IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

STATE OF NORTH DAKOTA, *et al.*, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Defendants.	Case No. 3:15-cv-00059-RRE-ARS

FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISSOLVE PRELIMINARY INJUNCTION AND DISMISS AMENDED COMPLAINT

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INTRODUCTION

Plaintiffs—the States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming, and the New Mexico Environment Department and the New Mexico State Engineer ("the States")—have filed actions seeking review of the Clean Water Rule ("Rule") both in this Court and in the United States Court of Appeals for the Sixth Circuit. On August 27, 2015, this Court concluded that it had jurisdiction to review the Rule, and granted a motion for preliminary injunction, staying the implementation of the Rule. Doc. 70. The States, along with some of the other parties seeking review of the Rule in the Sixth Circuit, moved to dismiss their petitions for review before that court. On February 22, 2016, the Sixth Circuit concluded that jurisdiction to review the Rule lies exclusively in that court pursuant to Section 509(b)(1) of the Clean Water Act ("CWA"), 33 U.S.C. § 1369(b). The Sixth Circuit therefore denied the motions to dismiss brought by the States and other petitioners.

In light of the decision of the Sixth Circuit that it has jurisdiction and will proceed to review the Clean Water Rule, the Federal Defendants ("the Agencies") move to dissolve the preliminary injunction and to dismiss the amended complaint pursuant to Federal Rules of Civil Procedure 12(h) and 60(b)(6).

First, the Sixth Circuit has concluded that it has exclusive jurisdiction to review the Rule under the Clean Water Act's judicial-review provision, Section 509(b), 33 U.S.C. § 1369(b), making clear that jurisdiction resides exclusively in the Sixth Circuit. Because the Sixth Circuit is the court in which all of the petitions for review of the Rule have been consolidated under 28 U.S.C. § 2112(a), that court's decision that it has exclusive jurisdiction must be given controlling weight. Second, the availability of review under CWA Section 509(b)(1) deprives this Court of

authority to grant relief under the Administrative Procedure Act ("APA"). 5 U.S.C. § 706. Third, review of the Clean Water Rule in multiple courts would be contrary to prudential limits on duplicative litigation. Fourth, the Sixth Circuit and other district courts have reached the correct conclusion regarding review of the Rule under Section 509. Finally, the Sixth Circuit's jurisdictional ruling is also conclusive as to the States' NEPA claim because that claim is inextricably intertwined with their challenge to the Clean Water Rule and will be resolved by the Sixth Circuit.

STATEMENT OF THE CASE

I. Statutory and regulatory background

A. The Clean Water Act and the Clean Water Rule

The CWA prohibits the discharge of any "pollutant" into "navigable waters" except as specifically allowed. 33 U.S.C. §§ 1311(a), 1362(7), (12). The Act broadly defines "navigable waters" as "the waters of the United States, including the territorial seas." *Id*. § 1362(7). Congress used this broad definition because applying the federal protections of the CWA to the relatively few waterways that support navigation would make it impossible to achieve the objectives of the Act. S. Rep. No. 92-414, at 77 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3742-43. The scope of "waters of the United States" is a critical component of the Act, defining, for example, where regulated parties must obtain permits to discharge pollutants. 33 U.S.C. §§ 1311, 1341, 1342, 1344.

The Clean Water Rule amends the definition of "waters of the United States" to provide clarity and certainty to the regulated community about what waters are within federal CWA jurisdiction and what waters fall outside of CWA protection. 80 Fed. Reg. 37,054 (June 29, 2015). The Agencies developed the Rule after a comprehensive analysis of the relevant science

and exhaustive public participation, including more than 400 meetings with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, federal agencies, and others. 80 Fed. Reg. at 37,057. The Agencies were further guided by their decades of experience in implementing the CWA and the information provided in over a million comments on the proposed regulation. *Id*. As the Sixth Circuit has observed, the Agencies "conscientiously endeavored, within their technical expertise and experience, and based on reliable peer-reviewed science, to promulgate new standards to protect water quality that conform to the Supreme Court's guidance." *In re Clean Water Rule: Definition of "Waters of the United States,"* No. 15-3751 (6th Cir.), Doc. 49-2, Order of Stay at 6.

B. Judicial review under the Clean Water Act

To establish a clear and orderly process for judicial review, the CWA vests the federal courts of appeals with exclusive, original jurisdiction to review certain EPA actions. As relevant here, actions originally reviewable in the courts of appeals include the Administrator's action

> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, [and]
>
> (F) in issuing or denying any permit under section 1342 of this title[.]

CWA Section 509(b)(1)(E), (F), 33 U.S.C. § 1369(b)(1)(E), (F). Where review under Section 509(b)(1) is available, "it is the exclusive means of challenging actions covered by the statute." *Decker v. NEDC*, 133 S. Ct. 1326, 1334 (2013). Petitions for review generally must be filed within 120 days after the challenged EPA action. 33 U.S.C. § 1369(b)(1).

EPA actions "with respect to which review could have been obtained under [Section 509(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2); *Decker*, 133 S. Ct. at 1334. Section 509(b) thereby

promotes, *inter alia*, the ability of regulators, the regulated community, and the public to rely on the validity of EPA regulations that are not promptly challenged or are upheld by a court of appeals.

When multiple petitions for review are filed to challenge a single EPA action, those petitions are by statute consolidated in one court of appeals. 28 U.S.C. § 2112(a)(3); *see, e.g.*, *Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012); *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927 (6th Cir. 2009). Specifically, Section 2112(a) provides that the Judicial Panel on Multidistrict Litigation "*shall*, by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed and received within the ten-day period specified in the first sentence of paragraph (1), in which the record is to be filed, and *shall* issue an order consolidating the petitions for review in that court of appeals." 28 U.S.C. § 2112(a)(3) (emphasis added).

Final agency action under the CWA that falls outside the categories enumerated in Section 509(b)(1), but that is reviewable under general principles of administrative law, may generally be challenged in federal district court under the Administrative Procedure Act. 5 U.S.C. § 701 et seq. An APA suit must be brought within six years from the date of the challenged agency action. 28 U.S.C. § 2401(a). Consequently, the validity of actions reviewable in district courts under the APA rather than in the courts of appeals under CWA Section 509(b)(1) can remain uncertain for vastly longer periods of time.

C. The National Environmental Policy Act

The Clean Water Act specifically exempts actions by EPA's Administrator from the requirements of the National Environmental Policy Act ("NEPA"), providing (with certain exceptions not relevant here) that "no action of the Administrator taken pursuant to this chapter

shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA].” 33 U.S.C. § 1371(c)(1) (CWA Section 511(c)(1)).

Where NEPA applies, “NEPA’s purpose is to ensure a fully informed and well considered decision … and disclosure to the public that the agency has considered environmental concerns in its decisionmaking.” *Friends of Norbeck v. U.S. Forest Serv.*, 661 F.3d 969, 973-74 (8th Cir. 2011). NEPA does not contain its own cause of action and NEPA challenges are thus reviewed under the APA.

II. The Clean Water Rule litigation

A. Petitions for review in the courts of appeals

More than 100 parties filed 22 petitions for review of the Clean Water Rule in multiple circuit courts of appeals within the 120-day window for filing petitions under CWA Section 509(b).[1] As required by 28 U.S.C. § 2112(a)(3), the Judicial Panel for Multidistrict Litigation consolidated the petitions in the United States Court of Appeals for the Sixth Circuit, which was randomly selected by the Panel. *In re Final Rule: Clean Water Rule: Definition of “Waters of the United States,”* MCP No. 135 (J.P.M.L.), Doc. 3.

