No. 16-299

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,

Petitioner,

v.

DEPARTMENT OF DEFENSE, et al.

Respondents.

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

BRIEF OF RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL AND NATIONAL WILDLIFE FEDERATION SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Whether the Court of Appeals has original jurisdiction under 33 U.S.C. §1369(b)(1) over a petition for review challenging a regulation that defines the scope of the term "waters of the United States" in the Clean Water Act.

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BRIEF OF RESPONDENTS

Respondents Natural Resources Defense Council (NRDC) and National Wildlife Federation (NWF) agree with the judgment below and the result urged by the federal respondents. The simplest resolution of this matter is to recognize that if a Clean Water Act rule enacted by the Administrator has the effect of approving effluent or other limitations on regulated parties under 33 U.S.C. §1311, then challenges to such a rule must be brought in the courts of appeals under 33 U.S.C. §1369(b)(1)(E). The Clean Water Rule at issue here qualifies: In enacting the Rule, the Administrator approved effluent limitations and other limitations on dischargers by specifying where the limitation in section 1311(a)—prohibiting *any* discharges except as in compliance with the Act—shall apply. *See Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054 (June 29, 2015). Accordingly, challenges to the Clean Water Rule must be brought in the courts of appeals, and this Court should affirm.

This result follows directly from section 1369 and this Court's precedents, which have analyzed the practical "effect[s] of [the agency's] action" rather than attaching a formalistic label to the relevant rule. *See Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196-97 (1980) (per curiam); *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 136 (1977); *see also NRDC v. EPA*, 673 F.2d 400, 405 (D.C. Cir. 1982) (Ginsburg, J.) (explaining that section 1369 should be given a "practical rather than a cramped construction"). Because these points are elucidated in the decision below and similar positions are likely to be addressed at length in the government's briefing,

however, we try not to repeat such arguments in detail here.

Instead, this brief addresses a key flaw in petitioner's attempt to obscure the applicability of section 1369(b)(1) by describing the Clean Water Rule as devoid of "limitations." That framing of the Rule raises justiciability concerns, as it calls into question petitioner's standing to challenge the Rule in its separate district court action under the Administrative Procedure Act. If, as petitioner says, the Rule "does not establish any regulatory requirements," "imposes no enforceable duty" on its members, and is "not a 'limitation' in any ordinary sense of the word," Pet. Br. 28-29 (quoting, in part, 80 Fed. Reg. 37,054, 37,102), then petitioner has no (1) standing to bring (2) a ripe challenge to (3) final agency action under the APA. As we will explain, if petitioner's district court challenge to the Rule were not justiciable, then petitioner would also lack standing to maintain its petition for certiorari. That means, in turn, that this Court cannot accept petitioner's premise about the effects of the Clean Water Rule and still have its own jurisdiction to grant petitioner the judgment it seeks.

Ultimately, justiciability issues pose no obstacle to the Court's review, however. The Rule has immediate effects on petitioner and other parties, as petitioner itself alleged in its district court action. Petitioner told the district court that it has standing to challenge the Rule on behalf of its members because "the Rule *requires* members of the Plaintiffs either to alter their activities to *avoid discharges* … or to *obtain permits* when previously they would not have had to." *See* S.D. Tex. No. 15-cv-165, Dkt. 1

(Complaint filed July 2, 2015) ("Tex. Compl.") at 14, ¶38 (emphasis added). Likewise, the only injury petitioner seeks to redress through vacatur of the Rule is the Rule's imposition of these *limitations* on what petitioner's members can do with respect to water bodies the Rule identifies as "waters of the United States." *See id.*

An honest examination of the Clean Water Rule's impacts shows that it is an agency action approving limitations on regulated parties—indeed, that is the *whole reason* petitioner wants to challenge it. Petitioner obscures that reality only by failing to concretize—at least in this proceeding—the injuries it believes the Rule causes. Discussing these issues helps clear away the confusion created by petitioner's brief. And once that is done, the application of section 1369(b)(1) to this case is straightforward.

STATEMENT OF THE CASE

I. The Clean Water Act

Congress enacted the Clean Water Act in 1972 to restore and protect the "chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). The Act applies a suite of pollution-control and cleanup measures to "navigable waters," which Congress defined as "the waters of the United States." *Id.* §1362(7). Congress recognized that these protections would not achieve the Act's goals if applied only to navigable-in-fact and interstate waters. Congress thus defined "navigable waters" broadly; the Senate Conference Report stated that the conferees intended "navigable waters" to be given "the broadest possible constitutional interpretation." S. Conf. Rep. No. 92-1236, at 144 (1972).

