No. 15-3751
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MURRAY ENERGY CORPORATION, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY et al., Respondents.	**PETITIONER'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

I. INTRODUCTION

On July 13, 2015, Murray Energy Corporation ("Murray") filed its Petition for Review challenging the Environmental Protection Agency ("EPA") and the Army Corps of Engineers' ("Corps") (the "Agencies") adoption of a rule which redefined the term "waters of the United States" under the entire Clean Water Act ("CWA"). 80 Fed. Reg. 37,054 (June 29, 2015) ("final rule"). The final rule, which expands the jurisdiction of the CWA well beyond the bounds of the law, is reviewable exclusively under the Administrative Procedure Act ("APA") in the federal district courts. *See* 5 U.S.C. §702.

In spite of its position that jurisdiction over this case is proper only in the federal district courts, Murray filed its Petition for Review in the Sixth Circuit as a

protective measure. *See Eagle-Picher Indust., Inc. v. EPA*, 759 F.2d 905, 912 (D.C. Cir. 1985) ("[W]e have previously admonished petitioners of the wisdom of filing protective petitions for review during the statutory period.").

Contrary to the Agencies' argument in lower courts, the final rule is not covered by 33 U.S.C. § 1369(b), which provides for jurisdiction in the courts of appeal for a specific set of enumerated claims arising from the actions of the EPA Administrator. *See* 33 U.S.C. § 1369(b). Quite simply, no reasonable reading of § 1369(b) would allow the final rule to fit within any of the very particular actions that Congress reserved for review by the courts of appeal. To the contrary, only extreme and unreasonable contortions of the plain meaning of §1369(b) would allow this Court to exercise jurisdiction.

Reaching and resolving the jurisdictional issue in this Court is essential so that Murray and the other petitioner-plaintiffs can proceed to prosecute the merits of their challenges. Accordingly, Murray's Motion to Dismiss challenges this Court's jurisdiction to hear Murray's Petition for Review and requests that the Court render a final decision rejecting its jurisdiction over this case.

II. STATEMENT OF THE CASE

A. The Clean Water Act -- Background on the "Waters of the United States"

As relevant here, the CWA prohibits the discharge of "pollutants" to "navigable waters." 33 U.S.C. §§ 1311(a), 1342(a), 1362(12). The term

"pollutant" includes, among other things, "dredged spoil, solid waste, . . . chemical wastes . . . heat . . . rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id*. §1362(6). The term "navigable waters" is defined in the Act to mean "waters of the United States." 33 U.S.C. § 1362(7).

Waters that are jurisdictional, (*i.e.*, "navigable waters" defined as "waters of the United States") are subject to multiple regulatory requirements of the CWA: standards, discharge limitations, permits and enforcement. Non-jurisdictional waters, in contrast, are entirely outside the scope of the CWA.

The CWA's single definition of "navigable waters" (and thus, the term "waters of the United States") applies to the entire Act. In particular, it applies to federal prohibition on discharges of pollutants except in compliance with the Act's requirements, 33 U.S.C. § 1311, requirements for point sources to obtain a permit prior to discharge, *id*. §§ 1342, 1344, water quality standards and measures to attain them, § 1313, oil spill liability and oil spill prevention and control measures, § 1321, certification that federally permitted activities comply with state water quality standards, § 1341, and enforcement, § 1319.

Over the years, EPA and the Corps have sought to expand the definition of "waters of the United States" to reach more water bodies – and even dry land – well beyond the bounds of what Congress intended. The U.S. Supreme Court has

repeatedly rejected the Agencies' efforts to rewrite the CWA. *See Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANC*"). The final rule is the Agencies' latest attempt to expand CWA jurisdiction, reviving and expanding what has already been flatly rejected by the Supreme Court.

B. The Final Rule

The previous definition of the term "waters of the United States" had been in place for nearly thirty years before Agencies promulgated the unlawfully expanded final rule. *See* 48 Fed. Reg. 14,146 (April 1, 1983) (adopting EPA definition); 51 Fed. Reg. 41,206 (Nov. 13, 1986) (adopting identical Corps definition). As noted above, the term is the jurisdictional trigger for nearly all CWA obligations – geographic features that meet the definition of "waters of the United States" are regulated by the federal government, while all others are not.

