No. 16-299

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,

Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, AND
U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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The agencies abandon any pretense that statutory language justifies the judgment below that WOTUS Rule challenges belong in the court of appeals under Section 1369(b)(1)(F). They rely solely on an incorrect reading of this Court's decision in *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980), in which EPA denied a permit. The agencies' principal argument, that the plain language of Subsection (E) covers the WOTUS Rule, was properly rejected by the court below. So was their strained reading of *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977), which involved a regulation establishing effluent limitations. The WOTUS Rule promulgates no effluent or other limitation, nor is it EPA action issuing or denying a permit. The agencies' policy reasons for asking this Court to twist plain statutory language are more than matched by countervailing considerations that favor district court jurisdiction. This Court should reverse with directions to dismiss the petitions for review.[1]

I. The Sixth Circuit Lacks Jurisdiction Under The Plain Language Of Section 1369(b)(1).

A. Subsection (E) Does Not Confer Jurisdiction.

The agencies contend that Subsection (E) authorizes court of appeals jurisdiction because the WOTUS Rule "promulgat[es] any effluent limitation or other limitation under section 1311." That position contradicts the plain language of the statute.

1. The WOTUS Rule is not a "limitation," which means a restriction or restraint imposed by EPA. NAM Br. 28-29. The agencies admitted in promulgating the

[1] All of the NAM's fellow coalition members join this reply. See NAM Br. 1 n.1.

Rule that it "does not establish any regulatory requirements" and "imposes no enforceable duty." 80 Fed. Reg. 37,054, 37,102. As respondent States explain (at 25-26), it is impossible for landowners to violate the Rule's definition of "waters of the United States."

The agencies say the Rule is a limitation because it defines those geographic areas to which Section 1311(a) applies. But the Rule does not determine how the property may be used or whether a permit is required. See U.S. Br. 2-3 (before permit requirements apply a "pollutant" must be "added" to jurisdictional waters from a "point source"); NAM Br. 6 (a host of exclusions from permitting must be analyzed). The agencies' reading turns any definition of any element relevant to whether a permit may be needed into a "limitation" within Subsection (E).

The agencies argue (at 23) that limitations need not be self-executing, citing regulations that establish effluent limits for categories of point sources which are then imposed on dischargers through NPDES permits. But when EPA issues those effluent regulations, EPA specifies who is regulated, and it provides specific notice of the limits, restrictions, or standards that apply. Such regulations—provided they are issued under Sections 1311, 1312, 1316, or 1345—"promulgat[e] * * * effluent limitation[s]" squarely within Subsection (E).[2] The WOTUS Rule, by contrast,

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[2] The proviso that effluent rules fall under the sections listed in (E) is important. The agencies misstate (at 23) that NAM concedes that effluent guidelines issued under Section 1314(b)(1)(A) fall within (E). We do not, and EPA's position is at odds with *du Pont*. The Fourth Circuit held in *du Pont* that Section 1314(b) rules fall under (E). This Court disagreed, concluding that challenges to Section 1314(b) regulations "could probably be brought only in the District Court." 430 U.S. at 125.

"applies to the entire statute" (*Rapanos* v. *United States*, 547 U.S. 715, 742 (2006) (plurality)), exempts some waters from coverage, and requires "case-specific analysis" to determine whether many waters "are jurisdictional." U.S. Br. 6; see, *e.g.*, Dkt. 129-1 at 79-81 (explaining vagueness of the Rule's definition of "tributary"). A definition of the CWA's geographical scope—which does not tell a landowner whether a permit is required—does not "promulgate" a "limitation" in any sense of the words.

2. The agencies incorrectly assert (at 27) that "a rule setting the geographic scope of effluent limitations" is an "effluent limitation." An "effluent limitation" is a "restriction" on "quantities, rates, and concentrations" of pollutants authorized to be discharged to jurisdictional waters. 33 U.S.C. § 1362(11). "Other limitations" likewise refers to EPA actions governing authorized discharges—a point the agencies obliquely acknowledge. See U.S. Br. 3 (NPDES permits "establis[h] permissible rates, concentrations, quantities of specified constituents, or other limitations"), 11 ("[e]ffluent and other limitations under Section 1311 apply only to discharges of pollutants to 'navigable waters'").

