes* then sued the Corps in federal court claiming the jurisdictional determination was arbitrary and capricious and in violation of the Administrative Procedure Act. *Id.* The district court dismissed the suit

on grounds that the jurisdictional determination was not a final agency action subject to judicial review. In other words, *Hawkes* must go through the permitting process before it can obtain judicial review. But the Eighth Circuit Court of Appeals reversed. The Corps appealed to the U.S. Supreme Court, which heard oral arguments on the case on March 30, 2016. *Id.*

#### 2. The Supreme Court Case

The question before the Supreme Court in *Hawkes* is whether jurisdictional determinations are considered a final agency action under the Administrative Procedure Act and hence, subject to judicial review. Whether an agency action is final involves a two-prong test: 1) does it mark the consummation of the agency’s decision-making process; and 2) does it determine “rights and obligations” or is it an action “from which legal consequences will flow?” *Bennett v. Spear*, 520 U.S. 154 (1997). The Corps argues that the jurisdictional determination is merely an informational statement and does not meet the second prong of the *Bennett* test. Further, the Corps argues that *Hawkes* is not without adequate remedy since it can obtain judicial review of the permit process or enforcement action. Seifter, *supra*, at 2.

*Hawkes*, on the other hand, argues that the second part of the test is met. Jurisdictional determinations are considered conclusive by the Corps in permitting proceedings, and it can compel a landowner to choose between three options: stop using the land, obtain a permit, or risk enforcement action. Seifter, *supra*, at 2. These options, according to *Hawkes*, constitute legal consequences.

In oral arguments, several Justices challenged the government’s position. Justice Alito forced a concession by the government that if jurisdictional determinations were binding on the Corps in subsequent proceedings, they would constitute a final agency action. Miriam Seifter, *Argument analysis: Justices debate finality issues in Clean Water Act case*, SCOTUSBLOG (Mar. 31, 2016, 5:33 PM), <http://www.scotusblog.com/2016/03/argument-analysis-justices-debate-finality-issues-in-clean-water-act-case>. Both Justices Alito and Roberts pointed to a Memorandum of Agreement (MOA) between the Corps and EPA that suggests that jurisdictional determinations are binding on the government. *Id.* Nonetheless, it is far from certain which direction the Court may rule. As one observer noted “[a]lthough a majority of Justices seemed to be inclined against the government’s position, the oral argument did suggest that the Court is interested in reaching a narrow ruling that will not disturb other agency practices.” *Id.*

This case is the most recent consideration of Clean Water Act jurisdictional concerns after the Court’s 2012 decision in *Sackett v. EPA*. 132 S.Ct. 1367 (2012). In *Sackett*, landowners were cited by EPA for Clean Water

Act violations for filling 0.5 acre of their property with dirt and rocks in preparation for building a house. *Id.* at 1370. The Sacketts asked EPA for a hearing but were denied. They then brought suit against EPA seeking declaratory and injunctive relief. *Id.* at 1371. The question before the Supreme Court in *Sackett* was whether the Compliance Order was a final agency action for which there was no other remedy at law other than judicial review. The Supreme Court held it was and that the Clean Water Act did not preclude such review. *Id.* at 1374.

*Hawkes* is unquestionably an important case to watch. At stake here is whether parties can obtain review of a jurisdictional determination as to the presence or absence of jurisdictional waters on their property without having to go through the expensive and time-consuming permitting process. In other words, will parties be forced to go through a permitting process before they can obtain judicial review of a determination of whether they must even obtain a permit? For agricultural operators and producers, the ability to obtain judicial review of a jurisdictional determination of waters of the U.S. on their property could be key to gaining some certainty in an otherwise murky and highly discretionary process, avoiding an expensive permitting process or enforcement action.

### C. Other Cases Highlighting Risks and Uncertainty of the Waters of the U.S. Analysis

#### 1. *Johnson v. EPA*

There is no shortage of litigation concerning jurisdictional waters, particularly where agricultural operations are concerned. In *Johnson v. EPA*, a farmer in Wyoming created a stock pond by damming a creek that runs across his property. According to his Petition for Review, the stream is a small perennial stream, and the water that runs through it is “return flow from agricultural runoff.” *Johnson v. EPA*, Docket No. 2:15-cv-00147-SWS, (D. Wyo. 2015), Petition for Review, p. 5, ¶ 22. Mr. Johnson further notes that “the creek ultimately empties into a controlled irrigation canal and reservoir, and the water is diverted for agricultural use.” *Id.* Notably, Mr. Johnson applied for and obtained a state permit from Wyoming to construct the stock pond. *Id.* at ¶¶ 24-25.

Mr. Johnson believed his stock pond to be exempt from Clean Water Act regulation. In January 2014, however, the EPA issued a compliance order to Mr. Johnson for violating the Clean Water Act by building the stock pond without first obtaining a permit. *Id.* at 6, ¶ 29. The EPA threatened fines and penalties of up to \$37,500 per day and demanded that Mr. Johnson return his property to its prior condition. According to Johnson’s Petition for Review, in the year and a half since the Compliance Order Mr. Johnson and his consultant have tried to explain to EPA that the pond is

exempt while the fines and penalties have risen to over \$20 million and are continuing to grow. *Id.* at 1, ¶ 2.

As a result, Mr. Johnson sued EPA seeking a declaratory judgment and injunctive relief to enjoin EPA from enforcing the Compliance Order. *Id.* at ¶ 3. The case is in final settlement negotiations and a Consent Decree has been proposed by EPA. The case, however, highlights the uncertainty facing agricultural operators and producers. Mr. Johnson felt he did everything possible to ensure his stock pond was exempt from Clean Water Act regulation, even obtaining a permit from the State of Wyoming to construct the pond. Yet he remains at the mercy of EPA, which maintains its position that the stream at issue is a jurisdictional water.

#### 2. *U.S. v. Lipar*

In *U.S. v. Lipar*, a Texas real estate developer was building in north Houston. 2015 WL 7681272, \*1 (S.D. Tex. 2015). Before he began development, Lipar had the site assessed by a professional engineer for potential coverage by the Clean Water Act. *Id.* A determination was made that the site was not covered by the Clean Water Act as it was well upstream any jurisdictional waters. *Id.* After work began on the site, an EPA employee visited the site and determined it was subject to the Clean Water Act and ordered Lipar to stop development of the tract. *Id.* Lipar attempted to obtain copies of EPA documentation regarding the property’s coverage under the Clean Water Act but all requests were denied. *Id.* After the dispute was unable to be resolved, EPA sued Lipar for violating the Clean Water Act, citing the unlawful discharge of fill material to wetlands in eight locations on the property. *Id.* EPA determined these locations to be jurisdictional waters. *Id.* at \*2.

The court did not agree ruling that the wetlands at issue were not jurisdictional and that EPA failed to show that the wetlands and navigable downstream waters were jurisdictionally connected. *Id.* at \*3. The court reasoned “wetlands with only an intermittent, physically remote hydrologic connection lack the necessary connection to jurisdictional waters.” *Id.* at \*4. The court further reasoned that EPA failed to show how the areas were jurisdictional under the significant nexus test. *Id.* The court ordered that the EPA take nothing in its suit and further ordered EPA to pay Lipar’s attorneys fees because EPA’s conduct was “oppressive and dishonest.” *Id.* at \*5.

#### 3. *The Duarte Nursery Case*

Yet another example of the uncertainty created by the jurisdictional waters determinations can be seen by a recent case out of California involving the Duarte Nursery. Sitting just outside Modesto, California, the Duarte Nursery is a large agricultural operation known for its grapevines, almond, walnut and pistachio root

stock, and vineyards and orchards. Robin Abcarian, *A land-use case that's enough to furrow a farmer's brow*, L.A. TIMES, (Jan. 15, 2016), at 1, <http://http://www.latimes.com/local/abcarian/la-me-0115-abcarian-farmer-wetlands-20160115-column.html>.

In 2012, Duarte hired a man to plow 450 acres that he purchased in Tehama County, north of Sacramento. His intention was to plant a crop of winter wheat, which could later be replaced by some other crop. The land consisted of rolling grassland on top of clay soil which collects water after rainfall called vernal pools. Duarte asked the contractor to plow around the pools. *Id.* at 2. The contractor avoided some, plowed over some, but none of the pools were destroyed. Notably, the plow was only to go 4 to 7 inches deep, not more than a foot and not in any circumstances deep enough to penetrate the clay layer beneath the pools. *Id.*

While the field was being plowed, a local Corps office manager came by the field and determined that the land was being plowed too deeply. The Corps issued a cease-and-desist letter to Duarte. The result has been multiple lawsuits between Duarte and the Corps, which are anticipated to continue for years to come. *Id.* While many, including the federal judge hearing the case, find some of the Corps claims baffling, the Corps refuses to back down. And under the current landscape, the Corps has little incentive to back down. Fortunately for Duarte, he has the funds to continue to fight, but for many agricultural operators and producers, the expense of litigation or of threatened fines and penalties could spell ruin and prohibit any challenge to EPA or Corps action.

#### **IV. WHAT DOES THIS MEAN FOR AGRICULTURE?**

While uncertainty abounds in defining Waters of the U.S., agriculture and landowners find themselves caught in a massive expansion of jurisdiction and shift in water and land use policy by EPA and the Corps. Operators and producers can quickly find themselves embroiled in enforcement actions resulting from unpermitted discharges into Waters of the U.S. even if they have no knowledge that a feature on their land is a jurisdictional water. The stakes are high, and there is no sign that greater certainty is coming soon.

Agricultural operators and producers can help themselves by staying informed of what activities may trigger Clean Water Act liability. Specifically, fertilizers, manure (including compost), silage, nutrient rich feedstuffs, chemical or biological pesticides can all be considered pollutants under the Clean Water Act. Further, moving dirt in an area that is determined to be a Water of the U.S. can constitute a discharge of "dredged or fill material." Activities such as grading, laser leveling, terracing, plowing, deep ripping, or other manipulation of soil on a field or pasture as well as construction or maintenance of roads, fences, ditches, and ponds can all fall under Clean Water Act regulation.

While many exemptions exist, it is important to remember that these exemptions are often narrowly construed and applied and many practices may disqualify a landowner from the exemption.

If an operator or producer is concerned their land may include a Water of the U.S., there are options to try to avoid compliance issues. These range from avoiding discharges to the feature entirely and treating it as a Water of the U.S. Another option is to seek clarification from EPA or the Corps as to whether the feature is a Water of the U.S. and/or whether the activities qualify for an exemption. Some operators and producers may seek a jurisdictional determination from the Corps to identify Waters of the U.S. on the property. Others may seek the advice of an experienced consultant. Whatever the course of action, agricultural operators and producers must remain diligent in identifying jurisdictional waters to ensure compliance.