The Act's core protection against water pollution limits "the discharge of any pollutant by any person" by prohibiting such discharges "[e]xcept as in compliance with this section and section 1312, 1316, 1317, 1328, 1342, and 1344 of this title." 33 U.S.C. §1311(a). Congress applied this protection to "waters of the United States" by defining "discharge of a pollutant" to include "any addition of any pollutant to navigable waters." *Id.* §1362(12). This is the engine that drives the Act. For example, section 1311(a) prohibits many discharges into waters of the United States absent a National pollutant discharge elimination system (NPDES) permit under section 1342. And an NPDES permit in turn must incorporate limitations that appear throughout the Clean Water Act and EPA regulations regarding effluents, toxic pollutants, water quality standards, industry-specific control technologies, and the like. *See, e.g.*, 40 C.F.R. pt. 122, subpart C; 40 C.F.R. §122.44 (requiring in particular that NPDES permits contain applicable effluent limitations). Thus, many limitations, including effluent limitations, are applied to parties only through the limitation in section 1311(a) and the NPDES permitting process.

EPA issued rules in 1973 covering a wide range of waters as "waters of the United States," including many that were not navigable-in-fact. 38 Fed. Reg. 13,528, 13,529 (May 22, 1973). By 1982, both EPA and the Army Corps of Engineers had issued regulations defining "waters of the United States," and these remained largely unchanged until the agencies adopted the Clean Water Rule in 2015. Those previous regulations covered navigable-in-fact waters, interstate waters, the territorial seas,

impoundments of waters of the United States, tributaries, wetlands adjacent to waters of the United States, and all other waters "the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce." 40 C.F.R. §122.3 (1981), 45 Fed. Reg. 33,290, 33,424 (May 19, 1980); *see also* 33 C.F.R. §323.2 (1983), 47 Fed. Reg. 31,794, 31,810 (July 22, 1982).

In 1985, this Court endorsed a broad reading of the phrase "waters of the United States," unanimously upholding the Corps' application of the Act to adjacent wetlands. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 139 (1985). The Court observed that excluding wetlands from the definition of "waters of the United States" would not do justice to "the realities of the problem of water pollution that the Clean Water Act was intended to combat." *Id.* at 132.

In the early 2000s, this Court rendered two additional decisions considering the extent of the Clean Water Act. In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, the Court ruled that the agencies' "Migratory Bird Rule," which interpreted the agencies' regulations to protect waters used by migratory birds, was not authorized under the Act when applied to "an abandoned sand and gravel pit." 531 U.S. 159, 162, 164, 174 (2001). In *Rapanos v. United States*, the Court remanded for further review the Corps' application of the Act to four wetlands lying "near ditches or man-made drains that eventually empty into traditional navigable waters." 547 U.S. 715, 729, 757 (2006). *Rapanos* produced no majority opinion: A four-Justice plurality proposed

one test for determining whether a water body is a "water of the United States," *id.* at 742; Justice Kennedy, concurring in the judgment, proposed another, *id.* at 779; and four dissenting Justices would have left the agencies' definition in place, but would at a minimum have upheld protection for waters satisfying either the plurality's or Justice Kennedy's test, *id.* at 810 (Stevens, J., dissenting).

Although *SWANCC* and *Rapanos* did not invalidate any agency regulation, they raised questions about the proper scope of the Act and those regulations. Subsequently, the agencies retreated from enforcing the regulations as written. They implemented informal policies—not compelled by this Court's decisions—that made it difficult to apply the Act's protections to certain waters that should have been covered. Numerous parties urged the agencies to revise their regulations and provide clarity. *See* 80 Fed. Reg. at 37,056-57; *see also Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (noting that the agencies could have avoided the unfortunate effects of the Court's splintered opinion had they developed regulations defining "an outer bound" to their authority).

II. The Clean Water Rule

Accordingly, in 2011, the agencies initiated a rulemaking process to amend their regulations. The agencies identified Justice Kennedy's opinion in *Rapanos*, which concluded that the Act protects wetlands that have a "significant nexus" to waters traditionally considered navigable, *id.* at 759, 779, 787 (Kennedy, J., concurring in the judgment), as the "key" to their interpretation of the Act. *See* 80 Fed.

Reg. at 37,060. The Rule provides that "[w]aters are 'waters of the United States' if they, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas." *Id.*

In support of the rulemaking, EPA's Office of Research and Development prepared a report (the Science Report) that synthesized the published, peer-reviewed scientific literature discussing the physical, chemical, and biological connectivity between various kinds of streams, wetlands, and other waters, and downstream water bodies. EPA-HQ-OW-2011-0880-20859.[1] The Science Report provides the scientific foundation for much of the final rule. *See* 80 Fed. Reg. at 37,057, 37,065.