Ironically, the final rule itself notes that it "does not establish any regulatory requirements," and is "[i]nstead, . . . a definitional rule," 80 Fed. Reg. at 37,054, that "appl[ies] to all provisions of the Act." *Id*. at 37,104. While the final rule creates a complex, expanded definition that affects the entire CWA, it is not one of the enumerated actions under the CWA that is subject to the jurisdiction of the courts of appeal.

C. Judicial Review Under the Clean Water Act

Under the CWA, most challenges to agency action are proper before federal district courts under the APA. *See, e.g.*, *City of Olmsted Falls v. United States EPA*, 435 F.3d 632 (6th Cir. 2006) (challenge to issuance of CWA § 404 dredge and fill permit); *Lake Cumberland Trust, Inc. v. EPA*, 954 F.2d 1218, 1222 (6th Cir. 1992) ("Section 1369(b)(1) specifically grants courts of appeals jurisdiction to review only certain EPA actions taken with respect to each of the requirements of the Act.") (citing *Boise Cascade Corp v. EPA*, 942 F.2d 1427, 1431-32 (9th Cir. 1991)); *see also Nw Envtl. Advocates v. EPA*, 537 F.3d 1006, 1015 (9th Cir. 2008) ("The specificity and precision of section [509], and the sense of it, persuade us that it is designed to exclude EPA actions that Congress did not specify."). However, in limited circumstances, the CWA provides for judicial review in the courts of appeal for actions taken by the EPA Administrator:

> (A) in promulgating any standard of performance under 33 USC § 1316,
>
> (B) in making any determination pursuant to § 1316(b)(1)(C),
>
> (C) in promulgating any effluent standard, prohibition, or pretreatment standard under § 1317,
>
> (D) in making any determination as to a State permit program submitted under § 1342(b),
>
> **(E) in approving or promulgating any effluent limitation or other limitation under §§ 1311, 1312, 1316 or 1345,**

(F) in issuing or denying any permit under § 1342, and

(G) in promulgating any individual control strategy under § 1314(l).

33 U.S.C. § 1369(b)(1) (emphasis added).

The Agencies have relied on two subsections in support of their position that jurisdiction over this action is proper in the courts of appeal: § 1369(b)(1)(E) as an action in approving or promulgating any effluent limitation or other limitation, and (b)(1)(F) as an action issuing or denying a permit under §1342. *See North Dakota v. EPA*, 2015 U.S. Dist. LEXIS 113831 (D.N.D. Aug. 27, 2015); *Georgia v. McCarthy*, 2015 U.S. Dist. LEXIS 114040 (S.D. Ga. Aug. 27, 2015); *Murray Energy Corp. v. EPA*, 2015 U.S. Dist. LEXIS 112944 (N.D. W. Va. Aug. 26, 2015).

Thus far, the lower courts have split on this issue. *See id.* The court in *North Dakota* went one way finding jurisdiction proper in the district courts, and two other cases went the other way, finding jurisdiction proper in the courts of appeal. An appeal has been filed with the Eleventh Circuit in the *Georgia* case, *see* No. 15-14035 (11th Cir.), and additional appeals may be forthcoming. Because the final rule does not fall into any of the seven subsections enumerated in § 1369(b), Murray seeks an opinion from this Court dismissing this action for lack of subject matter jurisdiction.

III. ARGUMENT

The final rule plainly does not qualify as one of the enumerated actions by the EPA Administrator subject to appellate review. As explained below, the plain text of §1369, relevant case law and the statutory structure, demonstrate that challenges to the final rule belong in district court.

A. The Final Rule is Outside the Plain Meaning of Section 1369

This Court's analysis of §1369 "begins with the plain words of the statute." *United States v. Ransbottom*, 914 F.2d 743, 745 (6th Cir. 1990). As this Court has held, "the plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Franklin v. Kellogg Co*., 619 F.3d 604, 614 (6th Cir. 2010) (citation and quotation omitted).

Here, the final rule is merely a definition that does not meet Subsection E's requirement as the approval or promulgation of an effluent limitation or other limitation under §§ 1311, 1312, 1316 or 1345, or Subsection F's requirement as the issuance or denial of a permit under §1342.

1. EPA Administrator Action

A threshold requirement for appellate court review under Section 1369(b) is that the reviewed action must be that of the EPA Administrator. 33 U.S.C. § 1369(b)(1); 33 U.S.C. § 1251(d); *see also Mianus River Preservation Committee v.*

EPA, 541 F.2d 899, 902 (2d Cir. 1976) ("The plain words of [Section 509] clearly specify review of only the 'Administrator's action,' the term 'Administrator' being defined in § 101(d) as the Administrator of the Environmental Protection Agency."). On the other hand, administrative actions of the Corps are not entitled to direct review in the appellate courts. *See, e.g., Rapanos*, 547 U.S. 715 (reviewing district court's rulings in Corps' action). Here, the final rule was promulgated by both the EPA and the Corps, and the Corps' participation in promulgating the rule defeats the jurisdictional prerequisite of § 1369(b).