On September 9, 2015, a group of State petitioners filed a motion in the Sixth Circuit for a nationwide stay of the Rule pending judicial review. On October 9, 2015, that court granted the motion and issued an order staying the Rule pending further order of the court. *In re EPA and Dep’t of Def. Final Rule*, 803 F.3d 804 (6th Cir. 2015). Those same States also moved to dismiss their own petitions, claiming a lack of subject-matter jurisdiction. To facilitate the orderly resolution of the jurisdictional question, the Sixth Circuit established a briefing schedule to allow

[1] Petitions were filed in eight U.S. Courts of Appeals—the Second, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and District of Columbia Circuits.

all parties to file motions and responses. Plaintiffs here (petitioners in the Sixth Circuit) filed their own motion to dismiss in the Sixth Circuit. *North Dakota v. EPA*, No. 15-3831 (6th Cir.) Doc. 55. The court heard oral argument on the motions on December 8, 2015, and on February 22, 2016, the Sixth Circuit issued a decision denying all motions to dismiss, thus confirming that court's exclusive jurisdiction to hear challenges to the Clean Water Rule. *In re Dep't of Def. and EPA Final Rule*, No. 3751 (lead) (6th Cir.) Doc. 72-2. (Attachment 1).

In the lead opinion, Judge McKeague concluded that the Rule is an EPA action fitting within both subsections (E) ("other limitation") and (F) ("issuing or denying any permit") of Section 509(b)(1) of the Clean Water Act. *Id. at* 11, 16. Judge Griffin disagreed but nevertheless concurred in the judgment based upon the Sixth Circuit's decision in *National Cotton Council of America v. EPA*, which Judge Griffin found to be controlling with respect to subsection (F). *Id.* at 30. Judge Keith dissented, agreeing with Judge Griffin's substantive analysis but disagreeing that *National Cotton Council* is controlling. *Id.* at 33. On February 29, 2016, a petition for rehearing *en banc* was filed by several industry organizations. *In re EPA and Dep't of Def. Final Rule*, No. 3751 (lead) (6th Cir.) Doc. 73.

B. Proceedings in this Court

The States brought the instant action for review of the Clean Water Rule under the Administrative Procedure Act on June 29, 2015, and filed an amended complaint on August 14, 2015. Doc. 1 ¶ 1, Doc. 44. The States allege that the Rule violates the APA, the CWA, NEPA, and the Constitution (Doc. 1 ¶ 2) and assert jurisdiction under the APA, 5 U.S.C. § 706, the federal question statute, 28 U.S.C. § 1331, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. On August 27, 2015, the Court issued a decision finding it had jurisdiction over this

action and entering a preliminary injunction (Doc. 70) and, on September 4, 2015, the Court clarified that its injunction applied only in the thirteen Plaintiff States (Doc. 79).

Following the Court's decision granting a preliminary injunction and the Sixth Circuit's decision granting a nationwide stay of the Rule, the Agencies asked this Court to stay proceedings pending a ruling by the Sixth Circuit on the jurisdictional question. Doc. 90. The States opposed that motion and also moved the Court to set a schedule for further proceedings. Docs. 82, 93. On November 10, 2015, Magistrate Judge Senechal issued an order denying the Agencies' motion to stay and granting the States' scheduling motion. Doc. 98.

The Agencies filed the certified index to the administrative record on November 20, 2015. Doc. 101. On December 11, 2016, the Court granted the State of Iowa's motion to intervene as a plaintiff. Doc. 107. Currently pending before the Court are the Agencies' appeal of the Magistrate Judge's order denying the Agencies' motion to stay (Doc. 102), Sierra Club's motion to intervene as a defendant (Doc. 127), and the States' motion to complete the administrative record (Doc. 104). Summary judgment briefing has been stayed at the States' request. Doc. 123.

C. Other district court challenges

Like the States, nearly all of the other petitioners in the Sixth Circuit also filed challenges to the Rule in district courts. At this time, fourteen complaints are pending in eleven district courts. The Agencies moved for centralization of pretrial proceedings in the district court actions under 28 U.S.C. § 1407, but the Judicial Panel for Multidistrict Litigation denied the motion. *In re Final Rule: Clean Water Rule: Definition of "Waters of the United States,"* MDL No. 2663 (J.P.M.L.), Doc. 163 (Oct. 13, 2015).

Following notice of the Sixth Circuit's order confirming its jurisdiction to hear the consolidated petitions for review, the Northern District of Oklahoma court dismissed two APA challenges *sua sponte*, concluding that because jurisdiction under 33 U.S.C. § 1369(b)(1) is exclusive, a finding of jurisdiction by the Sixth Circuit "divests this Court of jurisdiction to hear a challenge to a final agency action." *Oklahoma v. EPA*, No. 4:15-cv-381-CVE-FHM (N.D. Okla. Feb. 24, 2016), Doc. 36; *Chamber of Commerce of the United States v. EPA*, No. 4:15-cv-386-CVE-PJC (N.D. Okla. Feb. 24, 2016) Doc. 49 (Attachment 2) (citing *Maier v. EPA*, 114 F.3d 1032, 1036-37 (10th Cir. 1997)).

Prior to the Sixth Circuit's decision, two district courts issued decisions that are also contrary to this Court's conclusion that subject-matter jurisdiction lies in district court. The Northern District of West Virginia and Southern District of Georgia courts held that jurisdiction lies exclusively in the Sixth Circuit under 33 U.S.C. § 1369(b)(1). *Murray Energy Corp. v. EPA*, No. 1:15-cv-110, 2015 WL 5062506 (N.D. W.Va., Aug. 26, 2015)[2] (Attachment 3); *Georgia v. McCarthy*, No. 2:15-cv-79, 2015 WL 5092568 (S.D. Ga., Aug. 27, 2015) (appeal pending) (Attachment 4).

No other district court where a challenge to the Clean Water Rule has been brought has found that it has subject-matter jurisdiction. Rather, stay motions were either granted or were pending while the jurisdictional issue was under consideration by the Sixth Circuit.

STANDARD OF REVIEW

Any party may challenge subject-matter jurisdiction at any time, pursuant to Rule 12(h)(3). *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 591 (8th Cir. 2003). Courts apply

[2] Murray Energy did not seek appeal in the Fourth Circuit Court of Appeals and has stated that it is "prepared to proceed in [the Sixth Circuit] now that it has ruled on jurisdiction." *Inside EPA Wkly*, Rep. 8 Vol. 37, 2016 WLNR 5849545 (Feb. 26, 2016).

the Rule 12(b)(1) standard to a motion filed under Rule 12(h). *Berkshire Fashions, Inc. v. M.V. Hakusan II,* 954 F.2d 874, 879 n. 3 (3d Cir. 1992); *Gates v. Black Hills Health Care Sys.,* 997 F. Supp. 2d 1024, 1029 (D.S.D. 2014). Under Rule 12(b)(1), the court must examine "whether it has authority to decide the claims." *Damon v. Groteboer,* 937 F. Supp. 2d 1048, 1063 (D. Minn. 2013); *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994) (stating that it is "to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.") (citations omitted). Subject-matter jurisdiction "is something the courts have a duty to examine at all stages of the litigation, *see Crawford v. F. Hoffman–La Roche, Ltd.,* 267 F.3d 760, 764 n. 2 (8th Cir. 2001), and the law of the case doctrine does not foreclose reconsideration of subject matter jurisdiction." *Hall v. USAble Life*, 774 F. Supp. 2d 953, 955 (E.D. Ark. 2011) (citing *Baca v. King*, 92 F.3d 1031, 1035 (10th Cir. 1996)); *DiLaura v. Power Auth. of N.Y.*, 982 F.2d 73, 77 (2d Cir. 1992)).

A motion seeking reconsideration and relief from a non-final order may be brought within a reasonable time under Federal Rule of Civil Procedure 60(b)(6) for "any . . . reason that justifies relief." Fed. R. Civ. P. 60(b)(6), (c); *see Middleton v. McDonald,* 388 F.3d 614, 616 (8th Cir. 2004) (noting broad discretion under Rule 60(b)). The Agencies are mindful that motions for reconsideration serve "to correct manifest errors of law or fact," and do not present "the occasion to tender new legal theories for the first time." *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988) (citation omitted). Rather, Rule 60(b) "provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances." *United States v. Young,* 806 F.2d 805, 806 (8th Cir. 1986) (citations omitted).