Nor is the WOTUS Rule "directly related" to effluent limitations. U.S. Br. 27. It sets in motion a complex inquiry using vague criteria to determine whether a feature is jurisdictional. The CWA requires separate inquiry into whether a planned activity involves an addition of pollutants from a point source, and whether exclusions apply, before a permit including effluent limitations is required.

3. The agencies rest most of the weight of their argument on "other limitation." But the term "effluent limitation," in combination with Subsection (E)'s

reference to four statutory provisions that each relate to specific types of discharge limitation, cabins the scope of "other limitation." NAM Br. 29-31. The agencies (at 18) emphasize the word "any." But by contrast to the cases they cite, "any" modifies only the preceding term ("effluent limitation"), not the term at issue ("other limitation"). Moreover, "'any' can and does mean different things depending upon the setting." *Nixon* v. *Mo. Mun. League*, 541 U.S. 125, 132 (2004). This Court reads "any" narrowly when, as here, context requires. *E.g.*, *Raygor* v. *Regents of Univ. of Minn.*, 534 U.S. 533, 542-544 (2002) (constitutional avoidance canon); *Gutierrez* v. *Ada*, 528 U.S. 250, 254-255 (2000) (*noscitur* canon); *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 357 (1994) (statutory structure). Even if applied to "other limitations," in context "any" cannot expand "other limitations" beyond those that, like effluent limits, establish restrictions on authorized discharges—precisely the subject of each statutory provision cited in Subsection (E).

The agencies say (at 24-25) *ejusdem generis* does not apply because the statute is "disjunctive," with one specific term preceding the general term. But the canon can apply in that context. *E.g.*, *Nowak* v. *United States*, 356 U.S. 660, 664 (1958). And it applies even under the agencies' restrictive reading. The CWA repeatedly pairs "other limitation" with "effluent limitation" and additional terms that relate to specific restrictions on what pollutant, and how much, may be discharged—making it clear that Subsection (E)'s use of "other limitation" does not mean "all limitations of whatever kind." U.S. Br. 18; *e.g.,* 33 U.S.C. §§ 1318(a) ("any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance"), 1370 (same).

Noscitur a sociis likewise applies. Common sense suggests that Congress would not have said "any effluent limitation or other limitation" if it meant "any limitation at all." The agencies argue (at 25-26) that "other limitation" is "broad," but this Court has applied *noscitur* to similar terms. *E.g.*, *Wash. State Dep't of Social & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) ("other legal process"). *Noscitur* requires no "'string of statutory terms.'" U.S. Br. 26. See, *e.g.*, *Gutierrez*, 528 U.S. at 254-255. It applies *precisely* when one specific term precedes the general term. Scalia & Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 205-206 (2012). Anyway, Subsection (E) supplies a string of terms: its listing of Sections 1311, 1312, 1316, and 1345 informs the meaning of "other limitations." See Pet. App. 30a. Each listed section regulates permitted discharges *into* jurisdictional waters (NAM Br. 30-31); they do not regulate *which* waters are jurisdictional.

The agencies speculate (at 27) that Congress paired "effluent" with "other" limitations "for emphasis or clarity." But "the same could be said of most superfluous language." *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017). The agencies give "effluent limitation" no emphasizing or clarifying role—the term becomes subsumed under "other limitation," and therefore unnecessary. See *Am. Paper Inst., Inc.* v. *EPA*, 890 F.2d 869, 877 (7th Cir. 1989).

4. The WOTUS Rule also is not a limitation "under section 1311." As respondent States (at 23-24) and Waterkeeper (at 15-16) explain, the Rule emanates from Section 1361(a), which grants EPA general rulemaking authority, and Section 1362(7), which defines "navigable waters." The Rule impacts "nearly every regulatory program under the Act." Waterkeeper Br. 2.

Section 1311 "unambiguously" requires EPA to promulgate technology-based effluent limitations. *Du Pont*, 430 U.S. at 127. It even references "[e]ffluent limitations established pursuant to this section." 33 U.S.C. § 1311(e). And the other statutes listed in Subsection (E)—Sections 1312, 1316, and 1345—each directs EPA to issue specific discharge regulations. None requires EPA to undertake rule-making to interpret a definitional phrase that appears in Section 1362.