#### **V. CONCLUSION**

Clean Water Act regulation is scarcely closer to the type of certainty and predictability that is needed to ensure the protection of Waters of the U.S. while allowing for growth and prosperity of Agriculture. Recent Supreme Court precedent combined with the new rule proffered by EPA and the Corps have done little to aid this endeavor but have instead championed a broad expansion of government regulation in the face of an increasingly amorphous and subjective process. The battle, however, is not over, and the growing crop of litigation against the new rule and agency application and interpretation of jurisdictional waters analysis brings hope that greater certainty may one day be achieved.

**APPENDIX 1**

RECOMMENDED FOR FULL-TEXT PUBLICATION  
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 16a0045p.06

**UNITED STATES COURT OF APPEALS**

FOR THE SIXTH CIRCUIT

In re: UNITED STATES DEPARTMENT OF DEFENSE AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY FINAL RULE: CLEAN WATER RULE: DEFINITION OF “WATERS OF THE UNITED STATES,” 80 FED. REG. 37,054 (JUNE 29, 2015).

MURRAY ENERGY CORPORATION (15-3751); STATE OF OHIO, et al. (15-3799); NATIONAL WILDLIFE FEDERATION (15-3817); NATURAL RESOURCES DEFENSE COUNCIL, INC. (15-3820); STATE OF OKLAHOMA (15-3822); CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al. (15-3823); STATE OF NORTH DAKOTA, et al. (15-3831); WATERKEEPER ALLIANCE INC., et al. (15-3837); PUGET SOUNDKEEPER ALLIANCE, et al. (15-3839); AMERICAN FARM BUREAU FEDERATION, et al. (15-3850); STATE OF TEXAS, et al. (15-3853); UTILITY WATER ACT GROUP (15-3858); SOUTHEASTERN LEGAL FOUNDATION, INC., et al. (15-3885); STATE OF GEORGIA, et al. (15-3887); ONE HUNDRED MILES, et al. (15-3948); SOUTHEAST STORMWATER ASSOCIATION, INC., et al. (15-4159); MICHIGAN FARM BUREAU (15-4162); WASHINGTON CATTLEMEN’S ASSOCIATION (15-4188); ASSOCIATION OF AMERICAN RAILROADS, et al. (15-4211); TEXAS ALLIANCE FOR RESPONSIBLE GROWTH, ENVIRONMENT, AND TRANSPORTATION (15-4234); AMERICAN EXPLORATION & MINING ASSOCIATION (15-4305); ARIZONA MINING ASSOCIATION, et al. (15-4404),

*Petitioners,*

v.

UNITED STATES DEPARTMENT OF DEFENSE, DEPARTMENT OF THE ARMY CORPS OF ENGINEERS and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

*Respondents.*

Nos. 15-3751 /3799/ 3817/  
3820/ 3822/ 3823/ 3831/  
3837/ 3839/ 3850/ 3853/  
3858/ 3885/ 3887/ 3948/  
4159/ 4162/ 4188/ 4211/  
4234/ 4305/ 4404

Nos. 15-3751, et al.

*In re: U.S. Dep't of Defense & U.S. Env'tl. Protection Agency Final  
Rule: Clean Water Rule*

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On Petitions for Review of Final Rule of the United States Department  
of Defense and United States Environmental Protection Agency.

Judicial Panel on Multi-District Litigation, No. 135.

Argued: December 8, 2015

Decided and Filed: February 22, 2016

Before: KEITH, McKEAGUE, and GRIFFIN, Circuit Judges.

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**COUNSEL**

**ARGUED:** Eric E. Murphy, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Petitioners. Martha C. Mann, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondents.

McKEAGUE, J., delivered the opinion in which GRIFFIN, J., joined in the result. GRIFFIN, J. (pp 19–31), delivered a separate opinion concurring in the judgment. KEITH, J. (pp. 32–33), delivered a separate dissenting opinion.

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**OPINION**

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McKEAGUE, Circuit Judge. This multi-circuit case consists of numerous consolidated petitions challenging the validity of the “Clean Water Rule” recently published by the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency (“the Agencies”). The Clean Water Rule is intended to clarify the scope of “the waters of the United States” subject to protection under the Clean Water Act. The Act provides that certain specified actions of the EPA Administrator are reviewable directly in the U.S. Circuit Courts of Appeals. Because of uncertainty about whether the Agencies’ adoption of the Clean Water Rule is among these specified actions, parties challenging the Rule have filed petitions in both district courts and circuit courts across the country. Many of the petitions have been transferred to the Sixth Circuit for consolidation in this action. Many of the petitioners and other parties now move to dismiss the very petitions they filed invoking this court’s jurisdiction, contending this court lacks jurisdiction to review the Clean Water Rule.

The movants find support for their position in the language of the Clean Water Act's judicial review provisions, which purport to define circuit court jurisdiction specifically and narrowly. Over the last 35 years, however, courts, including the Supreme Court and the Sixth Circuit, have favored a "functional" approach over a "formalistic" one in construing these provisions. These precedents support the Agencies' position that this court does have jurisdiction. The district courts that have confronted the jurisdictional question in this litigation have arrived at conflicting answers.<sup>1</sup> For the reasons that follow I conclude that Congress's manifest purposes are best fulfilled by our exercise of jurisdiction to review the instant petitions for review of the Clean Water Rule.

## I. BACKGROUND

Petitioners in these various actions, transferred to and consolidated in this court by the Judicial Panel on Multi-District Litigation for handling as a multi-circuit case, challenge the validity of a Final Rule adopted by respondents U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, "the Clean Water Rule." 80 Fed. Reg. 37,054 (June 29, 2015). The Clean Water Rule clarifies the definition of "waters of the United States," as used in the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, "through increased use of bright-line boundaries" to make "the process of identifying waters protected under the Clean Water Act easier to understand, more predictable and consistent with the law and peer reviewed science, while protecting the streams and wetlands that form the foundation of our nation's water resources." 80 Fed. Reg. at 37,055. Petitioners contend that the definitional changes effect an expansion of respondent Agencies' regulatory jurisdiction and dramatically alter the existing balance of federal-state collaboration in restoring and maintaining the integrity of the nation's waters. Petitioners also contend the new bright-line boundaries used to determine which tributaries and waters adjacent to navigable waters have a "significant nexus" to waters protected under the Act are not consistent with the law as defined by the Supreme Court, and were adopted by a process not in conformity with the rulemaking requirements of the Administrative Procedures Act

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<sup>1</sup>See *Murray Energy Corp. v. U.S. E.P.A.*, 2015 WL 5062506 (N.D. W.Va. Aug. 26, 2015) (holding jurisdiction lies in circuit court); *State of Georgia v. McCarthy*, 2015 WL 5092568 at \*2-3 (S.D. Ga. Aug. 27, 2015) (same); *North Dakota v. U.S. E.P.A.*, 2015 WL 5060744 at \*2 (D. N.D. Aug. 27, 2015) (holding jurisdiction lies in district court).

(“APA”). The Agencies maintain that the requirements of the APA were met and that the Rule is a proper exercise of their authority under the Clean Water Act.

The Rule became effective on August 28, 2015. On October 9, 2015, however, we issued a nationwide stay of the Rule pending further proceedings in this action. *In re EPA and Dep't of Def. Final Rule*, 803 F.3d 804 (6th Cir. 2015). We found that petitioners had demonstrated a substantial possibility of success on the merits of their claims and that the balance of harms militated in favor of preserving the status quo pending judicial review.

Meanwhile, eight motions to dismiss have been filed by numerous petitioners and intervenors. The motions assert that judicial review is properly had in the district courts, not here. They contend the instant challenges to the Clean Water Rule do not come within the judicial review provisions of the Clean Water Act, 33 U.S.C. § 1369(b)(1).

Section 1369(b)(1) identifies seven kinds of action by the EPA Administrator that are reviewable directly in the circuit courts. Only two of the seven kinds of action listed in § 1369(b)(1) are implicated here, subsections (E) and (F). In its entirety, § 1369(b)(1) provides as follows:

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

may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person.

Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

33 U.S.C. § 1369(b)(1).

Movants contend the EPA's and the Corps' adoption and promulgation of the Clean Water Rule is not action of the Administrator "in issuing or promulgating any effluent limitation or other limitation" or "in issuing or denying any permit" under § 1369(b)(1)(E) or (F). They contend the Clean Water Rule is simply a definitional rule and that neither the statutory language nor the legislative history evidences congressional intent to authorize direct review of such action in the circuit courts.

## II. ANALYSIS

### A. General Standards

The question of subject matter jurisdiction is a question of law the court addresses *de novo*. *Iowa League of Cities v. U.S. E.P.A.*, 711 F.3d 844, 861 (8th Cir. 2013). That is, the Agencies' interpretation of the Clean Water Act is entitled to no deference in this regard. *Friends of the Everglades v. U.S. E.P.A.*, 699 F.3d 1280, 1285 (11th Cir. 2012).

Federal courts are courts of limited jurisdiction and have subject matter jurisdiction only as authorized by the Constitution and by Congress. *Id.* at 1289. Here, the court's authority to conduct direct review of the Agencies' challenged action, must be found, if at all, in the Clean Water Act, 33 U.S.C. § 1369(b)(1). *Id.* at 1285 (recognizing availability of direct circuit court review only over those actions specifically enumerated in § 1369(b)(1)). Not all actions taken under the Clean Water Act are directly reviewable in the circuit courts. *Nat'l Cotton Council of America v. U.S. E.P.A.*, 553 F.3d 927, 933 (6th Cir. 2009). Where review is available under § 1369(b)(1), "it is the exclusive means of challenging actions covered by the statute." *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S.Ct. 1326, 1334 (2013). Matters not reviewable under § 1369(b)(1) may be actionable in the district courts by other means. *See id.* (recognizing availability of private enforcement action under 33 U.S.C. § 1365); *Narragansett Elec. Co. v. U.S. E.P.A.*, 407

F.3d 1, 8 (1st Cir. 2005) (recognizing availability of judicial review in district court under the APA).

Whether subject matter jurisdiction lies in the circuit courts is governed by the intent of Congress. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 746 (1985). In determining the scope of circuit court jurisdiction Congress intended to prescribe under the Clean Water Act, the analysis must begin with the statutory language. *Id.* at 735. Yet, even where statutory language may seem unambiguous, “plain meaning, like beauty, is sometimes in the eye of the beholder.” *Id.* at 737. The parties agree that subsections (E) and (F) are the only two provisions of § 1369(b)(1) that potentially apply.

## **B. Statutory Language**

### **1. Subsection (E) – “Other Limitation”**

Movants contend the Rule’s definition of “waters of the United States” is not, under § 1369(b)(1)(E), “an effluent limitation or other limitation” approved or promulgated under 33 U.S.C. § 1311, 1312, 1316, or 1345. “Effluent limitation” is defined 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 navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.” 33 U.S.C. § 1362(11).