ARGUMENT

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

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

The Sixth Circuit's decision that it has jurisdiction to review the Clean Water Rule is binding on this Court because the Sixth Circuit is the court designated by statute to hear the consolidated petitions for review of the Rule, including the petition filed by the States in the Eighth Circuit and transferred to the Sixth Circuit by order of the Judicial Panel for Multidistrict Litigation. When multiple petitions for review of the same EPA action are filed in different courts of appeals under CWA Section 509(b)(1), the petitions are subject to mandatory consolidation in a single circuit court of appeals randomly selected under 28 U.S.C. § 2112(a). By operation of Section 2112(a), one court is authorized to decide all petitions for review of the same agency action. The agency must file the administrative record in that court, *id.* § 2112(a)(3), and all other courts of appeals "shall" transfer petitions for review of the agency action to the designated circuit, *id.* § 2112(a)(5). This mandatory transfer provision ensures that all challenges to the same agency action are reviewed by the court designated by the Judicial Panel for Multidistrict Litigation's random selection.

A number of statutes provide for judicial review of certain agency actions in only one circuit. *E.g.*, 42 U.S.C. § 7607(b)(1) (actions under the Clean Air Act); 47 U.S.C. § 402(j) (actions under the Federal Communications Act); 15 U.S.C. § 21 (certain orders under anti-trust law). The multi-circuit consolidation process in 28 U.S.C. § 2112 similarly reflects Congress's intent that petitions for review of the same agency action filed in multiple circuits be reviewed in a consolidated proceeding in one court.

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

The legislative history of CWA Section 509(b)(1) and 28 U.S.C. § 2112(a) further demonstrates that Congress intended that actions reviewable under Section 509(b)(1) be subject to judicial review in a single, consolidated proceeding. Under the CWA as amended in 1987, Section 509(b)(3) mandated a multi-circuit consolidation process functionally similar to that provided in the current version of Section 2112(a). Pub. L. No. 100-4, § 505(b) (1987), 101 Stat. 7. When Congress amended Section 2112(a) in 1988 to alter the consolidation mechanism from one based on the "first-to-file" to the current random-selection process, it rescinded CWA Section 509(b)(3)'s by then duplicative mechanism for consolidation. Pub. L. No. 100-236, §§ 1-2 (1988).

The cases applying Section 2112 similarly reflect the fundamental presumption that the court selected to review all challenges to the same agency action is authorized to make

nationally-binding determinations on the merits of the case. *See, e.g., North Carolina, Envtl. Policy Inst. v. EPA*, 881 F.2d 1250 (4th Cir. 1989); *City of Gallup v. Fed. Energy Reg. Comm'n*, 702 F.2d 1116 (D.C. Cir. 1983); *Virginia Elec. & Power Co. v. EPA*, 655 F.2d 534 (4th Cir. 1981)[3]; *Natural Res. Defense Council v. EPA*, 673 F.2d 392 (D.C. Cir. 1980).

As noted, the States here filed a petition for review of the Clean Water Rule in the Eighth Circuit Court of Appeals. Under Section 2112(a)(5), that court was required to transfer that petition to the Sixth Circuit. There can be no question but that the Sixth Circuit's judgment on that petition, including its jurisdictional finding, is dispositive and binding on the Eighth Circuit. Thus, the Eighth Circuit would have to reverse any contrary decision by this Court. *Cf. In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987) *aff'd sub nom. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989) (concluding that a decision by a 28 U.S.C. § 1407 transferee court should be treated as binding on return to the transferor court because, if it were not, "transfers under 28 U.S.C. § 1407 could be counterproductive"). The Agencies are bound nationwide by the Sixth Circuit's decisions, win or lose, absent reversal by the Supreme Court. The same is true with respect to all other parties to the Sixth Circuit proceeding, including the plaintiff States here. Any other result would render CWA Section 509(b)(1) and 28 U.S.C. § 2112(a) a nullity.

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[3] In deciding to transfer a petition for review to the D.C. Circuit, the Fourth Circuit noted that some parties "had raised a possible deficiency in jurisdiction of courts of appeal generally under section 509(b)." *Virginia Electric*, 655 F.2d at 537. The Fourth Circuit left that issue for the D.C. Circuit, as the transferee court that would hear the consolidated petitions, to decide. The D.C. Circuit resolved the jurisdictional issue in *Natural Res. Defense Council v. EPA*, 822 F.2d 104, 109 n.1 (D.C. Cir. 1987). As this and other cases demonstrate, it is uncontroversial for a circuit court in which multiple petitions for review under CWA Section 509(b) are consolidated to resolve questions of jurisdiction under Section 509(b). *See, e.g., Friends of the Everglades*, 699 F.3d at 1283; *Natural Res. Def. Council v. EPA*, 656 F.2d 768, 776 (D.C. Cir. 1981).

Indeed, if parties unhappy with a circuit court randomly selected under Section 2112(a) or wanting to hedge their bets against an adverse decision could simply file duplicative district court challenges, chaos would inevitably ensue. Congress clearly intended to avoid such inefficient, duplicative litigation and forum shopping by means of Section 2112(a). Worse yet, anyone dissatisfied with the designated circuit court's decision on the merits could file a district court action outside of that circuit anytime within six years of the agency action being challenged in the hope of obtaining a different result. *See* 28 U.S.C. § 2401. That would be directly contrary to Congress's intent in enacting Section 2112(a), the judiciary's interest in preserving scarce resources, agencies' interest in efficient administration of Congress's statutory mandates, and the public's interest in regulatory certainty.

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

B. Exclusive Review under CWA Section 509(b)(1) precludes review in the district courts under the Administrative Procedure Act.

The States' claims in this case challenge the Clean Water Rule—an agency action that the Sixth Circuit held falls within CWA Section 509(b)(1)'s exclusive judicial review provision. *In re EPA and Dep't of Def. Rule*, Doc. 72-2 (Attachment 1). Because the Sixth Circuit has confirmed its jurisdiction to review the Rule, the States have an adequate remedy in a court and cannot pursue a duplicative challenge in this Court under the APA.

"[A] statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute." *TRAC v. FCC*, 750 F. 2d 70, 77 (D.C. Cir. 1984) (citations omitted).[4] The law of the Eighth Circuit is in accord—"[w]hen Congress has established a special statutory review procedure for administrative actions, we generally treat that procedure as the exclusive means of review." *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1299 (8th Cir. 1989) (Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") judicial review scheme provided exclusive mechanism for review of FIFRA registrations and cancellations); *see also Sw. Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901, 906 (8th Cir. 1984) *cert. granted, judgment vacated sub nom. Arkansas Pub. Serv. Comm'n v. Sw. Bell Tel. Co.*, 476 U.S. 1167 (1986) (a specific grant of exclusive jurisdiction takes precedence over a more general grant). With regard to the CWA, the Supreme Court has expressly stated that where Section 509(b)(1) applies, "it is the exclusive means of challenging actions covered by the statute." *Decker*, 133 S. Ct. at 1334; *see also Maier*, 114 F.3d at 1036-37 (recognizing same).

Although the States assert jurisdiction in this Court under the Administrative Procedure Act, 5 U.S.C. § 706, the federal question statute, 28 U.S.C. § 1331, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 (Doc. 1 ¶ 3), none of those statutes provides a separate basis for jurisdiction here.[5] By its terms, the APA limits judicial review to final agency actions

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[4] *See also Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965) (where Congress has enacted a specific statutory scheme of review, that mode must be adhered to notwithstanding an express command of exclusiveness).