The agencies' assertion (at 28) that the WOTUS Rule has the "legal and practical effect" of making an effluent limitation applicable to "waters that [it] covers" not only elides a slew of intervening steps governed by other definitions, but also sacrifices Subsection (E)'s "readily understandable" "reference" to "limitation[s] under" Section 1311 to mean numeric and similarly specific limits on authorized pollutant discharges. *Bethlehem Steel Corp.* v. *EPA*, 538 F.2d 513, 516 (2d Cir. 1976). Section 1369(b)(1) cross-references *ten* CWA provisions, none of which is Section 1361(a)'s general rulemaking power or 1362(7)'s definition of the Act's geographic scope. That omission "counsels heavily against a finding of jurisdiction." Pet. App. 31a.

The agencies' reading renders superfluous Subsection (E)'s references to Sections 1312 (water-quality-based effluent limitations) and 1316 (new source performance standards). Section 1311(a) authorizes discharges that "compl[y] with" Sections "1312" and "1316." Any EPA action under Section 1312 or 1316 therefore has a "legal and practical effect" on limitations included in permits and on the scope of Section 1311(a)'s prohibition. If that were enough to trigger Subsection (E), Congress would not have listed Sections 1312 and 1316 in Subsection (E).

Nor would Congress in Subsection (G) have made Section 1314(*l*)(1)(D) individual control strategies for navigable waters impaired by toxic pollutants reviewable in the court of appeals. Those strategies, which are incorporated into NPDES permits, have a "legal and practical effect" on "effluent and other limitations under Section 1311." U.S. Br. 28; see NAM Br. 27.

Furthermore, Congress's decision *not* to list certain EPA actions in Section 1369(b)(1) would be meaningless, for Subsection (E) would encompass unlisted EPA actions. For example, EPA approval or promulgation of state water quality standards under Section 1313 has the "legal and practical effect" of requiring that effluent limitations in permits be tailored to meet those standards. 33 U.S.C. § 1313.

The agencies confidently assert (at 29) that EPA action under Sections 1314(*l*) and 1313 is not covered by Subsection (E), but on the agencies' view that any action with legal or practical effects on effluent limitations falls within (E), that assertion is false. The agencies' all-encompassing approach "makes a mess" of Subsection (E). *SW Gen.*, 136 S. Ct. at 941. It expands the categories listed in Section 1369(b)(1). And it requires parties and courts to engage in endless pre-merits inquiry into whether particular EPA action has the "legal and practical effect" of making "limitations under Section 1311 applicable." U.S. Br. 28.

This Court presumes "'that statutory language is not superfluous.'" *McDonnell* v. *United States*, 136 S. Ct. 2355, 2369 (2016). The agencies' reading makes Congress's inclusions and exclusions from Section 1369(b)(1) largely meaningless and invites continued costly debate over where jurisdiction lies.

5. The agencies' explanation of why EPA administrative enforcement orders lie outside Subsection (E) is unintelligible. They write (at 29-30) that Subsection (E) "does not reach EPA administrative enforcement orders" determining that "a landowner was violating Section 1311" (like "the order at issue in *Sackett* v. *EPA*, 566 U.S. 120 (2012)"), because "an enforcement order does not itself approve or promulgate effluent or other limitations under Section 1311." That reasoning is backwards.

The WOTUS Rule defines jurisdictional waters, but does not itself approve or promulgate any limitation. Enforcement orders, by contrast, *include* jurisdictional determinations—petitioners in *Sackett* challenged EPA's jurisdictional determination (566 U.S. at 122)—but *go further* to find a violation, order compliance, and prohibit further discharges. The agencies cannot explain why an EPA order finding a violation of Section 1311 is challenged in district court, as *Sackett* held, yet a challenge to the definitional WOTUS Rule falls within Subsection (E).

6. The agencies suggest (at 20) that the NAM and other challengers would not be complaining about the Rule were it not an effluent or other limitation. NRDC (at 18-24) goes a step further by claiming that challengers would lack standing in district court if the Rule were not a limitation on their conduct. But there is no "justiciability trap." NRDC Br. 23. Courts are free to consider subject matter jurisdiction before addressing standing. See *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 585 (1999). Yet NRDC demands that this Court consider standing before the subject-matter jurisdiction question on which it granted certiorari, and do so for a *different case* in which the district court has not yet addressed standing.

Anyway, establishing standing in the district court does not involve showing that the WOTUS Rule is an "effluent limitation or other limitation" under Subsection (E), but that the Rule injures plaintiffs in a concrete way that is redressable by striking it down. *Town of Chester* v. *Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017).