The Agencies do not contend that the Clean Water Rule is an action in approving or promulgating an effluent limitation, but rather that it is an “other limitation.” The Act does not define “other limitation.” Inasmuch as “effluent limitation” is defined as a “restriction” on discharges from point sources, the Agencies contend “other limitation” must be understood as a different kind of “restriction.” They contend the Rule’s clarification of the scope of “waters of the United States” protected under the Clean Water Act constitutes an “other limitation” in two respects. First, it has the effect of restricting the actions of property owners who discharge pollutants from a point source into covered waters. Second, it has the effect of imposing limitations or restrictions on regulatory bodies charged with responsibility for issuing permits

under the National Pollutant Discharge Elimination System (“NPDES”) to those who discharge pollutants into covered waters.

On its face, the Agencies’ argument is not compelling. After all, the Rule’s clarified definition is not self-executing. By clarifying the definition, the Agencies did not approve or promulgate any limitation that imposes *ipso facto* any restriction or requirement on point source operators or permit issuers. Rather, they promulgated a definitional rule that, operating in conjunction with other regulations, will result in imposition of such limitations. Is such an indirect consequence sufficient to bring the Rule within the scope of § 1369(b)(1)(E)?

The Agencies say yes and cite several cases in support. The seminal case supporting their construction of subsection (E) is *E.I. du Pont de Nemours Co. v. Train*, 430 U.S. 112, 136 (1977), where the Supreme Court eschewed a strict, literal reading. The Court characterized a construction that would provide for direct circuit court review of individual actions issuing or denying permits, but disallowed such review of the “basic regulations governing those individual actions,” as a “truly perverse situation.” *Id.* Hence, even though § 1369(b)(1) provided for circuit court review only of limitations promulgated under certain enumerated sections, and the challenged regulation was promulgated under a different section—which was, however, closely related to one of the enumerated sections—the Court had “no doubt that Congress intended review of the two sets of regulations to be had in the same forum.” *Id.* at 136–37. The Court thus construed § 1369(b)(1)(E), in light of Congress’s manifest intent, to encompass review of more agency actions than a literal reading of the provision would suggest.

*E.I. du Pont* can be read in more ways than one. As the Agencies see it, the Clean Water Rule is a “basic regulation governing those individual actions” taken by the EPA Administrator (e.g., promulgation of limitations) that *are* subject to direct circuit court review. Accordingly, giving § 1369(b)(1) a practical construction per *E.I. du Pont*, the Agencies argue that Congress intended the lawfulness of the Clean Water Rule to be subject to direct circuit court review.

Their position finds support in several decisions of our sister circuits. In *Nat. Res. Def. Council v. U.S. E.P.A.*, 673 F.2d 400 (D.C. Cir. 1982) (J. Ginsburg), a case closely analogous to ours, the D.C. Circuit addressed numerous consolidated challenges to EPA regulations that had

been filed in circuit courts of appeals and district courts. The regulations did not establish any numerical limitations, but prescribed permitting procedures that constituted “a limitation on point sources and permit issuers and a restriction on the untrammelled discretion of the industry.” *Id.* at 405 (internal quotation marks omitted). Following *E.I. du Pont*, the court held this “limitation” was sufficient to bring the regulations within the ambit of direct circuit court review under § 1369(b)(1)(E). Employing “a practical rather than a cramped construction,” the court held that direct review in the circuit court was appropriate, even though the regulations did not impose technical requirements but were “far more general and rest[ed] dominantly on policy choices.” *Id.* In fact, the court cited several reasons for concluding that such “broad, policy-oriented rules” are actually more suitable for direct circuit court review than “specific technology-based rules.” *Id.* at 405 n.15. The court noted that *E.I. du Pont* “does not unequivocally dictate our result but [its] reasoning strongly supports our holding that we have jurisdiction.” *Id.* at 406.

In *Virginia Elec. & Power Co. v. Costle*, 566 F.2d 446 (4th Cir. 1977) (“*VEPCO*”), the Fourth Circuit addressed consolidated petitions challenging EPA regulations prescribing requirements for the location, design, construction and capacity of cooling water intake structures used to withdraw from, rather than discharge into, covered waters. The challengers argued that such requirements could not be “other limitations” under § 1369(b)(1)(E) until they were actually adopted in an individual permit proceeding. Because the requirements were not self-executing, the challengers argued they were only presumptively applicable and did not actually impose any limitation or restriction on point-source discharges. The court held the argument was foreclosed by *E.I. du Pont*. *VEPCO*, 566 F.2d at 449–50. The court held the requirement that certain information be considered in determining the best available technology for intake structures was a sufficient restriction on the discretion of point source operators and permit issuers to constitute an “other limitation” under subsection (E). *Id.* Further, citing *E.I. du Pont*, the court noted the regulations were so closely related to effluent limitations, that “it would be anomalous to have their review bifurcated between different courts.” *Id.* at 450. The court held that circuit court review was proper under subsection (E), stating that “this result is consistent with the jurisdictional scheme of the Act, which in general leaves review of standards of nationwide applicability to the courts of appeals, thus furthering the aim of Congress to achieve nationally uniform standards.” *VEPCO*, 566 F.2d at 451.

More recently, the Eighth Circuit followed suit. In *Iowa League of Cities v. U.S. E.P.A.*, 711 F.3d 844 (8th Cir. 2013), the court addressed two letters from the EPA sent to a senator and alleged to have effectively established new regulatory standards governing municipal water treatment processes. The court first noted that “the Supreme Court has recognized a preference for direct appellate review of agency action pursuant to the APA.” *Id.* at 861 (citing *Fla. Power*, 470 U.S. at 745). The court rejected the EPA’s contention that the subject letters, couched in terms of what “should not be permitted” by regulated entities, did not “promulgate” a binding limitation. Noting that the EPA had characterized the letters as expressing its position or policy, the court dismissed the notion that the instruction was not binding as “Orwellian Newspeak.” *Id.* at 865. The court did not cite *E.I. du Pont*, but adopted the *VEPCO* formulation of “limitation” and went on to hold that subsection (E) applies if “entities subject to the CWA’s permit requirements face new restrictions on their discretion with respect to discharges or discharge-related processes.” *Id.* at 866.

These decisions from the D.C., Fourth, and Eighth Circuits demonstrate courts’ willingness to view *E.I. du Pont* as license to construe Congress’s purposes in § 1369(b)(1) more generously than its language would indicate.<sup>2</sup> However, movants herein read *E.I. du Pont* differently. They argue *E.I. du Pont*’s holding is narrower and should be limited to its facts. In support they cite decisions from the Eleventh and Ninth Circuits refusing to find circuit court jurisdiction under subsection (E).

In both *Friends of the Everglades v. U.S. E.P.A.*, 699 F.3d 1280, 1287 (11th Cir. 2012), and *Northwest Environmental Advocates v. U.S. E.P.A.*, 537 F.3d 1006, 1015–16 (9th Cir. 2008), the courts reached *results* different from those reached in the D.C., Fourth, and Eighth Circuits. However, the decisions in all five circuits are readily reconcilable. In both *Friends of the Everglades* and *Northwest Environmental*, the courts acknowledged the above discussed *NRDC* and *VEPCO* rulings, but found the regulations before them materially distinguishable from those deemed to come within the scope of § 1369(b)(1)(E). Far from *restricting* “untrammeled

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<sup>2</sup>Most recently, the “functional approach” employed in these cases was applied by two district courts in relation to the Clean Water Rule in *this* litigation to find circuit court jurisdiction under subsection (E). *Murray Energy Corp. v. U.S. E.P.A.*, 2015 WL 5062506 (N.D. W.Va. Aug. 26, 2015); *State of Georgia v. McCarthy*, 2015 WL 5092568 at \*2–3 (S.D. Ga. Aug. 27, 2015).

discretion,” the regulations at issue in *Friends of the Everglades* and *Northwest Environmental* actually created *exemptions* from limitations. Both courts concluded that an exemption from limitation simply cannot be fairly characterized as a limitation. Neither court criticized the approach adopted in *E.I. du Pont* and applied in *NRDC* and *VEPCO*. Nor did either court reject the notion that an “other limitation” can be made out by an indirect restriction on discretion. Rather, *Friends of the Everglades* and *Northwest Environmental* held that no construction could render an exemption from limitation what it plainly is not: a “limitation” under subsection (E).<sup>3</sup> The two lines of authority are therefore not inconsistent.

Here we acknowledge that the Rule is definitional only and does not *directly* impose any restriction or limitation. Yet, neither does the Rule create an exemption from limitation. By clarifying the definition of “waters of the United States,” the Rule undeniably has the *indirect* effect of altering permit issuers’ authority to restrict point-source operators’ discharges into covered waters. The alteration invariably results in expansion of regulatory authority in some instances and imposition of additional restrictions on the activities of some property owners. These restrictions, of course, are presumably the reason for petitioners’ challenges to the Rule. Hence, although the Rule is definitional in nature, it is undeniably, in the language of *E.I. du Pont*, a “basic regulation governing other individual actions issuing or denying permits.” 430 U.S. at 136. To rule that Congress intended to provide direct circuit court review of such individual actions but intended to exclude from such review the definitional Rule on which the process is based, would produce, per *E.I. du Pont*, “a truly perverse situation.” *Id.* To avoid just such an outcome, the *E.I. du Pont* Court reasoned that Congress must have intended that both types of regulation would be subject to review in the same forum, i.e., the circuit courts.<sup>4</sup>

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<sup>3</sup>These authorities were cited as persuasive in *this* litigation by one district court. *North Dakota v. U.S. E.P.A.*, 2015 WL 5060744 at \*2 (D. N.D. Aug. 27, 2015). However, the *North Dakota* court ignored the fact that, unlike the regulations at issue in those cases, the Clean Water Rule does not create an exemption. And despite noting the pertinence of the *NRDC-VEPCO-Iowa League* line of cases, the *North Dakota* court conspicuously ignored their holdings.

<sup>4</sup>*E.I. du Pont*’s analysis is also dispositive of movants’ argument that review under subsection (E), by its terms, applies only to action by the EPA Administrator approving or promulgating a limitation “under section 1311, 1312, 1316, or 1345 of this title.” Movants contend that all of these sections pertain to effluent limitations. Inasmuch as the Agencies do not even argue that the Clean Water Rule represents an effluent limitation, movants contend the Rule cannot be deemed to have been promulgated under any of these sections.

*E.I. du Pont* is the last word from the Supreme Court on § 1369(b)(1)(E). It is still good law. Our sister courts in the D.C., Fourth, and Eighth Circuits have all applied *E.I. du Pont*'s approach and have defined the scope of direct circuit court review under subsection (E) more broadly than a strict interpretation of its language would indicate. The two circuit-level decisions, from the Ninth and Eleventh Circuits, that declined to find circuit court jurisdiction under subsection (E) did so in relation to agency action materially distinguishable from the Rule here at issue. The movants' position is thus devoid of substantial case law support. While their plain-language arguments are not without facial appeal, we are hardly at liberty to ignore the consistent body of case law that has sprung from that language in encounters with the real world. In response to concern about producing a "perverse situation" seemingly at odds with congressional purpose, movants have no answer beyond their argument that Congress must be held to say what it means and mean what it says. Were we writing on a blank slate, the argument would be more persuasive, but we're not. As an "inferior court," we are obliged to take our lead from the Supreme Court. Having discerned no persuasive grounds to depart from the rationale that controlled in *E.I. du Pont*, I conclude that we, like our sister circuits, must follow its lead.