[5] The APA itself is not a grant of jurisdiction, but provides a cause of action and a limited waiver of sovereign immunity, while the federal question statute establishes subjects that are within the jurisdiction of federal courts to entertain ("civil actions arising under the Constitution, laws, or treaties of the United States") but does not waive sovereign immunity. For simplicity, we refer to the States' claim under the APA and the federal question statute as "APA claims." The Declaratory Judgment Act creates a remedy, but does not provide a basis for jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950); *First Fed. Sav. & Loan Ass'n of Harrison, Ark. v. Anderson*, 681 F.2d 528, 533 (8th Cir. 1982).

where "there is no other adequate remedy in a court." 5 U.S.C. § 704. *Cathedral Sq. Partners Ltd. P'ship v. S.D. Hous. Dev. Auth.*, 679 F. Supp. 2d 1034, 1040 (D.S.D. 2009) *on reconsideration*, 875 F. Supp. 2d 952 (D.S.D. 2012). Thus, the APA "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988); *accord Cent. Platte Natural Res. Dist. v. USDA*, 643 F.3d 1142, 1149 (8th Cir. 2011) ("Congress did not mean for the APA [] . . . to duplicate existing review mechanisms.") (citation omitted). As the Eighth Circuit has held, where there is an opportunity for judicial review under another statute, review under the APA is unavailable. *Defenders of Wildlife*, 882 F.2d at 1302-03.

The States already have a petition for review pending in the Sixth Circuit, where they raise the same challenges to the Clean Water Rule as they do here. The Sixth Circuit has confirmed that it will adjudicate that challenge. Accordingly, there is "an adequate remedy in a court," and the States' APA claims may not go forward. *Cf. Central Platte Natural Res. Dist.*, 643 F.3d at 1149 (affirming dismissal of APA claim where plaintiff had sought to simultaneously pursue Freedom of Information Act claim seeking the same relief); *Turner v. Sec'y of the U.S. Dept. of Housing and Urban Dev.*, 449 F.3d 536, 540 (3d Cir. 2006) (affirming that APA claim against agency was precluded where plaintiff had "adequate remedy" in prior suits she brought against her landlord); *Schaeffer v. U.S. Dept. of Educ.*, No. 4:05 CV 641 SNL, 2005 WL 3008516, at *7 (E.D. Mo. Nov. 9, 2005) (dismissing APA claim where plaintiff had three times pursued an alternative remedy in other suits).[6]

[6] As the American Farm Bureau Federation, American Petroleum Institute, National Association of Home Builders, and other petitioners before the Sixth Circuit concede in their petition for rehearing *en banc*, where there is jurisdiction in the courts of appeals under CWA Section

Because this Court lacks legal authority in this case, it must dissolve the preliminary injunction and dismiss the States' complaint.[7]

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

There are also sound prudential reasons for this Court to dismiss the States' claims here. The States already have a pending petition for review of the Rule in the Sixth Circuit and that court has determined that it has jurisdiction over such petition. Thus, if the present case were allowed to proceed, the States would simultaneously be pursuing the very same claims (and the same relief) in two federal courts, which would waste judicial and party resources and create the possibility of inconsistent results. Principles of judicial economy and comity among the courts counsel in favor of avoiding such duplicative litigation.

The Eighth Circuit has followed the Supreme Court in recognizing "a general policy that duplicative litigation in *federal* courts should be avoided." *Missouri ex rel. Nixon v. Prudential Health Care Plan Inc.*, 259 F.3d 949, 953 (8th Cir. 2001) (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)) (emphasis in original). Allowing a party to pursue simultaneously the same claims against the same party in more than one court wastes the courts' time and resources and leads to piecemeal litigation. *Prudential*, 259 F.3d at 954 (limit on duplicative suits motivated by "reasons of wise judicial administration" and avoidance of "piecemeal litigation"); *Colorado River*, 424 U.S. at 817-18 (citations omitted) (same). Based on these principles, the Eighth Circuit, in *Prudential*, stated in no uncertain terms:

509(b)(1), "then it necessarily does *not* lie in the district courts under the APA." *In re EPA and Dep't of Def. Final Rule*, No. 15-3751(lead) Doc. 73 at 13-14 (emphasis in original).

[7] We explain in Section III, *infra*, that Plaintiffs' NEPA claim is also subject to exclusive appellate jurisdiction under section 509(b)(1).

"Plaintiffs may not pursue multiple federal suits against the same party involving the same controversy at the same time." 259 F.3d at 954. The court further found that the principles underlying avoidance of duplication apply even when the pending suits are in circuit and district courts:

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

Prudential, 259 F.3d at 954.

Moreover, the Sixth Circuit is the only court able to provide a "comprehensive disposition of [the] litigation." *Colorado River*, 424 U.S. at 817. Numerous parties have petitions for review pending in the Sixth Circuit. The Sixth Circuit is the only court able to resolve all challenges to the Clean Water Rule in one proceeding. Thus, even if this Court concludes that the Sixth Circuit's jurisdictional decision is not binding per se, it should defer to the Sixth Circuit based on comity and judicial efficiency, dissolve the preliminary injunction, and dismiss the amended complaint.

II. The opinions of the Sixth Circuit and other district courts, holding that the Clean Water Rule is reviewable in the Sixth Circuit, are consistent with the text, structure, and purposes of CWA Section 509(b)(1) and should at least be given highly persuasive effect.

As explained above, the Sixth Circuit's decision must be controlling on this Court both in order for Section 2112(a) to function as designed and because APA review is not available where there is an adequate remedy in another court. The Court should dismiss the complaint on those grounds, and its analysis need not proceed any further. In any event, in addition to considering the legal effect of the Sixth Circuit's decision, this Court may also reconsider its prior jurisdictional ruling in light of the decisions of the Sixth Circuit and the district courts for the

Northern District of West Virginia and Southern District of Georgia and conclude, as those courts did, that only the United States Court of Appeals for the Sixth Circuit may entertain challenges to, and issue any preliminary or permanent relief respecting, the Clean Water Rule.

A. The Clean Water Rule falls squarely within Section 509(b)(1)(E) because it is an "other limitation" promulgated under CWA Section 301, 33 U.S.C. § 1311.

Section 509(b)(1)(E) provides for exclusive review of the Clean Water Rule because it is an EPA action "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 [of the CWA]." 33 U.S.C. § 1369(b)(1)(E). The Rule is an "other limitation" because it is a restriction on those who discharge a pollutant into protected waters and those who issue permits, such as the States here. And the Rule was promulgated under Section 1311, which prohibits the discharge of any pollutant by any person to waters of the United States except as in compliance with law, 33 U.S.C. §§ 1311(a), 1362(7), (12). *See* 80 Fed. Reg. at 37,055 (citing, among other provisions, 33 U.S.C. § 1311 as "authority for this rule"); *In re EPA*, Doc. 72-2 at 10-11 n.4 (Attachment 1); *Georgia*, 2015 WL 5092568 at *2 (Attachment 3). By defining what waters are "waters of the United States," the Clean Water Rule implements the most fundamental restriction in the Act.

While the CWA does not define "other limitation," it does define "effluent limitation" as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into [waters of the United States], the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11). The Act therefore sets forth "other limitation" as an alternative type of limitation to "effluent limitation," both of which are governed by the judicial review provision of Section 509(b)(1)(E). *Id.* § 1369(b)(1)(E). As a matter of sound statutory construction, the term "other limitation" refers to restrictions under the

specified CWA sections that are *not* effluent limitations. *See Virginia Elec. & Power Co. v. EPA ("VEPCO")*, 566 F.2d 446, 449 (4th Cir. 1977) ("[W]e cannot assume that [Section 509(b)(1)(E)'s] inclusion [of the phrase 'other limitation'] was meaningless or inadvertent."); *see also ConocoPhillips Co. v. EPA*, 612 F.3d 822, 831 (5th Cir. 2010) ("We have jurisdiction over challenges to an agency's action that result[s] in 'other limitations' under the CWA, and coolant water intake regulations are deemed 'other limitations.'"); *Friends of the Everglades*, 699 F.3d at 1286 (citing Black's Law Dictionary, 1012 (9th ed. 2009), in recognizing that an "other limitation" is a "restriction").