The Corps' role in the rulemaking and the attendant inapplicability of § 1369 is not a mere technicality. Instead, it speaks to the nature of what the final rule aims to accomplish and why it does not fit within the four corners of § 1369.

The final rule applies to all aspects of the CWA including those within the sole providence of the Corps. With respect to the Corps' jurisdiction, the final rule principally impacts CWA Section 404, which grants the Secretary of the Army, acting through the Corps, the power to "issue permits . . . for the discharge of dredged or fill material into the navigable waters." 33 U.S.C. § 1344(a). The Section 404 permit program along with the EPA-run Section 402 National Pollutant Discharge Elimination System ("NDPES") permitting program, 33 U.S.C. § 1342, are the cornerstones of the CWA. In fact, nearly all harms to

Murray's interests resulting from the final rule are related to one of these two programs.

For the final rule to be implemented, neither of the Agencies could act alone in redefining the key definition upon which jurisdiction for requiring § 404 and § 402 permits is based. Otherwise, the same geographic feature could be subject to the CWA for one program but not the other. That is why the final rule made identical changes in the regulations for both of the Agencies' relevant rules.

To be reviewable in the courts of appeal under § 1369(b)(1), a rule must fit into one of the seven enumerated EPA Administrator actions, all of which the Administrator has exclusive authority to perform **without** the participation of the Corps. But here, as noted above, that was not possible, since the final rule necessitated action by both the Administrator and the Corps. Said another way, the final rule cannot be said to arise "under" any of the enumerated sections because it had to be based on an authority greater than that reserved to the EPA Administrator alone. The final rule itself acknowledges as much, citing the *entire* CWA, 33 U.S.C. § 1251, et seq., as the authority for its issuance. 80 Fed. Reg. at 37,055.

The necessity of the Corps' participation in the final rule demonstrates that jurisdiction in this Court is improper even before parsing the two specific subsections the Agencies assert as the basis for jurisdiction, which are themselves equally unavailing.

2. Subsection (E)

By statute, the EPA's action "in approving or promulgating any effluent limitation or other limitation under §§ 1311, 1312, 1316 or 1345" is reviewable by the courts of appeal. 33 U.S.C. § 1369(b)(1). The term "effluent limitation" means a "restriction on quantities, rates, and concentrations . . . discharged from point sources." 33 U.S.C. §1362(11). The Agencies have not asserted that the final rule is an "effluent limitation" because it plainly does not "dictate in specific and technical terms the amount of each pollutant that a point source may emit." *Am. Paper Inst., Inc. v. EPA*, 890 F.2d 869, 876 (7th Cir. 1989). The Agencies claim, however, that the final rule is an "other limitation." This interpretation falls flat.

To qualify as an "other limitation," the EPA action must be "closely related" to effluent limitations, meaning that they must be technical in nature and related to the allowable amounts of pollutants discharged by point sources. *Virginia Electric & Power Co. v. Costle*, 566 F.2d 446, 450 (4th Cir. 1977). Other limitations "direct[] . . . point sources to engage in specific types of activity," *Am. Paper*, 890 F.2d at 877, such as a regulation that directed the "location, design, construction and capacity . . . of a point source." *Virginia Electric*, 566 F.2d at 448 n.8.

The district court in *Murray Energy* found that the final rule's expanded jurisdiction, which would include new geographic features making

some of them "point sources," was enough to constitute an "other limitation." *Murray Energy*, 2015 U.S. Dist. LEXIS 112944, *16. This misses the point. A far cry from what has been accepted as an "other limitation" in other cases, the final rule "does not establish any regulatory requirements," 80 Fed. Reg. at 37,054, let alone ones that change the nature, quantity, characteristics, means, or methods by which pollutants may be discharged. *See Virginia Electric*, 566 F.2d at 448; *Am. Paper Inst., Inc.*, 890 F.2d at 876.