The immediate legal consequence of the WOTUS Rule is that the entire CWA applies to features that fall within its definition. The NAM and its fellow plaintiffs alleged in their district court complaint that the "vague" WOTUS Rule "requires unpredictable case-by-case determinations" that leave their members unable to "know which features on [their] lands" are "jurisdictional." This deprives plaintiffs "of notice of what the law requires of them"—at risk of substantial criminal and civil penalties—and "makes it impossible for them to make informed decisions concerning the operations, logistics, and finances of their businesses." Dkt. 1 ¶¶31-32, No. 3:15-cv-165 (S.D. Tex.). Plaintiffs' members hired consultants to analyze the applicability of the Rule to their property, and must consider seeking jurisdictional determinations or applying for permits. *Id.* ¶¶34-35. Analysis of whether the definition of WOTUS may capture features of land is one element in deciding whether a permit is required for particular activities, along with "pollutant," "addition," "point source," and exclusions. But it does not follow from the fact that the WOTUS definition has practical and legal consequences for landowners that it qualifies as an "effluent limitation or other limitation" under the provisions of the CWA listed in Subsection (E).

In summary, the majority below correctly ruled that Section 1369(b)(1)(E) does not confer jurisdiction.

B. Subsection (F) Does Not Confer Jurisdiction.

1. The agencies do not pretend that the WOTUS Rule "issu[es] or den[ies] any permit under section 1342." 33 U.S.C. § 1369(b)(1)(F). That "should end the analysis." Pet. App. 39a.

The agencies (at 10, 31) say jurisdiction nevertheless exists under Subsection (F) "as construed in" *Crown Simpson*, using a "functional interpretive approach." *Crown Simpson* did not endorse that free-wheeling interpretation. It held that Subsection (F) conferred jurisdiction over EPA's veto of a state-issued permit because the veto had "the precise effect" of a permit denial. 445 U.S. at 196. Subsection (F)'s text applied: EPA *denied* the permit—but for EPA's veto, the permit would have issued. See States Br. 16 ("ordinary meaning" of "deny" is "to refuse the use of or access to"). Unlike a permit veto, the WOTUS Rule does not stop any permit from issuing. Nor does it require any permit to issue. The Rule makes no decision whatever on "particular permit applications." Waterkeeper Br. 9.

This Court should reject the agencies' request to extend *Crown Simpson* far beyond its holding and in conflict with statutory text. The agencies' invocation of reliance (at 33) is misplaced. Some courts have accepted the agencies' limitless reading of *Crown Simpson*, but others have not. *E.g.*, *Friends of the Everglades* v. *EPA*, 699 F.3d 1280, 1287-1288 (11th Cir. 2012); *Nw. Envtl. Advocates* v. *EPA*, 537 F.3d 1006, 1016-1018 (9th Cir. 2008); NAM Br. 39-40. The majority below understood that *Crown Simpson* does not compel a finding for the agencies. Pet. App. 39a-42a, 45a.

2. The agencies argued below that, under *Crown Simpson*, Subsection (F) reaches EPA actions "affecting the granting or denying of permits." Pet. App. 18a. They now abandon that argument, presumably recognizing that it has no stopping point and renders superfluous Sections 1369(b)(1)(A), (C), (D), (E), and (G). See NAM Br. 25-27; U.S. Br. 34. They now contend that Subsection (F), under *Crown Simpson*, reaches EPA actions "establish[ing] the boundaries of EPA's permitting authority." U.S. Br. 11, 16; *id.* at 33 ("whether EPA has jurisdiction to issue or deny a permit"). But the agencies cannot explain how a rule defining one condition of their jurisdiction to issue or deny a permit is "functionally similar" to the act of issuing or denying a permit. Rejecting that proposition obviously does not require "overturn[ing]" *Crown Simpson*. U.S. Br. 33.

Nor does the agencies' new approach address the superfluity that drove them to this retreat. For example, Section 1369(b)(1)(D) covers EPA determinations under Section 1342(b) to authorize states to administer NPDES permit programs, which have a profound effect on the role of EPA vis-à-vis states in issuing or denying permits. Subsection (D) would be superfluous on the agencies' new rewriting of (F). The agencies say (at 34) that superfluous language "serve[s] a useful purpose." But that "could be said of most superfluous language." *SW Gen.*, 137 S. Ct. at 941.