Viewing the Clean Water Rule through the lens created in *E.I. du Pont* reveals a regulation whose practical effect will be to *indirectly* produce various limitations on point-source operators and permit issuing authorities. Accordingly, although the Rule does not itself impose any limitation, its effect, in the regulatory scheme established under the Clean Water Act, is such as to render the Rule, per the teaching of *E.I. du Pont* and its progeny, subject to direct circuit court review under § 1369(b)(1)(E).

## **2. Subsection (F) – “Issuing or Denying Permit”**

Evaluation of the second claimed basis for direct circuit court review proceeds in like manner. Movants argue that § 1369(b)(1)(F) does not justify jurisdiction in the circuit court because the Clean Water Rule is not an action of the EPA Administrator “in issuing or denying a permit.” Yet, in relation to subsection (F), too, the Supreme Court has opened the door to

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Yet, the Rule purports to be adopted under authority, *inter alia*, of section 311 (33 U.S.C. § 1311). 80 Fed. Reg. at 37,055. And subsection (E) prescribes direct circuit court review of any “other limitation,” in addition to any effluent limitation. It follows that the Rule, representing an “other limitation” as defined in *E.I. du Pont* and its progeny, and adopted pursuant to § 1311, comes within the scope of circuit court review under § 1369(b)(1)(E).

constructions other than a strict literal application. In *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196–97 (1980), the Court reversed the Ninth Circuit and held that an action of the Administrator “functionally similar” to denial of a permit is encompassed within subsection (F). If the “precise effect” of the action would be to deny a permit, the Court reasoned, it would be irrational to conclude, based on a strictly literal application of subsection (F), that the action would be subject to review in district court rather than circuit court. The Court recognized that direct review in the circuit court “would best comport with the congressional goal of ensuring prompt resolution of challenges to EPA’s actions.” *Id.* at 196. Addition of another level of judicial review, the Court observed, “would likely cause delays in resolving disputes under the Act.” *Id.* at 197. In conclusion, the Court remarked: “Absent a far clearer expression of congressional intent, we are unwilling to read the Act as creating such a seemingly irrational bifurcated review system.” *Id.*

Here, similarly, the Agencies contend that the effect of the Clean Water Rule, operating in the extant regulatory scheme, is to impact permitting requirements, thereby affecting the granting and denying of permits. This is enough, the Agencies argue, to bring the Clean Water Rule within the ambit of subsection (F), because it too impacts permitting requirements. In support they cite a Sixth Circuit case, *Nat’l Cotton Council v. U.S. E.P.A.*, 553 F.3d 927, 933 (6th Cir. 2009), *cert. denied sub nom. Crop Life v. Baykeeper*, 130 S.Ct. 1505 (2010), and *Am. Farm Bureau Fed’n v. Baykeeper*, 130 S.Ct. 1505 (2010). In *National Cotton*, this court held 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. The court relied on authorities from the Ninth Circuit and D.C. Circuit stemming from *E.I. du Pont* and *Crown Simpson*. See *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 966 F.2d 1292, 1296–97 (9th Cir. 1992); *Am. Mining Cong. v. U.S. E.P.A.*, 965 F.2d 759, 763 (9th Cir. 1992); *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 656 F.2d 768, 775 (D.C. Cir. 1981). In fact, the *National Cotton* court noted that this more expansive reading of subsection (F) encompassed even regulations that *exempted* certain discharges from permitting requirements. *Nat’l Cotton*, 553 F.3d at 933. That

is, under subsection (F), a regulation that imposes no restriction or limitation is reviewable in circuit court, so long as it affects permitting requirements.<sup>5</sup>

Movants maintain that a mere impact on permitting requirements is not enough to bring the Rule within subsection (F). They contend the holding of *Crown Simpson*'s expansion of the plain language of the provision is really quite narrow and that *National Cotton*'s reading of subsection (F) is overly broad and even inconsistent with *Crown Simpson*. They contend the “precise effect” of the Clean Water Rule is *not* to deny any permit and that it is therefore not “functionally similar.”

Movants attack *National Cotton* on several fronts. First, they contend the decision is not entitled to precedential weight because its determination of jurisdiction was summary in nature and devoid of substantive analysis. In support they cite *Emswiler v. CSX Transportation, Inc.*, 691 F.3d 782, 788–90 (6th Cir. 2012), for the proposition that “drive-by jurisdictional rulings” based on “less than meticulous” reasoning should be accorded no precedential effect. *Emswiler* is inapposite. The *Emswiler* court used these characterizations in relation to an opinion’s careless characterization of a party’s failure to meet a threshold exhaustion requirement as depriving the court of subject matter jurisdiction. While the failure to exhaust impacted the plaintiff’s ability to win relief on the merits, the *Emswiler* court called it “less than meticulous” to say the failure to exhaust deprived the court of subject matter jurisdiction. *Id.* at 789. The *National Cotton* jurisdictional ruling was not the product of carelessness. It is succinct because it efficiently follows the holdings of several other rulings—one by the Supreme Court—whose reasoning it implicitly incorporated by citing them.

Granted, the Eleventh Circuit expressly declined to follow *National Cotton* in *Friends of the Everglades*, 699 F.3d at 1288, rejecting the position that *Crown Simpson* legitimized direct circuit court review of any “regulations relating to permitting itself.” The court noted that, although the Sixth Circuit adopted that interpretation in *National Cotton*, it did so in reliance on two Ninth Circuit cases that had since been distinguished by the Ninth Circuit in *Northwest Environmental*, 537 F.3d at 1016–18. In *Northwest Environmental*, 537 F.3d at 1018, as in

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<sup>5</sup>*National Cotton* was followed in *this* litigation in *Murray Energy*, 2015 WL 5062506 at \*5–6, the court noting there was no dispute that the Clean Water Rule will have an impact on permitting requirements.

*Friends of the Everglades*, 699 F.3d at 1288, the court ruled that a regulation creating a permanent exemption from the permitting process could not have the effect of granting or denying a permit reviewable under § 1369(b)(1)(F) precisely because the regulation *excluded* certain discharges from the permitting process altogether.

Yet, even if it be conceded that *National Cotton* said too much when it noted in *dicta* that the Ninth Circuit had construed subsection (F) broadly enough to include an exemption from regulation, the fact remains that the action here under review is not an exemption. Rather, both petitioners and the Agencies operate on the understanding that the effect of the Clean Water Rule is not solely to exclude waters from protection, but to extend protection to some additional waters. This extension indisputably expands regulatory authority and impacts the granting and denying of permits in fundamental ways. The later clarification of Ninth Circuit law noted in *Friends of the Everglades* does not, therefore, in any way undermine the authority of *National Cotton* as applied to the Clean Water Rule.

Finally, movants contend *National Cotton* is wrongly decided. They contend that *Crown Simpson*'s expanded construction of subsection (F) was narrow and circumscribed; whereas *National Cotton*'s holding that subsection (F) authorizes circuit court review of "regulations governing the issuance of permits" is unduly broad. Perhaps. Yet, if we believed *National Cotton* was not distinguishable and was wrongly decided, we would still not be free to reject its holding. Generally, in a multi-circuit case where a question of federal law is at issue, the transferee court is obliged to follow its own interpretation of the relevant law. *See Murphy v. FDIC*, 208 F.3d 959, 964–65 (11th Cir. 2000) (citing *In re Korean Airlines Disaster*, 829 F.2d 1171, 1175–76 (D.C. Cir. 1987), and observing that other circuits have uniformly agreed with the D.C. Circuit). Moreover, no other court has held that *National Cotton* was wrongly decided. *National Cotton*, as well as the Ninth Circuit and D.C. Circuit authorities on which it relied, are still good law. Movants have not identified any materially contrary authority.

Furthermore, *National Cotton*'s construction is consistent with congressional purpose, which appears to have been the guiding light in both *E.I. du Pont* and *Crown Simpson*. In *Florida Power*, 470 U.S. at 744–45, in relation to the Atomic Energy Act, the Court recognized that "one crucial purpose" of statutes providing for direct circuit court review of agency action is

judicial economy. *Id.* at 744. The Court noted that the district court's superior factfinding capacity is typically unnecessary to judicial review of agency action. On the other hand, providing for initial review in the district court has the negative effect of "requiring duplication of the identical task in the district court and in the court of appeals; both courts are to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review." *Id.* The Court acknowledged that the intent of Congress, not the Court's concept of sound policy, is ultimately determinative, but concluded:

Absent a firm indication that Congress intended to locate initial APA review of agency action in the district courts, we will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals.

*Id.* at 746. *See also Tennessee v. Herrington*, 806 F.2d 642, 650 (6th Cir. 1986) (following *Florida Power* and noting that where Congress has provided for direct circuit court review but its intent is ambiguous in a specific case, policy considerations are relevant); *Natural Resources Def. Council v. Abraham*, 355 F.3d 179, 193 (2d Cir. 2004) (citing cases from Second, Seventh, Tenth and D.C. Circuits for the proposition that "when there *is* a specific statutory grant of jurisdiction to the court of appeals, it should be construed in favor of review by the court of appeals.").

*National Cotton's* broader reading of subsection (F) is thus consistent with the preference in favor of circuit court review recognized in *Florida Power* and implicitly at work in both *E.I. du Pont*, *see* 430 U.S. at 128 (characterizing it as "almost inconceivable that Congress would have required duplicate review in the first instance by different courts"), and *Crown Simpson*, *see* 445 U.S. at 196–97 (noting unwillingness to conclude Congress intended to cause delays that would result from duplicative review process).

In *Florida Power*, the Court overruled Justice Stevens' objection that proper deference to Congress required enforcement of "the plain and simple construction of the statutory language." *Id.* at 750. Justice Stevens' plain-language position, like that of movants in this case, is not devoid of logic. Yet, as Justice Stevens protested, the Court rejected it as a matter of mere "semantic quibbles." *Id.* We do not view movants' plain-language arguments as semantic quibbles, but, in my view, they have clearly failed to identify any *substantial* reason to conclude

the preference favoring direct circuit court review—created by Congress in § 1369(b)(1) and honored by the Supreme Court—does not, in this case, ultimately serve all parties' interests in efficiency, judicial economy, clarity, uniformity and finality.

*Florida Power*, like *E.I. du Pont* and *Crown Simpson*, demonstrates a strong preference for construing Congress's provision for direct circuit court review of agency action by a practical, functional approach rather than a technical approach. A holding that we have jurisdiction to hear the instant petitions for review of the Clean Water Rule is consistent with this understanding. On the other hand, a contrary ruling, though facially consonant with the plain language of § 1369(b)(1), finds practically no solid support in the case law. Accordingly, I conclude that we have jurisdiction under subsection (F) as well.