"Other limitation" has also long been recognized as including restrictions other than numerical limitations. In *VEPCO*, the Fourth Circuit held that it had original jurisdiction under Section 509(b)(1)(E) to review EPA regulations that required consideration of certain information in selecting the location, design, construction, and capacity of cooling water intake structures regulated under the CWA. 566 F.2d at 448. As here, EPA had relied on 33 U.S.C. § 1311 as a basis for that regulation. *Id.* at 450. The *VEPCO* court concluded that it had jurisdiction, even though the regulations (as here) did not contain numerical limits or specific structural or locational requirements applicable to point source dischargers, but rather required consideration of certain technical information in the determination of applicable standards. *Id.* at 450. In rejecting the utility companies' argument that the regulations were not limitations, the Fourth Circuit stated that because the regulations "require[d] certain information to be considered in determining the best available technology for intake structures," they constituted "a limitation on point sources and permit issuers, for we construe that term as a restriction on the untrammeled discretion of the industry which was the condition prior to the passage of the statute." *Id.*

VEPCO is all the more relevant because the Eighth Circuit has followed its reasoning in asserting jurisdiction under Section 509(b)(1)(E) over EPA's correspondence with a United States Senator addressing certain regulatory requirements governing water treatment processes. In *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), the court of appeals explained that EPA's statements "regarding the use of blending is an 'other limitation' because, as in *VEPCO,* it restricts the discretion of municipal sewer treatment plants in structuring their facilities." 711 F.3d at 866. The Eighth Circuit further observed that "[m]any of our sister circuits have adopted the *VEPCO* approach," by construing CWA Section 509(b)(1)(E) to apply to rules that restrict the discretion of dischargers. *Id.* (citations omitted). As noted by the Sixth Circuit, the Eighth Circuit adopted the *VEPCO* formulation of "limitation" when it held 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," *In re Dep't of Def*, Doc. 72-2 at 9 (Attachment 1), quoting *Iowa League of Cities*, 711 F.3d at 866; *see also Murray*, 2015 WL 5062506, at *4 (Attachment 3) (recognizing same).

The D.C. Circuit has also cited *VEPCO* in holding that it had original jurisdiction to hear a petition challenging EPA's Consolidated Permit Regulations, which do "not set any numerical limitations on pollutant discharge" but are a "set of procedures for issuing or denying [National Pollutant Discharge Elimination System] permits." *Natural Res. Def. Council*, 673 F.2d at 402. The court rejected the argument that because the regulations were "general" rules rather than technology-based rules, they did not constitute "effluent limitation[s] or other limitation[s]" under Section 509(b)(1)(E). *Id.* at 404. *See also Nat'l Wildlife Fed'n. v. EPA*, 949 F. Supp. 2d 251, 256-57 (D.D.C. 2013) (citing Section 509(b)(1)(E) and *VEPCO* in concluding that the district court lacked jurisdiction to review an EPA regulation pertaining to what information

could or could not be considered in issuing a general National Pollutant Discharge Elimination System permit for vessels).

In its August 27, 2015 order, this Court acknowledged *Iowa League of Cities* and *VEPCO* and noted that the Rule "changes what constitutes waters of the United States." Doc. 70 at 4. However, the Court applied an overly constrained construction of Section 509(b)(1)(E) when it concluded that the Rule "imposes no 'other limitation'" because "the States have exactly the same discretion to dispose of pollutants into waters of the United States after the Rule as before[.]" *Id.*. To the contrary, consistent with the Eighth Circuit's interpretation of that provision in *Iowa League of Cities*, and the Sixth Circuit's conclusion, by defining what waters require permits for discharges of pollutants, the regulatory definition of waters of the United States—including the Clean Water Rule—qualifies as an "other limitation."

The regulatory definition of waters of the United States in the Rule qualifies as an "other limitation" in two respects: it restricts the ability of property owners who are operating a potential point source into covered waters, and it requires authorized states to process Section 402 permits for covered waters.

As to property owners, the CWA prohibits the "discharge of any pollutant"—defined as "any addition of any pollutant to *navigable waters* from any point source"—unless conducted in compliance with the Act's provisions. 33 U.S.C. §§ 1311(a) and 1362(12) (emphasis added). "[N]avigable waters" is defined to include the "waters of the United States," 33 U.S.C. § 1362(7), but "waters of the United States" is not further defined in the statute. The scope of waters of the United States is central to the prohibition in 33 U.S.C. § 1311(a) and, as a result, to the National Pollutant Discharge Elimination System ("NPDES") (CWA Section 402) permit program and other CWA programs that regulate point source discharges. *See, e.g.*, 33 U.S.C. §§

1311(a), 1342(a), 1344(a); 40 C.F.R. § 122.1(b)(1) (providing that the Section 402 permit program "requires permits for the discharge of 'pollutants' from any 'point source' into 'waters of the United States,'" and "[t]he terms 'pollutant,' 'point source' and 'waters of the United States' are defined at [40 C.F.R.] § 122.2").

The Rule defines the term "waters of the United States," with some waters falling within the definition and some falling outside the definition. 80 Fed. Reg. at 37,055-60. For those waters that fall within the reach of the Rule and for point sources within those waters, the Rule operates as a restriction on the use of those point sources. Thus, property owners who are operating a point source are restricted in their ability to discharge pollutants to waters without constraint as a direct result of the Clean Water Rule and the requirements of the CWA. *See In re Dep't of Def.* Doc. 72-2 at 10 (Attachment 1) ("These restrictions, of course, are presumably the reason for petitioners' challenges to the Rule.").

Further, the States essentially concede that the Rule is a restriction or limitation on states as permit-issuers under CWA Section 402, 33 U.S.C. § 1342. States that have received authorization for the Section 402 NPDES permitting program must process permits for waters within their states that meet the Rule's definition of "waters of the United States." *Cf. VEPCO*, 566 F.2d at 448; *Natural Res. Def. Council*, 673 F.2d at 405 (holding that permit regulations were "a limitation on point sources and permit issuers").

In their motion for a preliminary injunction, the States acknowledge that they have "permitting and oversight obligations" associated with the definition of waters of the United

States. Doc. 33 at 10.[8] As the Sixth Circuit recognized, the Rule "alter[s] permit issuers' authority to restrict point-source operators' discharges into covered waters." *In re Dep't of Def.*, Doc. 72-2 at 10 (Attachment 1); *see also Georgia*, 2015 WL 5092568, at *2 (Attachment 4) ("Indeed, that is, in part, why the Plaintiffs are suing, and it is part of the harm of which they complain.").

As the *Murray* decision correctly explains, jurisdiction under CWA Section 509(b)(1)(E) does not turn on a comparison of the Rule with the pre-existing regulatory definition of waters of the United States. Instead, what matters is the Rule's effect on regulated entities and permit issuers compared to the absence of any regulation whatsoever. In *Murray*, the court rejected the plaintiff's argument that it "was already regulated under the prior rule." *Murray*, 2015 WL 5062506, at *6 (Attachment 3). The court explained that under *VEPCO*, 566 F.2d at 450, Section 509(b)(1)(E) does not apply "only to cases in which the affected industry enjoyed unfettered discretion prior to the issuance of the challenged rule." *Murray*, 2015 WL 5062506, at *6 (Attachment 3). The *Murray* court's reading of *VEPCO* is correct; there, the Fourth Circuit found it sufficient for purposes of Section 509(b)(1)(E) that the challenged regulation in question served as a "limitation on point source[] [dischargers] and permit issuers" and as "a restriction on the untrammeled discretion of the industry *which was the condition prior to the passage of the [CWA]*." *VEPCO*, 566 F.2d at 450 (emphasis added).