The proper reading of *Crown Simpson*—to the extent it has not been superseded by statute (see NAM Br. 23 & n.10)—is that Subsection (F) confers jurisdiction over EPA actions that issue or deny a permit or (the equivalent) decide whether a permit will or will not issue. That is the only reading that respects

Subsection (F)'s text and gives other subsections independent force.

3. The justification the agencies offer for asking this Court to rewrite "issuing or denying" an NPDES permit to mean promulgating rules addressing whether "EPA has jurisdiction to issue or deny a permit" is that Section 1369(b)(1) would otherwise "irrational[ly] bifurcat[e]" review of EPA's jurisdictional determination "in an individual NPDES permitting decision" from "EPA's resolution of the same question on a more categorical basis." U.S. Br. 12-13, 33.

That rationale invites this Court to rewrite countless jurisdictional statutes. See NAM Br. 46-47. And the bifurcation the agencies point to is no more irrational than Congress's choice to assign NPDES permit challenges to the court of appeals but Section 1344 permit challenges to district court.

But at bottom, the agencies offer a solution in search of a problem, for bifurcation is uncommon in practice. To determine whether property contains WOTUS, landowners usually seek a jurisdictional determination (reviewable in district court) rather than undertake the considerable expense of applying for a permit (reviewable in the court of appeals). See *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807 (2016). The agencies have issued 400,000 such determinations since *Rapanos*. U.S. Br. 6. And when jurisdictional determinations are made in administrative enforcement orders, those are reviewed in district court. *Sackett*, *supra*. Our interpretation puts the vast majority of challenges relating to jurisdiction in district court (where *SWANCC*, *Rapanos*, *Riverside Bayview*, *Sackett*, and *Hawkes* all began).

C. Statutory Purpose And Structure Reinforce The Plain Language.

1. The agencies contend (at 35) that the purpose of Section 1369(b)(1) is to "facilitat[e] quick and orderly resolution of disputes concerning the legality of important rules governing the scope of a regulatory scheme." But "[l]egislation" is "the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known 'pursues its [stated] purpose [ ] at all costs.'" *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

Section 1369(b)(1) is one of "thousands of compromises dividing initial review of agency decisions between district and circuit courts" that "var[y] dramatically" even "within particular legislation." Mead & Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1, 2, 15-16 (2015). No one denies that the Corps and states play important roles in CWA's regulatory scheme, yet Section 1369(b)(1) does not cover review of their actions. No one disputes that Section 1344 permitting is important, yet Section 1369(b)(1) does not apply. And the agencies say (at 29-30) that EPA's *nationwide* regulations governing hazardous substances, vessel wastes, and construction grants fall outside Section 1369(b)(1). The agencies make no attempt to reconcile these exclusions with their view of Section 1369(b)(1)'s purpose. If quick and orderly resolution of "important rules" were Congress's purpose, it would have authorized review of all "nationally applicable regulations" under the CWA, words Congress used in the Clean Air Act. 42 U.S.C. § 7607(b)(1).

The agencies ignore Section 1369(b)(1)'s most salient feature: it enumerates seven categories of agency action using a list so precise that "Congress

refer[s] to specific subsections of the Act." *Du Pont*, 430 U.S. at 136. Many courts have confined those categories to their text because "[n]o sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions, while meaning to imply a more general and broad coverage than the statutes designated." *Longview Fibre Co.* v. *Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992); see Waterkeeper Br. 17 & n.9.

2. The agencies say (at 40) that the NAM seeks to "render nugatory" case law interpreting Section 1369(b)(1). As explained above, our reading is in harmony with *du Pont*, *Crown Simpson*, and many courts of appeals' decisions. And we offer "a consistent and principled" rule (*ibid.*) that is easily applied in practice: read Section 1369(b)(1) textually. See *Henson*, 137 S. Ct. at 1725 (the "legislature says * * * what it means and means * * * what it says"). This will not "hinder" but *aid* "judicial efforts to resolve future jurisdictional disputes." U.S. Br. 40. The agencies' plea for court of appeals jurisdiction over actions sufficiently connected to effluent limitations or permits, by contrast, will just result in more litigation about where to litigate.