### **C. Miscellaneous Objections**

Movants present arguments based on other statutory provisions, items of legislative history and canons of construction. The arguments are not persuasive. That the Clean Water Rule was promulgated jointly by the EPA Administrator *and* the Secretary of the Army does not defeat the fact that it represents action, in substantial part, of the Administrator. The items of legislative history identified by the parties and said to be probative of congressional intent are sparse and frankly shed little light on the specific jurisdictional questions before the court. *See E.I. du Pont*, 430 U.S. at 133 (dismissing arguments based on other provisions of the statute and legislative history as inconclusive and not deserving of detailed discussion). Similarly, the various canons of construction alluded to by the parties are inconclusive and carry little weight in comparison with the dispositive considerations, as defined in the foregoing discussion of the guiding case law.

Movants also raise what they characterize as “due process concerns.” They contend that if circuit court jurisdiction is exercised under § 1369(b)(1), then any other challenges to the Clean Water Rule not made within 120 days after its promulgation are foreclosed unless based on grounds which arose after the 120th day, per § 1369(b)(2). If subsequent as-applied challenges are thus deemed precluded, then unwary point-source operators and landowners uncertain about the scope of the Clean Water Act's regulatory reach may be subject to

enforcement actions and penalties without fair notice of the conduct prohibited. In *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992), the Ninth Circuit referred to this preclusive effect as a “peculiar sting.”

The concern is speculative and overblown in this case. If the court 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. See *Narragansett Elec. Co. v. U.S. E.P.A.*, 407 F.3d 1, 5 (1st Cir. 2005) (noting that “the short time frame in § 1369(b) clearly reflects some effort to protect the EPA’s interests in finality in certain matters, particularly certain rulemakings with substantial significance and scope.”). On the other hand, this court’s exercise of jurisdiction and ruling on a challenge to the *validity* of the Rule would not preclude challenge to subsequent *application* of the Rule in a particular permitting requirement or enforcement action. See *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S.Ct. 1326, 1335 (2013) (noting that whereas a challenge to the validity of regulations would be subject to the exclusive jurisdictional bar of § 1369(b)(2), an enforcement action would not be). To the extent our eventual ruling on the validity of the Rule might conceivably be asserted in overbroad fashion as barring a defense against application of the Rule in an enforcement action, the asserted bar would be subject to testing as excessive and unfairly prejudicial in that action. See *Nat. Res. Def. Council v. U.S. E.P.A.*, 673 F.3d 400, 407 (D.C. Cir. 1982) (rejecting the same “due process” argument and suggesting that overbroad application of the § 1369(b)(2) bar could be challenged, when ripe, as unconstitutional). We therefore reject movants’ “due process concerns” as premature and unfounded.

### III. CONCLUSION

Both sides have presented worthy arguments in support of their respective positions on jurisdiction. Since enactment of the Clean Water Act in 1972, the jurisdictional provisions of § 1369(b)(1)(E) and (F) have been subjected to judicial scrutiny in relation to various regulatory actions and have been consistently construed not in a strict literal sense, but in a manner designed to further Congress’s evident purposes. Pursuant to the uniform trend of the instructive case law, the scope of direct circuit court review has gradually expanded. In response, Congress has not moved to amend the provision or otherwise taken “corrective” action. As explained

above, the instant petitions for review of the Clean Water Rule come within the scope of subsections (E) and (F), as they have come to be defined in the governing case law. Movants have failed to identify any particular circumstances or practical considerations that would justify holding that adjudication of the instant petitions for judicial review in the various district courts would better serve Congress's purposes. Instead, recognition of our authority and our duty to directly review the Clean Water Rule in this multi-circuit case is in all respects consonant with the governing case law and in furtherance of Congress's purposes. Conversely, to rule that we lack jurisdiction would be to contravene prevailing case law and frustrate congressional purposes without substantial justification.

We hold that jurisdiction is properly laid in this court. All pending motions to dismiss are **DENIED**.

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**CONCURRING IN THE JUDGMENT**

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GRIFFIN, Circuit Judge, concurring in the judgment, only.

I concur in the judgment holding that we possess subject-matter jurisdiction in this case; thus, I join in denying petitioners' motions to dismiss. However, I do so only because I am required to follow our precedentially-binding decision, *National Cotton Council of America v. U.S. E.P.A.*, 553 F.3d 927 (6th Cir. 2009). Were it not for *National Cotton*, I would grant the motions to dismiss.

I.

Congress establishes the jurisdiction of the courts of appeals and other inferior courts. *See, e.g., Kontrick v. Ryan*, 540 U.S. 443, 452 (2004). In determining whether the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, creates jurisdiction in our court over a case or controversy, we must examine and apply the terms of the statute enacted by Congress. As with all matters of statutory construction, we should apply a textualist, not a “functional” or “formalistic,” approach.<sup>1</sup>

In this regard, “[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms.” *Caminetti v. United States*, 242 U.S. 470, 485 (1917). “If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.” *Id.* at 490. Recognizing the consequences of unbridled judicial forays into the legislative sphere, the Supreme Court has admonished “time and again that courts must presume that a legislature says

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<sup>1</sup>With a heavy heart, I acknowledge the sudden passing of Justice Antonin Scalia. Justice Scalia was the founder and champion of the modern textualist mode of constitutional and statutory construction. His essay, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997), and other writings and opinions profoundly influenced a generation of attorneys, legal scholars, and judges. Justice Scalia's legacy will live on for decades in countless opinions such as this one.

in a statute what it means and means in a statute what it says there.” *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). Accordingly, “[w]hen the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” *Id.* (internal citations and quotation marks omitted).

Whether it is desirable for us to possess jurisdiction for purposes of the efficient functioning of the judiciary, or for public policy purposes, is not the issue. Rather, the question is whether Congress in fact created jurisdiction in the courts of appeals for this case. I conclude that it did not.

The Environmental Protection Agency and the U.S. Army Corps of Engineers (“the Agencies”) argue that both 33 U.S.C. § 1369(b)(1)(E) and (F) vest this court with jurisdiction regarding petitioners’ claims. In my view, it is illogical and unreasonable to read the text of either subsection (E) or (F) as creating jurisdiction in the courts of appeals for these issues. Nonetheless, because *National Cotton* held otherwise with respect to subsection (F), I concur in the judgment, only.

## II.

Subsection (E) creates jurisdiction to review an action “approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title[.]” Sections 1311 and 1312 specifically set forth effluent limitations and water quality related-effluent limitations. Sections 1316 and 1345 provide additional limitations on discharges and sewage sludge to achieve state water quality standards when those in sections 1311 and 1312 fall short. The Act defines “effluent limitation” as expressly relating to *discharges*:

The term “effluent limitation” means 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 navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

§ 1362(11) (emphasis added). It does not define “other limitation.”

Petitioners ask that we draw an associational link between effluent and other limitations, directing this court to a Fourth Circuit case that speaks in terms of an “other limitation” being “closely related” to “effluent limitations,” *Va. Elect. & Power Co. v. Costle*, 566 F.2d 446, 450 (4th Cir. 1977) (“*VEPCO*”), and to a Seventh Circuit case holding that “other limitation” is “restricted to limitations directly related to effluent limitations.” *Am. Paper Inst., Inc. v. U.S. E.P.A.*, 890 F.2d 869, 877 (7th Cir. 1989). On the other hand, the Agencies advocate for—and the lead opinion applies—a broad reading of “other limitation”; that is, “other limitation” includes “restrictions that are *not* effluent limitations.”

In my view, both are wrong. Whatever the relationship may be between effluent and other limitations, the plain text of subsection (E) clearly delineates what the limitations are, and what they are not: the “limitations” set forth in §§ 1311, 1312, 1316, and 1345 provide the boundaries for what constitutes an effluent or other limitation. The statutory interpretation canon, *noscitur a sociis*, drives this point home. Simply, “a word is known by the company it keeps” to “avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.” *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (citation omitted). Application of this canon is simple: “any effluent limitation or other limitation” must be related to the statutory boundaries set forth in §§ 1311, 1312, 1316, and 1345.

The problem with the boundaries for the Agencies is that the definitional section the Clean Water Rule modifies—“[t]he term ‘navigable waters’ means the waters of the United States, including the territorial seas”—does not emanate from these sections. It is a phrase used in the Act’s definitional section, § 1362, and no more. But the definitional section is not mentioned in § 1369, let alone the specific sections listed in subsection (E). And the definitional section, as the lead opinion acknowledges, is not self-executing; at best, it operates in conjunction with other sections scattered throughout the Act to define when its restrictions even apply. Accordingly, the lack of any reference to § 1362 in subsection (E) counsels heavily against a finding of jurisdiction. *See Friends of Earth v. U.S. E.P.A.*, 333 F.3d 184, 189 (D.C. Cir. 2003) (“[T]he courts of appeals have consistently held that the express listing of specific EPA actions in section 1369(b)(1) precludes direct appellate review of those actions not so

specified.”); *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992) (“It would be an odd use of language to say ‘any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title’ in § 1369(b)(1)(E) if the references to particular sections were not meant to exclude others.”).

The Agencies’ response to this textual point is underwhelming, raising suppositional and policy arguments. First, the Agencies contend that they promulgated the Clean Water Rule *only* under the *effluent limitations* provision codified at § 1311. Section 1311 makes the unauthorized “discharge of any pollutant by any person . . . unlawful.” § 1311(a). The phrase “discharge of any pollutant” is defined, as pertinent here, as “any addition of any pollutant to navigable waters from any point source.” § 1362(12)(A). The Agencies concede that “[t]he plain text reading of the phrase ‘other limitation under sections 1311, 1312, 1316, or 1345’ . . . *can only refer to limitations that are promulgated under the specified sections but are not effluent limitations.*” (Emphasis added.) They then suppose in circular fashion that “[b]y defining what waters are ‘waters of the United States,’ the Clean Water Rule establishes where the Act’s prohibitions and requirements apply.”

This may be true, but it fails muster on the point of whether the Clean Water Rule is any “other limitation” within the meaning of § 1311. Importantly, neither the Agencies nor the lead opinion have identified a specified subsection within § 1311 that are “not effluent limitations” under which the Agencies promulgated the Clean Water Rule. This is because they cannot. Waters of the United States applies across the Act, not just to those discharge limitations set forth in § 1311. The Clean Water Rule is not a “limitation” on the discharge of pollutants *into* waters of the United States; rather, it sets the jurisdictional reach for whether the discharge limitations even apply in the first place. In the Agencies’ own words:

The action 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.

Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,102 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401). In short, I refuse to read § 1369’s narrow jurisdictional

authorization in such a circular fashion, expansively turning the broadening of the Act's jurisdiction into a limitation that may be imposed *only when jurisdiction is appropriate*. Cf. *North Dakota v. U.S. E.P.A.*, --- F. Supp. 3d ---, 2015 WL 5060744, at \*2 (D.N.D. Aug. 27, 2015) (“[T]he States have exactly the same discretion to dispose of pollutants into the waters of the United States after the Rule as before.”).