Although the Rule is definitional, it still qualifies as an "other limitation" within the meaning of the statute and binding Eighth Circuit precedent. "The Rule operates as a limitation

[8] Though the Agencies disputed the States' allegations of irreparable harm, it is indisputable that the States are required to consider the scope of waters of the United States in their implementation of the CWA.

or restriction on permit issuers and people who would discharge into the bodies of water the Rule now includes as waters of the United States. The [waters of the United States] rule accomplishes significant limiting and significant restricting even if accomplished by way of defining." *Georgia*, 2015 WL 5092568, at *2 (Attachment 4). *Cf. Natural Res. Def. Council*, 822 F.2d at 112-13 (reviewing EPA's regulatory definition of "new source" for purposes of National Pollutant Discharge Elimination System program permitting under 509(b)(1)(E)). The Sixth Circuit agreed with the *Georgia* court, citing to *VEPCO* and *Iowa League of Cities* as examples of cases where Section 509(b)(1)(E) jurisdiction applied to actions that were "not self-executing" but nonetheless constituted a "binding limitation." *In re Dep't of Def.* Doc. 72-2 at 8-9 (Attachment 1). Accordingly, this Court should reconsider its conclusion that the Rule imposes no "other limitation" because it is definitional. Like the plaintiffs in *Murray* and *Georgia*, the States here "seek review of the Administrator's action in promulgating a limitation under section 1311." *Georgia*, 2015 WL 5092568, at *2 (citation omitted) (Attachment 4).

In its decision, *In re Dep't of Def.*, Doc. 72-2 at 9 (Attachment 1), the Sixth Circuit cited to *Iowa League of Cities*, in which the Eighth Circuit observed that "the Supreme Court has recognized a preference for direct appellate review of agency action[.]" 711 F.3d at 861-62 (citing, *inter alia*, *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 745 (1985)). *Cf. Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593 (1980) (observing, in the context of a final action by EPA under the Clean Air Act, that "[t]he most obvious advantage of direct review by a court of appeals is the time saved compared to review by a district court, followed by a second review on appeal."). However, that does not mean that Section 509 is without limits. In its August 27, 2015 order, the Court expressed the concern that "[i]t is difficult to imagine any action that EPA might take in the promulgation of a rule that is not either definitional or regulatory." Doc. 70 at 5. *See*

also id. at 5 n.18 ("Congress did not intend court of appeals jurisdiction over all EPA actions taken pursuant to the Act[,]" quoting *Nat'l Cotton Council*, 553 F.3d at 933 (citation omitted)). But meaningful dividing lines exist. The phrase "other limitation" must relate to the sections of the CWA specifically identified in Section 509(b)(1)(E): Sections 301, 302, 306, or 405 [33 U.S.C. §§ 1311, 1312, 1316, or 1345].

For example, just within the Eighth Circuit, district courts have regularly reviewed EPA actions taken in connection with CWA Section 303, 33 U.S.C. § 1313. *See, e.g., WaterLegacy v. EPA*, 300 F.R.D. 332 (D. Minn. 2014) (reviewing an EPA approval of State-adopted water quality standards); *El Dorado Chem. Co. v. EPA*, 960 F. Supp. 2d 838 (W.D. Ark. 2013), *aff'd*, 763 F.3d 950 (8th Cir. 2014) (challenging an EPA decision denying proposed changes to a State's water quality standards); *Mo. Coal. for the Env't Found. v. Jackson*, 853 F. Supp. 2d 903 (W.D. Mo. 2012) (reviewing EPA's approval of a State's water quality standards); *Thomas v. EPA*, No. C06-0115, 2007 WL 4439483 (N.D. Iowa Dec. 17, 2007) (reviewing EPA's partial approval of a State's list of waters not meeting water quality standards); *Minn. Ctr. for Envtl. Advocacy v. EPA*, No. CIV03-5450, 2005 WL 1490331 (D. Minn. June 23, 2005) (reviewing EPA's approval of State's total maximum daily load for specified waters). District courts may also review challenges to administrative compliance orders issued by EPA pursuant to CWA Section 309(a), 33 U.S.C. § 1319(a). *Sackett v. EPA*, 132 S. Ct. 1367 (2012). EPA's rules implementing Section 404 are also reviewable in district court under the Administrative Procedure Act. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 440 F.3d 459 (D.C. Cir. 2006) (affirming district court review of rule promulgated by EPA and the Corps of Engineers pertaining to dredge or fill material under CWA Section 404). And EPA's decision to veto a permit issued under CWA Section 404, 33 U.S.C. § 1344, is similarly reviewable in

district court. *See, e.g.*, *Mingo Logan Coal Co. v. EPA*, 70 F. Supp. 3d 151 (D.D.C. 2014). All of these decisions are consistent with the Agencies' view of the limits of CWA Section 509(b)(1).

Indeed, there can be no dispute that most final actions that EPA takes under the CWA are subject to challenge in district courts because they fall outside the scope of CWA Section 509(b)(1). But with respect to the Clean Water Rule and similar comprehensive and permit-centric regulations issued by EPA, it is critical that courts give effect to "'the congressional goal of ensuring prompt resolution of challenges to EPA's actions[.]'" *Georgia*, 2015 WL 5092568, at *3 (Attachment 4) (quoting *Murray* at 16; *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196 (1980) (*per curiam*). *See also In re Dep't of Def.*, Doc. 72-2 at 6 (Attachment 1) ("Whether subject matter jurisdiction lies [in the circuit court] is governed by the intent of Congress.") (citing *Fla. Power & Light*, 470 U.S. at 746). As the Sixth Circuit recognized, "[t]o rule that Congress intended to provide direct circuit court review of [individual permitting] 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 'a truly perverse situation.'" *In re Dep't of Def.*, Doc. 72-2 at 10 (Attachment 1) (citing *E.I. du Pont de Nemours Co. v. Train*, 430 U.S. 112, 136 (1977)).[9]

In sum, as the Southern District of Georgia court aptly concluded, the "undeniable and

[9] *E.I. du Pont* considered whether Section 509(b)(1) applied to the review of EPA's promulgation of nationally applicable effluent limitations, by regulation, for classes of sources, or whether it applied only to source-specific effluent limitations and variances that dictate the limits of individual conduct. The Court held that EPA's action fell within Section 509(b)(1)(E) because EPA had "promulgat[ed] an effluent limitation for existing point sources under [Section] 301." 430 U.S. at 136. It is clear that jurisdiction to review EPA's issuance or denial of individual permits that contain effluent limitations lies in the courts of appeals, and the Court stressed a pragmatic interest in determining the extent of that jurisdiction: the power to review individual permit decisions necessarily encompasses the power to review the basic rules that control those decisions. *Id.*

inescapable effect" of a rule comprehensively defining waters of the United States "is to restrict pollutants and subject entities to the requirements of the [CWA's] permit program."[10] *Georgia*, 2015 WL 5092568, at *2 (Attachment 4); *see also Murray*, 2015 WL 5062506, at *5 (Attachment 3) ("Here, there is no dispute that the Clean Water Rule will have an impact on Murray's permitting requirements."). The very essence of defining what waters are regulated under the CWA is to impose restrictions on permit writers and dischargers of pollutants into such waters.

Accordingly, this Court's prior order was clearly erroneous, and the Court should conclude that the Sixth Circuit has exclusive jurisdiction to review the Rule under Section 509(b)(1)(E).

B. The Clean Water Rule falls within Section 509(b)(1)(F) because it is a regulation that governs the issuance of NPDES permits.