D. Legislative History Reinforces The Plain Language.

1. The agencies mischaracterize the legislative history of the 1972 Act establishing Section 1369(b). They observe (at 41) that the Senate Report characterized the Senate bill as routing to the D.C. Circuit suits against EPA "requirements, standards and regulations." S. Rep. 92-414 at 84-85 (1971). But the Senate bill did not treat all components of Section 1369(b) that way. It sent challenges equivalent to those described in Subsections (A)-(D) of the adopted version

of Section 1369(b)(1) to the D.C. Circuit, because those actions were "national in scope." *Id.* at 85. But it sent to the regional circuits challenges to "any effluent limitation under section [1311] or [1312]" or to the issuance or denial of a Section 1342 permit—essentially Subsections (E) and (F) as adopted, but without the term "other limitation"—because it viewed those EPA actions as local in nature. *Ibid.*; see Federal Water Pollution Control Act Amendments of 1971, S. 2770, 92nd Cong. § 509(b) (1971).

The Senate's approach thus contradicts the agencies' contention that Subsection (E) broadly covers national rules that can be traced, however remotely, to Section 1311(a). Ultimately, it indicates little about how a rule like WOTUS should be reviewed under the *different* Act that emerged after compromise with the House, which favored broad district court review. See H.R. Conf. Rep. No. 92-1465 at 147 (1972) (the House amendment to "Section [1369] is basically the same as the Senate bill *except that review [of EPA action lies] in the district court*").

The agencies (at 41) quote the House Report statement that Section 1369(b)(1) established "a clear and orderly process for judicial review." H.R. Rep. 92-911 at 136 (1972). That statement says nothing about *which* agency actions the House intended to fall within Section 1369(b)(1). And the agencies' vague test encourages protective filings and litigation over jurisdiction, so it is anything but clear and orderly. The agencies also ignore the House Report's statement that "[Section 1369] is not intended to exclude judicial review under other provisions of the legislation that are otherwise permitted by law." *Ibid.* The House intended actions, like the WOTUS Rule, that fall outside Section 1369(b)(1) to be reviewable in district courts under the APA.

The agencies (at 15) misread the Conference Report as "indicat[ing] that Section 1369(b)(1) would govern 'any suit against a federal standard.'" The Conference Report was there describing the Senate bill discussion of what became Subsections (A)-(D), not its treatment of what became Subsections (E)-(F), nor the subsequent House amendment that called for district court review, nor the compromise that emerged from conference. See H.R. Conf. Rep. No. 92-1465 at 147 (1972). Moreover, the Conference Report explained that the "conferees do not intend to, in any way, affect the right of a party for which judicial review was not available" under Section 1369(b)(1). *Id.* at 148. This language confirms Congress's intent not to have Section 1369(b)(1) apply beyond its terms.

Finally, the agencies acknowledge (at 42) that Congress's "language was imprecise" "insofar as" legislative reports suggested that "*every* nationwide regulation" would fall within Section 1369(b)(1). In other words, even on the agencies' own wishful reading of the legislative history, it does not support the line the agencies would now draw.

2. The agencies misread 1977 amendments to the CWA, which did not modify Section 1369(b)(1). Pub. L. 95-217, 91 Stat. 1566 (Dec. 27, 1977). Congress rejected the Administrative Conference of the United States' recommendation to expand original court of appeals review under Section 1369(b)(1). The agencies (at 45) quote snippets of the Conference's report but ignore its acknowledgement that "[n]ot every action of the EPA" was "reviewable in the courts of appeals" under Section 1369(b)(1). 41 Fed. Reg. 56,767-56,768 (Dec. 30, 1976). And they disregard the report's opinion that both Section 1369(b)(1) and the Clean Air Act's judicial review provisions were "inconsistent, incomplete, ambiguous, and unsound"; courts were "stretch[ing]"

their texts; "corrective amendments" were "desirable"; and "[a]ll national standards" should be reviewed by the D.C. Circuit. *Ibid.*

Senator Kennedy proposed adopting the Administrative Conference's recommendation, but other Senators opposed and tabled his amendment. 123 Cong. Rec. 26,754-26,761 (1977). The floor debate does *not* "confirm Congress's understanding" that Section 1369(b)(1) covers "nationwide regulations." U.S. Br. 44. Senator Kennedy described his amendment as "centraliz[ing] judicial review of national regulations" before the D.C. Circuit, and "defined" those national regulations to include "any regulation issued under sections [1311] or [1342]." 123 Cong. Rec. at 26,754, 26,758.