Second, the Agencies raise policy considerations as to why review of such a nationally important rule should originate in the courts of appeals. They argue, for example, that the definition of waters of the United States is a “fundamental” and “basic regulation” pertinent to the Act's backbone—its prohibition against discharging pollutants into such waters without a permit. The Agencies also argue initial review in the district courts will inevitably lead to waste of judicial and party resources, delays, and possibly even different results.

However, no matter how important a policy prerogative may be, the Act's plain and unambiguous text binds this court. That text stands in marked contrast to the Clean Air Act's express authorization to challenge “any other nationally applicable regulations” by the EPA in the D.C. Circuit. See 42 U.S.C. § 7607(b)(1); *Am. Paper Inst.*, 890 F.2d at 877 (“Congress could easily have provided jurisdiction . . . by providing a general jurisdiction provision in the Act. Instead, Congress specified those EPA activities that were directly reviewable by the court of appeals.”) (internal citation omitted). And that text makes clear that this court does not have jurisdiction to hear a challenge to a regulation that does not impose any limitation as set forth by the Act.

The lead opinion departs from the Act's plain text by relying on a string of cases it contends encourages a function-over-form approach to subsection (E). *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), we are told, broadly interprets the Act's jurisdictional authorization to prevent the “truly perverse situation” where the courts of appeals review actions issuing or denying permits, but not the “basic regulations governing those individual actions.” I agree that *E.I. du Pont* speaks to such policy considerations, but disagree that such policy considerations drove the Court's analysis.

In *E.I. du Pont*, the Supreme Court considered effluent limitation regulations promulgated by the EPA for discharges by the inorganic chemical industry. *Id.* at 122–24. The primary issue was whether the Act granted the EPA the power to set effluent limitations by regulation (thereby falling within subsection (E)) or by guideline (thereby falling outside subsection (E)). *Id.* at 124–25. “Thus the issue of jurisdiction to review the regulations [was] intertwined with the issue of [the] EPA’s power to issue the regulations.” *Id.* at 125. After resolving the “critical question [of] whether [the] EPA has the power to issue effluent limitations by regulation” in the EPA’s favor based on the statute’s text and legislative history, *id.* at 124, 126–36, the Court plainly noted that its holding that the Act “authorize[d] the [EPA] to promulgate effluent limitations [by regulation] for classes and categories of existing point sources necessarily resolve[d] the jurisdictional issue as well.” *Id.* at 136 (emphasis added).

Yet, the lead opinion draws its “functional” “lens” from *E.I. du Pont*’s subsequent discussion as to why it rejected the industry’s argument that subsection (E)’s reference to § 1311 (the effluent limitations provision) “was intended only to provide for review of the grant or denial of an individual variance” from the Act’s effluent limitations restriction. *Id.* Among other reasons, the Court found this argument unpersuasive because the industry’s “construction would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits . . . but would have no power of direct review of the basic regulations governing those individual actions.” *Id.* This policy reason came *after* a plain textual rejection of the industry’s position. *Id.* It is, therefore, a far stretch to take this dicta and expand it as the lead opinion does to find jurisdiction proper when a regulation’s “practical effect” only sets forth “indirect” limits. And, unlike in *E.I. du Pont*, the Agencies here admit they have not promulgated an effluent limitation. I therefore decline to read *E.I. du Pont*, as the lead opinion does, as shoehorning an exercise in jurisdictional line-drawing into subsection (E)’s “other limitation” provision.

To the extent policy considerations are responsible for *E.I. du Pont*’s outcome, I disagree that, to borrow the lead opinion’s phrase, such “real world” considerations mandate a watered-down version of textualism in this case, erroneously elevating the perceived congressional purpose over the statutory language. As the Supreme Court emphasized just last year, “[o]ur job

is to follow the text even if doing so will supposedly ‘undercut a basic objective of the statute.’” *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2169 (2015) (citation omitted). Thus, when presented with “the clear meaning of the text, there is no need to . . . consult the [statute’s] purpose. . . . [I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167–68 (2004) (citation omitted and second alteration in original). Put differently, unambiguous text trumps policy considerations. *See Kloeckner v. Solis*, 133 S. Ct. 596, 607 n.4 (2012) (“[E]ven the most formidable argument concerning the statute’s purposes could not overcome the clarity we find in the statute’s text.”); *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1710 (2012) (“[N]o legislation pursues its purposes at all costs, and petitioners’ purposive argument simply cannot overcome the force of the plain text.”) (internal citation omitted); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993) (“[V]ague notions of a statute’s ‘basic purpose’ are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration.”). As set forth, subsection (E)’s language could not be clearer, thus removing policy considerations from this court’s analytical quiver.

Circuit case law drawing on this “functional approach” similarly misses the mark. Notably, *VEPCO* appears to define “limitation” as “a restriction on the untrammelled discretion of the industry which was the condition prior to the [Act’s] passage.” 566 F.2d at 450. Other cases relied upon by the lead opinion have followed this analysis. *See, e.g., Iowa League of Cities v. U.S. E.P.A.*, 711 F.3d 844, 866 (8th Cir. 2013); *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 673 F.2d 400, 405 (D.C. Cir. 1982) (“*NRDC II*”). However, *VEPCO*’s statement requires context.

The regulation at issue in *VEPCO* governed the “structures used to withdraw water for cooling purposes.” 566 F.2d at 446–51. It did “not impose specific structural or locational requirements upon cooling water intake structures,” and instead just “require[d] that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.” *Id.* at 450. Because the regulation mandated the consideration of certain information in constructing intake structures, the Fourth Circuit reasoned, that “in itself [was] a limitation on point sources and permit issuers” and

therefore restricted “the untrammelled discretion of the industry.” *VEPCO* also drew from *E.I. du Pont*, reasoning that the regulation issued there was “so closely related to the effluent limitations and new source standards of performance . . . that . . . it would be anomalous to have their review bifurcated between different courts.” *Id.* (citing *E.I. du Pont*, 430 U.S. at 136).

At most, *VEPCO* is an example of what constitutes an “other limitation”—a restriction on the industry’s abilities to intrude upon the waters of the United States without the Agencies’ permission to do so. In this regard, the Fourth Circuit’s “untrammelled discretion” language makes absolute sense, but I disagree with the lead opinion’s reliance upon this language here. The *Act* in and of itself restricts the industry’s untrammelled discretion. I see no textual indication that Congress intended *any* restriction on the industry to be directly reviewed by the courts of appeals, yet under the lead opinion’s reading, *any* industry restriction requires review here. The lead opinion’s application thus swallows the rule.

Finally, that the Clean Water Rule arguably expands the Act’s jurisdiction cannot be a reason to find a functional limitation under subsection (E). The lead opinion hangs its “functional” premise on the fact that the Clean Water Rule is a “basic regulation” affecting the Act’s core, defining where it applies and where it does not. It presumes, perhaps rightly so, that the Clean Water Rule “results in [an] expansion of regulatory authority in some instances and impos[es] . . . additional restrictions on the activities of some property owners.” However, I cannot agree that the latter supports the former in concluding that the Clean Water Rule “has the *indirect* effect of altering permit issuers’ authority to restrict point-source operators’ discharges into covered waters.” A plausible hypothetical removes the linchpin in this analysis. Suppose instead of taking a flow-like approach to the Act’s jurisdiction, the Agencies—perhaps under a different administration—promulgate a rule that ebbs toward a more restricted view, consistent with the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). Under the lead opinion’s analysis, a rule *narrowing* the scope of the waters of the United States would *also* be an “other limitation” sufficient to trigger our jurisdiction because it too would indirectly affect point-source operators and permit issuing authorities, albeit in a less restrictive manner. Congress could not have intended such a nonsensical result.

For these reasons, I cannot conclude that subsection (E) authorizes our jurisdiction.

## III.

Second, the lead opinion concludes we have jurisdiction to hear petitioners' challenges under subsection (F). I agree, but for different reasons. Specifically, while 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. I therefore concur in the judgment, only.

Section 1369(b)(1)(F) provides exclusive jurisdiction in this court to review an action "issuing or denying any permit under section 1342, [the National Pollutant Discharge Elimination System ("NPDES")]." On its face, subsection (F) clearly does not apply to the Clean Water Rule's promulgation. See *Rhode Island v. U.S. E.P.A.*, 378 F.3d 19, 23 (1st Cir. 2004) ("By its plain terms, [subsection (F)] conditions the availability of judicial review on the issuance or denial of a permit."). Under a plain text reading, the Clean Water Rule neither issues nor denies a permit under the NPDES. In my view, this should end the analysis. I am, however, constrained by our court's precedent holding that "issuing or denying any permit" means more than just that.

As the lead opinion correctly notes, several courts have deviated from a strict reading of the jurisdictional language and toward a more "functional" approach. In *Crown Simpson Pulp Company v. Costle*, for example, the Supreme Court blessed jurisdiction in the courts of appeals when the EPA's action—there, vetoing California's proposal to grant permits for pulp mills to discharge pollutants into the Pacific Ocean—had the "precise effect" of denying a permit. 445 U.S. 193, 196 (1980). In other words, jurisdiction was proper because the EPA's action was "functionally similar to its denial of a permit in States which do not administer an approved permit-issuing program." *Id.* A contrary ruling, held the Supreme Court, would lead to an "irrational bifurcated system" depending upon "the fortuitous circumstance of whether the State in which the case arose was or was not authorized to issue permits." *Id.* at 196–97. Both the D.C. Circuit, *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 656 F.2d 768, 776 (D.C. Cir. 1981) ("*NRDC I*"); *NRDC II*, 673 F.2d at 405 (then-Judge Ginsburg's "practical rather than a cramped construction" counsel), and the Ninth Circuit, *Am. Mining Congress v. U.S. E.P.A.*, 965 F.2d 759 (9th Cir. 1992), *Nat. Res. Def. Council, Inc., v. U.S. E.P.A.*, 966 F.2d 1292, 1297 (9th Cir. 1992)

(“*NRDC III*”), *Nat. Res. Def. Council v. U.S. E.P.A.*, 526 F.3d 591, 601 (9th Cir. 2008) (“*NRDC IV*”), have similarly adopted a functional approach to jurisdiction under subsection (F).

I depart ways with the lead opinion at the breadth with which it reads *Crown Simpson*. As the Ninth Circuit made clear in *Northwest Environmental Advocates v. U.S. E.P.A.*, “[t]he facts of [*Crown Simpson*] make clear that the Court understood functional similarity in a narrow sense.” 537 F.3d 1006, 1016 (9th Cir. 2008). The Supreme Court was clearly concerned with a rigid construction of “issuing or denying” given the factual circumstances of *Crown Simpson*—*i.e.*, had the EPA not delegated California the authority to designate NPDES permits, it would have had the power to grant or deny permits directly (thus explaining the “perverse” result rationale). With this factual overlay, the Court’s “precise effect” exception makes sense.