Section 509(b)(1)(F) provides for exclusive review in the courts of appeals of EPA action "in issuing or denying any permit under section 1342 [Section 402 of the CWA]." 33 U.S.C. § 1369(b)(1)(F). This Court correctly explained that this provision encompasses actions "functionally similar to the denial or issuance of a permit." Doc. 70 at 4 n.12 and 5 (citing *Crown Simpson*, 445 U.S. at 196[11]; *Iowa League*, 711 F.3d at 862; *Friends of the Everglades*, 699 F.3d

[10] The *Georgia* court thus distinguished the Clean Water Rule from the rule at issue in *Friends of the Everglades*, in which the Eleventh Circuit concluded that a rule *excluding* certain water conveyances from NPDES permitting requirements "impose[d] no restrictions on entities engaged in water transfers." *Georgia*, 2015 WL 5092568, at *2 (quoting *Friends of the Everglades*, 699 F.3d at 1286).

[11] In *Crown Simpson*, the Supreme Court held that Section 509(b)(1)(F) vested jurisdiction in the courts of appeal to review "EPA's action denying a variance and disapproving effluent restrictions contained in a permit issued by an authorized state agency." 445 U.S. at 194. The court of appeals had concluded that EPA's action in disapproving a permit issued by a *State* was not a decision by *EPA* "issuing or denying" a permit under Section 509(b)(1)(F). 445 U.S. at

at 1288; and *Nat'l Cotton Council*, 553 F.3d at 933). But the Court clearly erred in concluding that "the Rule has at best an attenuated connection to any permitting process." Doc. 70 at 5.

As the United States District Court for the Northern District of West Virginia explained: "[I]t is clear that the Clean Water Rule effectively requires Murray to obtain additional permits, and it therefore falls within the scope of § 509(b)(1)(F)." *Murray*, 2015 WL 5062506, at *6 (Attachment 3). Here again, the fundamental question is not whether the Rule requires more or fewer permits compared to the predecessor regulation or practice. Rather, it is whether the Rule changes the permitting requirements for would-be dischargers compared to no regulation at all. *VEPCO*, 566 F.2d at 450. The Rule defines what aquatic features fall within, and outside, the statutory term "waters of the United States," and thereby changes the circumstances in which some would-be dischargers must, or need not, seek a permit under the CWA.

In *Iowa League of Cities*, the Eighth Circuit stated that "the Supreme Court has interpreted broadly the direct appellate review provision in CWA section 509(b)(1)(F)." 711 F.3d at 862. Both the Northern District of West Virginia in *Murray* and the Southern District of Georgia in *Georgia* noted that the Sixth Circuit—the court assigned to resolve all petitions for review of the Rule, including the threshold question of subject matter jurisdiction—is consistent with the Supreme Court in "constru[ing] the appellate jurisdiction provided by § 509(b)(1)(F) broadly." *Murray*, 2015 WL 5062506, at *5 (Attachment 3) (describing *Nat'l Cotton Council*).

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196. In reversing the court of appeals, the Supreme Court rejected that narrow reading of Section 509(b)(1)(F), ruling instead that because "the precise effect of [EPA's] action is to 'den[y]' a permit within the meaning of § 509(b)(1)(F)," that provision applied and jurisdiction was exclusively in the courts of appeals. *Id.* The Court rejected the formalistic approach taken by the court of appeals, where "denials of NPDES permits would be reviewable at different levels of the federal-court system depending on the fortuitous circumstance of whether the State in which the case arose was or was not authorized to issue permits." *Id.* at 196-97.

See also Georgia, 2015 WL 5092568, at *1 (Attachment 4) ("The Sixth Circuit . . . has taken a broader approach to § 1369(b)(1)(F)[] and found that jurisdiction was appropriate in the Court of Appeals when the rule at issue regulated permitting procedures but did not deal with the issuance or denial of a particular permit.") (citing *Nat'l Cotton Council*, 553 F.3d at 933).[12] In *National Cotton Council*, petitioners challenged a rule exempting certain applications of pesticides from the CWA Section 402 NPDES permit program. The Sixth Circuit found the rule to fall within CWA Section 509(b)(1)(F) because it "regulates the [underlying] permitting procedures." *Nat'l Cotton Council*, 553 F.3d at 933.[13] Similarly, by defining the statutory term "waters of the United States," the Clean Water Rule regulates and is central to CWA Section 402 permitting procedures.

In its decision confirming its jurisdiction to review the Clean Water Rule, the Sixth Circuit followed its earlier precedent in *National Cotton Council* and held that the Clean Water Rule is an underlying permitting regulation. *In re EPA*, Doc. 72-2 at 11-16, 19. But *National Cotton Council* is merely one example of circuit courts applying the Supreme Court's opinion in *Crown Simpson* to give Section 509(b)(1) a "practical rather than a cramped construction." *Natural Res. Def. Council*, 673 F.2d at 405. *See also In re Dep't of Def.*, Doc. 72-2 at 30

[12] The Southern District of Georgia did not reach the question whether the Rule falls within the scope of CWA Section 509(b)(1)(F), having found that Section 509(b)(1)(E) applies. *See Georgia*, 2015 WL 5092568, at *1 (Attachment 4).

[13] In *Friends of the Everglades* and *Northwest Environmental Advocates*, the courts concluded that the rules at issue were not within the jurisdiction of Section 509(b) because they were purely exemptions from the CWA permit program. *Friends of the Everglades*, 699 F.3d at 1284; *Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1018 (9th Cir. 2008). In contrast here, rather than exempting activities from regulation under the NPDES permitting program, the Clean Water Rule identifies what water bodies *will* require CWA permits when pollutants are discharged into them. In this way, the Rule constitutes both a "limitation" under Section 509(b)(1)(E) and an underlying permitting regulation under Section 509(b)(1)(F).

(Attachment 1) (stating that *National Cotton Council* is neither unique nor divergent from the predominant view of other circuits) (Griffin, J., concurring).

Another is *American Mining Congress v. EPA*, where the Ninth Circuit exercised original jurisdiction in reviewing an EPA stormwater discharge rule that excluded discharges from certain inactive mines from NPDES permitting. 965 F.2d 759, 763 (9th Cir. 1992). The court concluded that Section 509(b)(1)(F) "allows us to review the *regulations governing the issuance of permits* under section 402 . . . as well as the issuance or denial of a particular permit." *Id.* (emphasis added). Indeed, the Ninth Circuit has long relied on Section 509(b)(1)(F) in finding it has jurisdiction to review NPDES permitting regulations. *See, e.g., Natural Res. Def. Council v. EPA*, 526 F.3d 591, 601 (9th Cir. 2008) (rule exempting discharges of oil and gas construction activities from NPDES permitting); *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 843 (9th Cir. 2003) (rule specifying which municipal separate storm sewer system and stormwater discharges are or are not subject to NPDES permitting); *Natural Res. Def. Council*, 966 F.2d 1292, 1296-97, 1304-06 (9th Cir. 1992) (rule exempting from NPDES permitting requirements various types of "light industry," construction sites less than five acres in size, and certain oil and gas activities).

Likewise, other courts of appeals have exercised original jurisdiction over challenges to regulations governing NPDES permitting. The Second Circuit exercised original jurisdiction to hear consolidated challenges to EPA's Concentrated Animal Feeding Operation ("CAFO") Rule, which set forth NPDES permitting requirements, including provisions requiring CAFOs of a certain size to seek a permit, provisions setting forth a process to allow certain CAFOs to be exempt from permitting, and "the types of discharges subject to regulation." *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 495-98, 504-506 (2d Cir. 2005). And the Fifth Circuit more

recently considered consolidated challenges to the CAFO Rule that EPA promulgated following the Second Circuit's remand in *Waterkeeper*. *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 749-51 (5th Cir. 2011).