The touchstone of being an "other limitation" is not whether there are new point sources (and under the final rule, many water bodies become jurisdictional but not point sources), but whether there are new limits imposed on point sources. As the court in *North Dakota* found: "The [Final] Rule here imposes no 'other limitation upon the Plaintiff[s] . . . .The contention is that the [plaintiffs] have exactly the same discretion to dispose of pollutants into the waters of the United States after the [Final] Rule as before. Rather, the rule merely changes what constitutes waters of the United States." *North Dakota*, 2015 U.S. Dist. LEXIS 113831, *6-7.

Moreover, the final rule was not promulgated "under" §§1311, 1312, 1316, or 1345 as required by Subsection E. In fact, the EPA would have lacked authority to promulgate the final rule under those sections because

the definitional change has impacts far beyond them, including sections which the EPA has no authority to alter (*e.g.*, § 404, discussed above).

3. Subsection (F)

The second basis for the Agencies' assertion of jurisdiction relates to §1369(b)(1)(F), which involves EPA's action "in issuing or denying any permit under § 1342." Here again, the Agencies' interpretation of the provision is untenable.

By its own terms, the final rule does not itself issue or deny an NPDES permit under §1342. And, the Agencies cannot point to any portion of the final rule that either directly or indirectly leads to such action. The Agencies assert that the final rule defines what geographic features are subject to the CWA and, thus, what geographic features require NPDES permits. The Court in *Murray Energy* found this persuasive, but it proves too much. *See Murray Energy*, 2015 U.S. Dist. LEXIS 112944, *15.

The cases finding jurisdiction proper based on Subsection F are those that directly involve EPA actions specific to the NPDES permit program. *See Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 933 (6th Cir. 2009) (reviewing challenge to EPA rule providing that certain "pesticides . . . do not require an NPDES permit. . . .") (referencing 71 Fed. Reg. 68,483 (2008)); *NRDC v. EPA*, 526 F.3d 591, 600 (9th Cir. 2008) (reviewing

challenge to EPA rule on Amendments to the NPDES Regulations for Storm Water Discharges Associated With Oil and Gas Exploration, Production, Processing, or Treatment Operations or Transmission Facilities, 71 Fed. Reg. 33,628 (2006)); *American Mining Congress v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992) (reviewing challenge to the EPA rule on NPDES Application Regulations for Storm Water Discharges, 53 Fed. Reg. 49,416 (1988)); *Natural Resources Defense Council, Inc. v. EPA*, 966 F.2d 1292, 1295 n.1 (9th Cir. 1992) (reviewing challenge to EPA rule on NPDES Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990 (1990)).

Here, the NPDES program can hardly be said to be the object or aim of the final rule as it was in the cases cited above. In those cases, the NPDES program was the central focus of the EPA action and the courts were left to determine only whether the NPDES-centric regulation was the equivalent of "issuing or denying" a permit. None of the cases involved regulation by the Corps.

In this case, the NPDES program, if anything, is merely associated with the final rule. But so are all of the other CWA sections. Certainly, the NPDES program is not the object of the final rule, making it distinguishable from the cases finding jurisdiction proper under the Subsection F. It makes no sense for the final rule to be included with those cases because it does not

have the "precise effect" of a permit issuance or denial. *See Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196 (1980). "Indeed, the [Final] Rule has at best an attenuated connection to any permitting process." *North Dakota*, 2015 U.S. Dist. LEXIS 113831, *8.

On two prior occasions, the definition of waters of the United States has been challenged in federal district courts with the Agencies, the parties, and the courts, never raising a concern. *See API v. Johnson*, 541 F. Supp. 2d 165, 171 (D.D.C. 2008); *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975). *Callaway* involved changes to the definition of "navigable waters." 392 F. Supp. at 686. In *API*, the challenged rule was the adoption, under 40 C.F.R. §112.2, of a new definition of "navigable waters." 541 F. Supp. 2d at 172. The final rule makes changes to the identical provision. *See* 80 Fed. Reg. at 37,108.

The Agencies have not yet expressed a position as to whether they were wrong on jurisdiction then or wrong on jurisdiction now. Either way, the fact that the Agencies have only now raised jurisdiction as an issue suggests how far a stretch it is for the final rule to be classified as one of the enumerated EPA actions under § 1369(b).

IV. CONCLUSION

For the foregoing reasons, Murray Energy Corporation respectfully requests that the Court dismiss its Petition for lack of subject matter jurisdiction.

Dated: October 1, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October 2015, I caused the foregoing Motion to Dismiss to be served via the Court's CM/ECF system on all registered counsel.

/s/ Brooks. M. Smith
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