That exception simply does not apply here. We have underscored that the text matters when interpreting the jurisdictional grant of § 1369(b)(1). *See Lake Cumberland Trust, Inc. v. U.S. E.P.A.*, 954 F.2d 1218, 1221–24 (6th Cir. 1992) (noting the textual distinctions between subsections (E) and (G) to find no jurisdiction). It is also not lost on me that *National Cotton* itself purported to accentuate § 1369(b)(1)’s narrowness. 553 F.3d at 933 (“Congress did not intend court of appeals jurisdiction over all EPA actions taken pursuant to the Act.”). It stretches the plain text of subsection (F) to its breaking point to hold that a definition setting the Act’s boundaries has, under *Crown Simpson*, the “precise effect” of or is “functionally similar” to, approving or denying a NPDES permit. At best, the Clean Water Rule is one step removed from the permitting process. It informs whether the Act requires a permit in the first place, not whether the Agencies can (or will) issue or deny a permit.

Two other points buttress my problem with jurisdiction here. First, the Clean Water Rule applies across the entire Act, and not just with respect to the NPDES permitting process. This is particularly true when considering the fact that the Clean Water Rule’s expansive definition also applies to the provision of the Act—§ 1344—requiring the Corps to issue permits for dredged or fill material. Section 1344, however, is not mentioned in subsection (F), only § 1342 is. Second, the Agencies’ own argument as to why they contend the Clean Water Rule constitutes “issuing or denying any permit” shows why there are problems with extending jurisdiction to cover the Clean Water Rule. By suggesting that the Clean Water Rule identifies what waters will and will

not require permitting under NPDES, they have therefore identified situations—*i.e.*, not waters of the United States—where there would never be permit decisions in the first place to be reviewed by the courts of appeals. *See Nw. Env'tl. Advocates*, 537 F.3d at 1018; *Friends of the Everglades*, 699 F.3d at 1288.

Although not bound by *Crown Simpson* and the other cases cited by the lead opinion, *National Cotton* dictates my conclusion. There, we extended jurisdiction under subsection (F) when a rule “regulates the permitting procedures.” 553 F.3d at 933. At issue in *National Cotton* was an EPA rule exempting certain pesticides from the NPDES permitting requirements. *Id.* at 929. In expanding subsection (F)’s jurisdictional authorization, our court relied upon statements by the Ninth Circuit in *American Mining Congress* and *NRDC III* extending jurisdictional review from the “issuance or denial of a particular permit” to “the regulations governing the issuance of permits” and the “rules that regulate the underlying permit procedures.” *Id.* at 933 (citations omitted).

*National Cotton*’s jurisdictional reach, in my view, has no end. Indeed, the lead opinion even acknowledges that *National Cotton* holds “a regulation that imposes no restriction or limitation is reviewable in circuit court, so long as it affects permitting requirements.” It is a broad authorization to the courts of appeals to review *anything* relating to permitting notwithstanding the statutory language to the contrary.

Moreover, the Ninth Circuit has subsequently rolled back the two cases relied upon by *National Cotton* to broadly interpret subsection (F), *American Mining Congress* and *NRDC III*. *See Nw. Env'tl. Advocates*, 537 F.3d at 1018. It also drew a line between statutory exemptions and permitting procedures, noting that a regulation granting a statutory exemption necessarily meant that the courts of appeals would “never have to consider on direct review an action involving the denial of an NPDES permit for pollutant discharges” and thus there was no danger of the “awkward[]” and bifurcated review problem described in *NRDC I*. *Id.* at 1018 (citation omitted). The Eleventh Circuit, sitting *en banc*, has also taken this tack. *See Friends of the Everglades*, 699 F.3d at 1288. It also directly criticized *National Cotton* for expanding subsection (F) to apply to any “regulations relating to permitting itself.” *Id.*

The lead opinion distinguishes *Northwest Environmental Advocates* and *Friends of the Everglades*, noting that those cases addressed permitting exemptions. But so too did *National Cotton*. In my view, the Ninth and Eleventh Circuit's commentary regarding *National Cotton* and its undergirdings have merit, especially considering subsection (F)'s plain text and the factually narrow circumstances of *Crown Simpson* and *E.I. du Pont*. These same reasons lead me to conclude the lead opinion's reliance on a non-Clean Water Act case to support its policy arguments, *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), is unavailing.

Taking *National Cotton*'s holding, as I must, there is a better way to reconcile these authorities: Permitting decisions under NPDES and exempting a certain action from the NPDES permitting process are functionally the same because both allow persons to discharge pollutants into the waters of the United States. Such actions, therefore, are reviewable under subsection (F). That is not what we have here. The Clean Water Rule presents neither a permitting exemption (*National Cotton*) nor similar functional equivalency (*Crown Simpson*) that any court has approved to find jurisdiction proper under subsection (F).

However, *National Cotton* goes further than just finding jurisdiction in cases involving permitting exemptions, and expands jurisdiction to review any regulation "governing" permits. 553 F.3d at 933. Although, in my view, the holding in *National Cotton* is incorrect, this panel is without authority to overrule it. See *Bennett v. MIS Corp.*, 607 F.3d 1076, 1095 (6th Cir. 2010) ("It is a well-established rule in this Circuit that a panel of this court may not overrule a prior published opinion of our court absent en banc review or an intervening and binding change in the state of the law.")<sup>2</sup> Here, the Clean Water Rule defines what waters necessarily require permits, and therefore is undoubtedly a "regulation[] governing the issuance of permits under section 402 [33 U.S.C. § 1342]." *National Cotton*, 553 F.3d at 933. Under this binding authority, the lead opinion properly concludes jurisdiction rests before us under subsection (F).

For these reasons, I concur in the judgment, only.

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<sup>2</sup>That this action is before us upon consolidation by the Judicial Panel on Multidistrict Litigation does not change this result, for we are to apply our law absent an indication that it is "unique" and "arguably divergent from the predominant interpretation of . . . federal law." *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 911 n.17 (6th Cir. 2003). Although I disagree with *National Cotton*, I cannot conclude that it is unique and diverges from the predominant view of the other circuits.

Nos. 15-3751, et al.

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Rule: Clean Water Rule*

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IV.

In sum, I am compelled to find jurisdiction is proper pursuant to *National Cotton*. Absent *National Cotton*, I would dismiss the petitions for lack of jurisdiction.

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**DISSENT**

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KEITH, Circuit Judge, dissenting. I agree 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. Like Judge Griffin, I disagree with Judge McKeague. Nevertheless, Judge Griffin concludes that original jurisdiction lies in the appellate courts under this court's opinion in *National Cotton Council of Am. v. U.S. EPA*, 553 F.3d 927 (6th Cir. 2009). I believe Judge Griffin's reading of that case is wrong.

In *National Cotton*, this court concluded that it had original jurisdiction to review a rule that created exemptions to the permitting procedures of the Clean Water Act (the "Act"). 553 F.3d at 933. In holding that jurisdiction was proper, the court reasoned that "[t]he jurisdictional grant of [subsection (F)] authorizes the court of appeals 'to review the regulations governing the issuance of permits . . . as well as the issuance or denial of a particular permit.'" *Id.* at 933 (quoting *Am. Mining Cong. v. U.S. EPA*, 965 F.2d 759, 763 (9th Cir. 1992)). Therefore, the court expanded subsection (F) to cover rules that "regulate[] the permitting procedures." *See id.*; *cf.* 33 U.S.C. § 1369(b)(1)(F) (relating to administrative actions that "issu[e] or deny[] any permit under section 1342"). I view this limited expansion of subsection (F) as the holding of *National Cotton*.

By contrast, Judge Griffin contends that *National Cotton*'s holding expanded the scope of subsection (F) to include anything "relating" to permitting procedures. While *National Cotton* expanded the scope of subsection (F) to cover rules "regulating" or "governing" permitting procedures, 553 F.3d at 933, it did not expand that subsection to cover all rules "relating" to those procedures, such as the one at issue here—a rule that merely defines the scope of the term "waters of the United States." That a rule "relates" to a permitting procedure does not mean that it "regulates" or "governs" that procedure. Therein lies the analytical fallacy in the concurrence. Simply put, it cannot be that any rule that merely "relates" to permitting procedures—however tenuous, minimal, or tangential that relation may be—confers original jurisdiction upon this

court under subsection (F). This could not have been the intent of the legislators who drafted seven carefully defined bases for original jurisdiction in the appellate courts—and it could not have been the intent of the *National Cotton* court itself.

Admittedly, the *National Cotton* court could have provided an explanation of what it meant by “regulations governing the issuance of permits.” See 553 F.3d at 933. By not explaining this phrase, it invited much speculation about the scope of subsection (F). For example, the Eleventh Circuit in *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1288 (11th Cir. 2012), declined to extend the rationale and holding of *National Cotton* because this court failed to provide a better explanation of its reasoning. However, *National Cotton*’s failure to define this phrase does not mean that this phrase must encompass everything. I am reluctant to read *National Cotton* in a way that expands the jurisdictional reach of subsection (F) in an all-encompassing, limitless fashion.

In sum, *National Cotton*’s holding is not as elastic as the concurrence suggests. If this court construes that holding to be so broad as to cover the facts of this case, that construction brings subsection (F) to its breaking point: a foreseeable consequence of the concurrence’s reasoning is that this court would exercise original subject-matter jurisdiction over all things related to the Clean Water Act. Accordingly, I respectfully dissent.

**APPENDIX 2**

United States v. Lipar, Slip Copy (2015)

2015 WL 7681272

Only the Westlaw citation is currently available.  
 United States District Court,  
 S.D. Texas.

United States of America, Plaintiff,  
 v.  
 Thomas E. **Lipar**, et al., Defendants.

Civil Action H-IO-I904

Signed 08/30/2015

Opinion on Summary Judgment

Lynn N. Hughes, United States District Judge

*1. Introduction.*

\*1 The government sued a developer and his contractors for filling wetlands. Because the government cannot show that the wetlands were jurisdictional waters of the United States, it will take nothing.

*2. Background.*

Thomas E. **Lipar**, among other things, is a real-estate developer. He and his companies—**Lipar** Group, Inc., LGI Land, LLC, LGIGP, LLC, and LGI Development—build residential housing developments. Though based primarily in Texas, **Lipar** and his affiliates build in Georgia, Arizona, and Florida.

Since 2004, **Lipar** has been developing tracts of land in north Houston. One tract is southeast of the Woodlands, between Spring Creek and the west fork of the San Jacinto River. It is called Benders Landing Estates. The other tract is northwest of the Woodlands, on the northwest tip of Windcrest Lake, near Magnolia, Texas. It is called Lake Windcrest.

Before it began clearing for Benders Landing, **Lipar** assessed the site and hired James Coody, a professional engineer, to opine about the land's coverage under the Clean Water Act. Coody advised **Lipar** that the Act did not cover the tract. He said it was well upstream of

jurisdictional waters.

In 2007, Jim Herrington, an employee of the Environmental Protection Agency, visited the tract. He later spoke with Coody about the tract's coverage under the Act. In March, the Agency told **Lipar** in a letter to stop developing the tract. Herrington visited the site again in July, and the Agency administratively ordered **Lipar** to stop development in December.