As these circuit court decisions demonstrate, applying a practical construction to Section 509(b)(1)(F) allows for the "clear and orderly process for judicial review" intended by Congress, *see* H.R. Rep. No. 92-911, at 136 (1972), where parties may challenge not only the grant or denial of a permit, but also EPA's rules that govern the Section 402 National Pollutant Discharge Elimination System permitting process.[14]

Here, the Clean Water Rule defines what aquatic features fall within, and outside, the statutory term "waters of the United States," and thereby identifies the circumstances in which some would-be dischargers must, or need not, obtain a permit under the CWA. The Rule is thus comparable to the regulations at issue in cases in which the underlying permitting regulations were determined to be reviewable under Section 509(b)(1)(F).

III. The Sixth Circuit Court of Appeals has exclusive jurisdiction over all the States' challenges to the Clean Water Rule, including their NEPA claim.

Although the Sixth Circuit's ruling does not directly address NEPA, the States' NEPA claim should be dismissed because jurisdiction to review that claim is subject to Section 509 as well. A special statutory review provision that governs designated agency decisions is presumed to be exclusive over more general review provisions. *Block v. N.D.*, 461 U.S. 273, 285 (1983); 5 U.S.C. § 703 (prescribing "the special statutory review proceeding relevant to the subject matter in a court specified by statute" as default for judicial review); *Cal. Save Our Streams Council,*

[14] In the Sixth Circuit's decision regarding jurisdiction to review the Rule, Judge McKeague noted "a uniform trend of the instructive case law" that has applied a broad reading of Section 509(b), and that "Congress has not moved to amend the provision or otherwise take 'corrective' action." *In re Dep't of Def.* Doc. 72-2 at 17 (Attachment 1).

Inc. v. Yeutter, 887 F.2d 908, 912 (9th Cir. 1989); *City of Rochester v. Bond*, 603 F.2d 927, 935 (D.C. Cir. 1979). Therefore, the presumptive availability of district court review over NEPA claims under the APA is irrelevant; where a special review provision applies, it takes precedence. *Bond*, 603 F.2d at 935; *Yeutter*, 887 F.2d at 912; *Defenders of Wildlife*, 882 F.2d at 1301.

A contrary holding would thwart the policies of centralized jurisdiction, which are to avoid piecemeal litigation and to encourage the prompt resolution of challenges to agency actions. *See Bond*, 603 F.2d at 936 (rejecting district court's jurisdiction over NEPA claim where "coherence and economy are best served if all suits pertaining to designated agency decisions are segregated in particular courts."); *Envtl. Defense Fund v. EPA*, 485 F.2d 780, 782-83 (D.C. Cir. 1973) (district court review of NEPA challenge to FIFRA order would defeat policy of FIFRA "to insure speedy resolution of the validity of EPA determinations").

NEPA claims in particular, when they are based on agency actions subject to special statutory review, do not warrant independent review in the district courts. NEPA contains no independent cause of action or jurisdictional provision, and a plaintiff must rely on the APA to bring a NEPA claim. *Friends of the Norbeck*, 661 F.3d at 973. For APA claims, de novo fact-finding is neither required nor appropriate. *See Fla. Power & Light*, 470 U.S. at 744 (noting "factfinding capacity of the district court is . . . typically unnecessary to judicial review of agency decisionmaking"); *Yeutter*, 887 F.2d at 912 (district court lacked jurisdiction to review NEPA challenge to FERC license where courts of appeal "are properly constituted to hear all relevant arguments"); *Envtl. Defense Fund*, 485 F.2d at 782-83 ("[I]ssues concerning NEPA statements can be developed in full before the administrative agency, without need for separate factual development in the district court."). Moreover, the Sixth Circuit has the power to order

complete relief for any violation of NEPA that is found, giving the States an "adequate"—and arguably superior, given the greater reach of any order—remedy in that forum.

The States' allegations of procedural defects in the Environmental Assessment prepared by the Corps of Engineers and the Finding of No Significant Impact signed by the Assistant Secretary for Civil Works do not alter this analysis. The States' lawsuit seeks to invalidate the Clean Water Rule, and the Environmental Assessment and Finding of No Significant Impact are challenged only because of their relationship to that Rule.[15] *See* Doc. 44 (Am. Compl.) ¶¶ 2, 67-68, 69, 81, Prayer for relief A.-D. The Rule, as the Sixth Circuit has confirmed, is action of a kind designated for exclusive appellate review under the CWA. The States' characterization of the action they challenge does not remove it from the operation of Section 509. *Yeutter*, 887 F.2d at 912 (exclusive appellate jurisdiction over NEPA challenge to FERC order where "although appellants seek to characterize the proceedings as an attack on the Forest Service's actions, it is clear that the suit is an attempt to restrain the licensing procedures authorized by FERC"); *Sutton v. U.S. Dep't. of Transp.*, 38 F.3d 621, 626 (2d Cir. 1994) (plaintiffs' characterization of claim as a NEPA violation "does not change the fact that the substantive claims alleged in their complaint are based in substantial part on the Federal Aviation Administration's determination [for which Aviation Act prescribed exclusive review]").

[15] Indeed, the nature of the harms the States assert—to their sovereign regulatory authority, administrative budgets, and ability to accomplish infrastructure projects—confirms that the Rule, not the alleged deficiencies in the Corps' NEPA process, is the gravamen of the States' action. *See* Doc. 33 at 10, 23. The interests the States seek to vindicate also are not sufficiently related to impacts on the physical environment to fall within NEPA's zone of interests. *See Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1038 (8th Cir. 2002) (same for lessee asserting economic harms); *Cent. S.D. Co-op. Grazing Dist. v. Sec'y of U.S. Dept. of Agric.*, 266 F.3d 889, 897 (8th Cir. 2001) (grazing association not within zone of interests).

The fact that the States have named the Department of the Army and Army Corps of Engineers, in addition to the EPA, as defendants also cannot supersede Section 509's statutory review regime for specified EPA actions. Because the Environmental Assessment and Finding of No Significant Impact were prepared in support of the rulemaking process for the Rule, challenges based on those documents fall within Section 509's ambit regardless of the agency responsible for them. *See Yeutter*, 887 F.2d at 912 (where conditions imposed by Forest Service would have no significance outside FERC licensing process, fact that Forest Service was named as defendant did not defeat statute conferring exclusive appellate jurisdiction over FERC orders). A contrary result would be inconsistent with the policies of the CWA's special review provision. *Id.* ("The point of creating a special review procedure in the first place is to avoid duplication and inconsistency."); *see Nat'l Parks Conservation Ass'n*, 998 F.2d 1523, 1529 (10th Cir. 1993) ("[I]f the BLM actions could not be directly reviewed by us while the FAA actions could, the bifurcated suit could result in inconsistency, duplication, and delay."). In any event, an action "does not cease to be 'action of the Administrator' merely because it was adopted and negotiated in conjunction with the Secretary of the Army and the Corps . . . ." *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1328-29 (9th Cir. 1992); 40 C.F.R. § 1501.3(b) (agency may prepare EA "at any time in order to assist agency planning and decisionmaking").[16]

The States' NEPA claim, like its other claims, must be dismissed for lack of jurisdiction.

[16] As the Agencies explained in their opposition to the States' motion for a preliminary injunction, Doc. 66 at 15-16, the States have failed to state a claim with respect to NEPA. With two exceptions not relevant here, the CWA specifically exempts actions by EPA's Administrator from NEPA's requirements. 33 U.S.C. § 1371(c)(1). The Rule is an "action of the Administrator" for which NEPA was not required, and the Corps' involvement in promulgating the Rule does not alter that conclusion. Whether or not the States have stated a cause of action is an issue for the Sixth Circuit to resolve.

CONCLUSION

This Court lacks subject matter jurisdiction. Accordingly, the preliminary injunction entered by the Court on August 27, 2015 must be dissolved and the States' amended complaint must be dismissed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2016, I caused a true and correct copy of the foregoing to be served via the court's CM/ECF system on all registered counsel.

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