But other Senators had expressed "considerable opposition" to that expansion of Section 1369(b) in committee, where it would have been "defeated." *Id.* at 26,758, 26,760. Senator Domenici commented that "we can come to this floor with every bill that has some national significance of a regulatory manner and we can find some precedent somewhere that they have jurisdiction, and we can nickel and dime the district courts of the United States out of business." *Id.* at 26,759. The agencies deny it (at 46-47), but Senator Domenici of course was talking about the amendment. Anyway, "[s]cattered floor statements by individual lawmakers" are "'among the least illuminating forms of legislative history." *Advocate Health Care Network* v. *Stapleton*, 137 S. Ct. 1652, 1661 (2017). The undeniable fact is that the 95th Congress chose not to enact the Administrative Conference's proposal to expand Section 1369(b)(1).

That same Congress *did* enact the Administrative Conference's proposal to alter judicial review under the

Clean Air Act. See Pub. L. 95-95, § 305(c)(1)-(2), 91 Stat. 685, 776 (Aug. 7, 1977) (broadening 42 U.S.C. § 7607(b)(1) to reach "any other nationally applicable regulations" and "any other final [EPA] action" that is "locally or regionally applicable"); *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 587 n.4 (1980). Congress's disparate actions confirm that Section 1369(b)(1) should be read narrowly. See NAM Br. 40, 43.

3. 1987 CWA amendments further undermine the agencies' arguments. Those amendments expanded Subsection (E) to include limitations under Section 1345 and added Subsection (G), which covers EPA's promulgation of individual control strategies for toxic pollutants under Section 1314(*l*). Pub. L. 100-4, §§ 308(b), 406(d)(3), 101 Stat. 7, 39, 73. Section 1345 requires rulemaking to restrict the discharge of sewage sludge using Section 1342 permits. 33 U.S.C. § 1345(b), (f). Section 1314(*l*) requires "establishment of effluent limitations under section 1342" to achieve water quality standards. *Id.* § 1314(*l*)(1)(D). If the agencies were correct (at 44) that Congress understood Section 1369(b)(1) to cover "rules that govern the CWA permitting process," there would have been no need for Congress to expand Section 1369(b)(1) to include these additional rules.

II. Policy Considerations Favor Interpreting Section 1369(b) Textually.

A. Interpreting Section 1369(b) Textually Promotes Jurisdictional Clarity.

The agencies never acknowledge "the need for judicial administration of a jurisdictional statute to remain as simple as possible." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 80 (2010); see NAM Br. 44-48. Their reading subverts that important goal.

The agencies ask this Court (at 17, 28) to hold that Subsection (E) "encompasses all EPA actions that impose limitations of any sort under Section 1311" or have a "legal and practical effect" on Section 1311 limitations. They offer several examples of actions that seemingly satisfy their standards but, they claim, fall outside Subsection (E)'s coverage. *E.g.*, U.S. Br. 29-30. They further ask this Court (at 31, 33) to adopt a "functional interpretive approach" under Subsection (F) that turns on what they think Subsection (F) "naturally reaches" and what is "functionally similar."

Forty-five years of experience tell us what will happen if this Court adopts those amorphous standards: "chaos." Waterkeeper Br. 6. Unsure still of which court has jurisdiction, parties will continue to file challenges in both district and circuit courts. Years will be spent litigating jurisdiction over EPA actions that fall outside Section 1369(b)(1)'s text but perhaps fall within its "manifest purposes." Pet. App. 4a. Jurisdictional doubt also will infect merits determinations, and a contrary jurisdictional decision by this Court could send the parties back to the starting gate after years of litigation.

As industry, respondent States, and most environmental parties agree, it is imperative that this Court break that cycle by reading Section 1369(b)(1) to create administrable standards. The best way to do so is by limiting Section 1369(b)(1) to its text and holding that it does not capture the WOTUS Rule.

B. A Narrow Reading Is Necessitated By Section 1369(b)'s Preclusion Provision.

A narrow reading is necessary because Section 1369(b)'s preclusion provision creates due-process and rule-of-lenity concerns and encourages "'buckshot petitions.'" NAM Br. 48-50.

The agencies do not deny that the NAM's reading would reduce the number of protective petitions. Nor do they dispute that due-process and rule-of-lenity concerns exist. They argue (at 49) that the Court should ignore those concerns *in this case* because they will "arise" only "in a future enforcement proceeding." But "a court must consider the necessary consequences of its choice." *Clark* v. *Martinez*, 543 U.S. 371, 380 (2005). "If one of [two readings] would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Id.* at 380-381. Indeed, the rule of lenity applies in civil cases *because* of potential prejudice to future criminal defendants. *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004). These principles require a narrow reading of Section 1369(b)(1) today to avoid prejudicing criminal and civil defendants tomorrow.