Earlier in 2007, a consultant for the Agency—Science Applications International Corporation—reported about the tract's coverage under the Act. Coody asked for a copy of the report. The Agency refused. Coody requested a copy under the Freedom of Information Act, but it was denied.

Herrington visited the site a third time in January of 2008. In June, the Agency again administratively ordered **Lipar** to stop development. The second order mentioned violations in different locations than the first order.

On May 27, 2010, the United States sued **Lipar**, his companies, Jesse Valeriano, JTI Contractors, Inc., and JTI Construction, Inc., for violating the Act. It says that **Lipar** discharged fill into waters of the United States without a permit in eight locations in Bender's Landing Estates and at Lake Windcrest.

*3. Jurisdictional Waters.*

The defendants say that the Act does not govern the areas that they developed. They say that the areas are not waters of the United States under the Act.

Traditionally, the government's power to regulate commerce extended only to those waterways which were accessible—navigable in fact—from a state other than those in which they lie.<sup>1</sup>

In 1972, the government enacted the Federal Water Pollution Control Act Amendments of 1972 which greatly expanded the Federal Water Pollution Control Act of 1948. These laws, together with further amendments in 1977 and 1987, have become known as the Clean Water Act.

\*2 Among other things, the Act prevents the discharge of dredge or fill into navigable waters—defined as the waters of the United States—without a permit. Waters of the United States has been interpreted to include more than waters that are navigable in fact.<sup>2</sup> It, however, does not include every water or patch of mud tangentially

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connected to a navigable water. Nor does its reach extend to the impossibly broad and distant outer limit of the vogue interpretation of Congress's power to regulate commerce.<sup>3</sup>

When dealing with non-adjacent wetlands—wetlands that are adjacent to a water or wetland which is adjacent to a water that is navigable in fact—courts employ one of two tests from a plurality decision of the Supreme Court. The first—and the more restrictive test in this court's view—holds that wetlands are waters of the United States only if (a) an adjacent channel contains a water of the United States and (b) the wetland has a continuous surface connection with the water such that it is difficult to determine where the water ends and wetland begins.<sup>4</sup> The second test holds that wetlands are jurisdictional waters only if they possess a significant nexus to waters of the United States—waters that are navigable in fact and waters or wetlands adjacent to navigable waters.<sup>5</sup>

Because the wetlands at issue here meet neither test, this court need not decide which is more restrictive.<sup>6</sup>

#### A. Lake Windcrest.

The government says that **Lipar** filled wetlands when it built Lake Windcrest. It says that the filled wetlands were jurisdictional waters of the United States because they had a continuous, surface connection to one or more of three tributaries that flow into Windcrest Lake. The lake, in turn through its spillway, flows into Dry Creek, which it says, at least seasonally flows into Spring Creek—in fact, it flows to Mill Creek, a tributary of Spring Creek. It says that Spring Creek is a traditionally navigable water. Alternatively, the government says that the wetlands have a significant nexus to Spring Creek.

To be navigable, a water must be susceptible of being used, in its ordinary condition, as a highway for commerce, over which trade and travel are or may be conducted in the customary modes on water.<sup>7</sup> The court is not convinced that Spring Creek is navigable. During all but a flood, a craft of more than six-inches draft would likely not be able to navigate it. Though, perhaps, a canoe or kayak may be able to ply its waters, these recreational uses are not customary modes of trade and travel. A river boat, cargo ship, tanker, or other burdened vessel could not traverse it.

Assuming that Spring Creek is navigable, the wetlands about which the government complains are not sufficiently connected to it to be jurisdictional waters. Following the government's reasoning, Mill Creek is adjacent to Spring Creek, a navigable water. Dry Creek is

adjacent to Mill Creek. Windcrest Lake is adjacent to Dry Creek. Three tributaries are adjacent to the lake. The wetlands about which it complains are adjacent to the three tributaries.

This regression is too tenuous. Mill Creek and Dry Creek, as the latter's name suggests, are little more than drainage ditches that conduct water only after a rain—a country boy could easily jump them. The same is true for the three tributaries. They are not permanent waters. The government's characterization as seasonal is generous and accurate only insofar as they are wet in the Spring and Fall after it has rained. They are wetlands only in the same way that the entire area is coastal prairie.

\*3 As even the government's environmental scientist—Peter Stokely—admits, there is no known, continuous surface connection from the wetlands to Spring Creek. The lake is dammed. Dry Creek is dry. The three tributaries flow intermittently. There is no difficulty determining where water ends and wetland begins.

The wetlands that were developed also bear no substantial nexus to waters of the United States. At best, they are part of the same watershed. This, however, is too broad. By the same logic, a storm sewer in Karen, Texas, is a jurisdictional water of the United States because the water it conducts eventually flows into Spring Creek. The government has nothing to show that the wetlands it complains about affect the chemical, physical, and biological integrity of Spring Creek or other waters farther downstream. It has nothing to show that fill discharged in the wetlands eroded and silted jurisdictional waters farther downstream, or something similar.

The wetlands that were developed in Lake Windcrest were not waters of the United States under the Act. The defendants needed no permit to fill them.

#### B. Benders Landing.

The government says that **Lipar** and the other defendants filled wetlands in seven areas around the Benders Landing development. It has labeled each by letter A through G. Generally, it says that each area contained wetlands because each had hydrophytic vegetation, hydric soils, and ponded water. Each area, it says, is connected by tributaries to either Spring Creek or the west fork of the San Jacinto River—navigable waters according to it. The government relies on stream data from the United States Geological Survey, aerial photographs, topographical maps, national wetland inventory data from the United States Fish and Wildlife Service, and site inspections. The government admits that the national wetland inventory

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### United States v. Lipar, Slip Copy (2015)

data is only about 50% accurate and that the soil maps were created for agricultural purposes, not wetland identification.

For the same reason as Spring Creek, the court is skeptical that the west fork of the San Jacinto River is navigable. Assuming that the development filled wetlands, and assuming that the west fork along with Spring Creek are navigable, the government has not shown that the wetlands **Lipar** and the others filled are jurisdictionally connected.

The government says that areas A and B flow through a tributary and into Tantrough Gully. The gully, in turn, flows to the west fork. Areas C and G flow through two other tributaries and eventually into the west fork. Areas D, E, and F all flow through other tributaries into Spring Creek.

The government's naturalists say that Tantrough Gully flows year round into the west fork. Each of the other tributaries, whether they flow to Spring Creek or the west fork, are intermittent. The government characterizes these intermittent flows as seasonal—that is, they drain the area after it rains.

Each area of wetland, the government says, has a continuous surface connection to the tributaries. These are conclusory legal generalizations. They are supported only by broad reference to the aerial photographs and topographical maps. What is more, they are belied by the naturalists themselves who attest that a continuous surface connection is, at best, a guess for some locations.

\*4 Assuming the government had proof, it does not matter. The seasonal connection of some wetlands to seasonal tributaries that feed navigable waters is too tenuous a connection to give the government jurisdiction under the Act. Wetlands with only an intermittent, physically remote hydrologic connection lack the necessary connection to jurisdictional waters.<sup>8</sup>

The government fares no better under the significant-nexus test. It has no particular data about the impact that these wetlands have on the west fork or Spring Creek. Like before, general allegations that the area is part of the watershed are unavailing.

#### 4. Sanctions.

For ten years the government has investigated whether the two sites contained jurisdictional wetlands. It gathered data for five years before it sued. In ten years, the government has discovered no fact to show that the

developed areas were jurisdictional wetlands.

Despite this, it has been intractable, uncooperative, and defiant.

#### A. Privilege.

On July 6, 2010, this court ordered that the parties exchange disclosures and principal documents well ahead of the conference of July 29. Before the conference, the government produced three privilege logs. After a more detailed order, the government adjusted its privilege log. The adjusted log was 336 pages and claimed thousands of pages. After several reevaluations by the government—during which it discovered that 10% of the papers it originally claimed were not privileged, and that a quarter of 50 documents selected by **Lipar** were not privileged—the government submitted another revised log.

The court appointed a special master to review the log. Applying the Department of Justice's own privilege guidelines, the master found that 88% of all the pages claimed by the government were not privileged. He discovered that the government included documents from completely unrelated cases which bore no significance to this case.

#### B. Good Faith.

Before it sued, the government thrice ordered **Lipar** and the other defendants to stop development. It threatened to fine them \$32,500 per day. At that time, and when it later sued, it had not delineated where the wetlands that it contends were filled were located. It also had not determined, assuming there were wetlands, whether they were connected to a navigable water.

It, then as now, relied on much the same information— aerial photographs, topographical maps, national wetland inventory data from the United States Fish and Wildlife Service, and site inspections. These data, at best, show that the developed areas were marshy, coastal prairie. None showed a continuous surface connection, or that the developed areas were somehow substantially linked to a navigable water.

The government's own papers suggest that it sued **Lipar** and the other defendants in part to discourage other companies from developing similar tracts in Houston. It disagreed with **Lipar's** interpretation of the United States Supreme Court's construction of the Act, and it was worried that other developers were aligning with **Lipar's** interpretation.

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### C. Disclosure.

On September 10, 2010, this court ordered the government to produce the technical data it relied on to sue. After three months, three dodges, and a compelled deposition, it finally complied.

### D. Rule xx, 37, and inherent power.

The court may sanction a party when it has acted in bad faith in instituting proceedings or continuing them.<sup>9</sup> The court may sanction a party when it has failed to obey an order on discovery.<sup>10</sup> The court has inherent power to sanction parties who misbehave.

\*5 The government has not followed court orders or has done so only after months of recalcitrance. When ordered to produce data, it either did not comply or did so only halfheartedly. It has never followed the spirit of the court's orders, and, at best, it only sometimes complied with the letter. It has withheld papers under claims of privilege either maliciously or because it is grossly incompetent. It has abused its power in an attempt to brow-beat the defendants and discourage their colleagues and competitors from developing similar areas. Its

### Footnotes

1 *Gilman v. Philadelphia*, 70 U.S. 713 (1865); *The Daniel Ball*, 77 U.S. 557 (1870).

2 *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985).

3 *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001).

4 *Rapanos v. U.S.*, 547 U.S. 715, 742.

5 *Id.* at 782.

6 *Marks v. U.S.*, 430 U.S. 188 (1977).

7 *The Daniel Ball*, 77 U.S. at 563.

8 *Rapanos*, 547 U.S. at 742.

9 Fed.R. Civ. P. ii.

10 Fed.R.Civ.P. 37.

behavior is reprehensible.

The court sanctions the government by requiring that it pay Lipar and the other defendant's reasonable attorney's fees which they incurred defending this suit.

### 5. Conclusion.

The government has not shown that the wetlands it says that Lipar and the other defendants filled were jurisdictional waters of the United States. It will take nothing.

Because its conduct has been oppressive and dishonest, it must pay the reasonable attorney's fees incurred defending this suit.

Signed on August 30, 2015, at Houston, Texas.

### All Citations

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