The agencies' reliance (at 49) on *Harrison* is misplaced. There, this Court held that Congress's 1977 amendments to the Clean Air Act unambiguously conferred jurisdiction over an EPA action without considering whether that holding created constitutional concerns. 446 U.S. at 586-594 & n.9. Justice Powell explained in his concurrence that the constitutional avoidance canon did not apply because "a narrow construction" was not "possible" given Congress's unambiguous amendments. *Id.* at 594-595.

Here, Congress did not expand the CWA's judicial review provisions when faced with the same call to do so. And the NAM's interpretation of Section 1369(b)(1) is certainly "plausible," which triggers the canon. *Clark*, 543 U.S. at 380-381. Further, this Court emphasized in interpreting "waters of the United States" that it is essential to read the CWA "as written" to avoid "significant constitutional" concerns.

Solid Waste Agency of N. Cook County v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173-174 (2001). A textual interpretation of Section 1369(b)(1), reinforced by the avoidance canon, compels reversal.

C. A Textual Reading Offers The Benefits Of Multilateral Review Of Agency Rulemaking.

The agencies do not deny that the NAM's reading of Section 1369(b)(1) will improve the quality of judicial decisions, increase the probability of correct dispositions, and aid this Court in its merits and case selection decisions. See NAM Br. 50-52; *du Pont*, 430 U.S. at 135 n.26 (extolling "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals").

The agencies argue (at 39) that a "Congress that placed great weight on doctrinal dialogue might have routed to district courts *all* litigation concerning EPA's administration of the CWA." The same can be said of the agencies' reading: a Congress that placed great weight on prompt review might have routed to courts of appeals *all* litigation concerning EPA's administration of the CWA. Yet Congress did not do so.

The agencies argue (at 39 n.6) that the NAM's reading would "requir[e] duplication of the identical task in the district court and in the court of appeals." But that is Congress's *default rule* for judicial review of agency action. 5 U.S.C. § 703; 28 U.S.C. § 1331. Indeed, it is the rule in *all* litigation when district courts decide questions of law or make any other determination that appellate courts review *de novo*. As a practical matter, challengers have incentives to limit the number of suits that proceed. See NAM Br. 52-54.

There are "reason[s] why Congress would have distinguished" between "the numerical aspect of effluent limitations and the geographical aspect of

those limits." U.S. Br. 39. Effluent limitations give specific notice of the restrictions that apply to a source or category of sources. The WOTUS Rule, by contrast, sets the geographic boundaries of the entire CWA. When a regulation has such profound impact on a statutory term that applies to all of the CWA's regulatory programs, Congress could rationally intend that the regulation be reviewed by district courts and sent through the regular appeals process because it is more important that judicial review be *correct* than *prompt*. The agencies would have a single panel set the law for the nation for all time, vastly increasing the probability of error.

D. The Agencies' Efficiency Arguments Are Unpersuasive.

The agencies claim (at 4) to champion the reliance interests of "the regulated community, regulators, and the public." But the regulated community, 30 States that administer much of the CWA, and many environmental organizations *oppose* the agencies' position. EPA may think *it* benefits by narrowing as much as possible the litigation it must defend; hardly anyone else sees benefits sufficient to twist Congress's scheme of review.

The agencies (at 48) say *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729 (1985), rejected a "presu[mption]" of district court jurisdiction whenever Congress also grants courts of appeals jurisdiction to review agency action. That is incorrect. *Florida Power* interpreted "ambiguous" judicial review provisions governing the Nuclear Regulatory Commission and stressed that jurisdiction is "governed by the intent of Congress and not by any views we may have about sound policy." *Id.* at 737, 746. "[N]owhere" in its "lengthy exegesis of those specific statutes" did this

Court "intimate that it was ruling as a matter of general administrative procedure." *Nader* v. *EPA*, 859 F.2d 747, 754 (9th Cir. 1988). Regardless, "[t]he role of this Court is to apply the statute as it is written—even if [it] think[s] some other approach might accor[d] with good policy." *Burrage* v. *United States*, 134 S. Ct. 881, 892 (2014).

CONCLUSION

The judgment should be reversed and the case remanded with instructions to dismiss for lack of jurisdiction.

Respectfully submitted.

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