The agencies proposed a rule on April 21, 2014, *see* 79 Fed. Reg. 22,188, and received over a million public comments. EPA-HQ-OW-2011-0880-20872 (Response to Comments). They ultimately issued the final Clean Water Rule on June 29, 2015. It divides waters into three groups: (1) waters that are categorically "waters of the United States"; (2) waters

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[1] The filing of the joint appendix was deferred in the case below (6th Cir. No. 15-3751, Dkt. 99-1), and briefing was stayed before the appendix was compiled. The record documents for the Rule are housed on the government's "regulations.gov" website, and a document can be found there by searching for EPA-HQ-OW-2011-0880 and adding a numeric suffix (e.g., "EPA-HQ-OW-2011-0880-**20859**"). The record documents cited here use that numbering system.

that are considered "waters of the United States" upon a case-by-case showing of their significant nexus to traditionally covered waters, and (3) waters that are categorically excluded from federal protection. 80 Fed. Reg. at 37,057. Because the Act limits what can be done with respect to "waters of the United States," including by requiring those who make discharges into such waters to obtain a permit, *see* 33 U.S.C. §§1311(a), 1342, 1362(7), 1362(12), the definition of "waters of the United States" functions as a limitation on dischargers. It also governs the issuance of NPDES permits from regulators by identifying the water bodies as to which permits must be sought.

III. Challenges to the Rule

Section 509(b)(1) of the Clean Water Act, 33 U.S.C. §1369(b)(1), provides that challenges to certain actions of the EPA Administrator must be made in circuit court within 120 days of the relevant action. The specified actions include those taken "(E) in approving or promulgating any effluent limitation or other limitation" under enumerated sections of the Act, and "(F) in issuing or denying any permit under section 1342." 33 U.S.C. §1369(b)(1).

Over 100 parties sued to challenge various aspects of the Rule. Although the petitioner here is an exception, most parties filed challenges in both district court and circuit court. Challengers sued in the District of Arizona, the Northern District of California, the District of the District of Columbia, the Northern District of Florida, the Northern and Southern Districts of Georgia, the District of Minnesota, the District of North Dakota, the

Southern District of Ohio, the Northern District of Oklahoma, the Southern District of Texas, the Western District of Washington, and the Northern District of West Virginia.[2] The government moved to consolidate these district court cases, but the Judicial Panel on Multidistrict Litigation denied the request. *See In re Clean Water Rule*, 140 F. Supp. 3d 1340, 1341, MDL No. 2663 (Oct. 13, 2015). The circuit court petitions, meanwhile, were promptly consolidated in the U.S. Court of Appeals for the Sixth Circuit. MCP No. 135, Dkt. 3 (July 28, 2015).

Petitioner National Association of Manufacturers (NAM) filed a district court action with other parties in Galveston, Texas. *See* Tex. Compl. at 1. But while its co-parties also brought actions in the court of appeals, petitioner did not. Instead, it intervened defensively in the Sixth Circuit to support dismissal of the circuit court actions in favor of district court review. *See* 6th Cir. No. 15-3820, Dkt. 6. While petitioner's district court action challenging the Rule made substantial standing-related allegations describing the effect of the Rule on its members,

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[2] D. Ariz. No. 15-cv-1752; N.D. Cal. No. 15-cv-3927; D.D.C. No. 15-cv-1324; N.D. Fla. No. 15-cv-579; N.D. Ga. No. 15-cv-2488; S.D. Ga. No. 15-cv-79; D. Minn. No. 15-cv-3058; D.N.D. No. 15-cv-59; S.D. Ohio No. 15-cv-2467; N.D. Okla. Nos. 15-cv-386 & 15-cv-381; S.D. Texas Nos. 15-cv-162, 15-cv-165, 15-cv-266, 15-cv-322; W.D. Wash. No. 15-cv-1342; N.D. W.Va. No. 15-cv-110.

petitioner made no similar effort in the court of appeals.[3]

Respondents NRDC and NWF filed narrow challenges to the Rule in both district court (D.D.C.) and circuit court (the Second and D.C. Circuits respectively). NRDC and NWF challenged certain aspects of the Rule as failing to protect waters that the groups' members use and enjoy. NRDC and NWF also intervened in various challenges, including the Sixth Circuit proceedings, to defend against claims that the Rule protects *too many* waters. *See* 6th Cir. No. 15-3751, Dkt. 23-2. Such claims would undermine federal safeguards for waters on which NRDC and NWF members rely for drinking water supply; for swimming, fishing, and other recreation; and for business purposes.

On February 22, 2016, the Sixth Circuit denied motions to dismiss for lack of subject matter jurisdiction that had been filed by various parties in the consolidated proceedings. Although there was no

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[3] Petitioner did file a declaration in the Sixth Circuit regarding its standing, but that appears to have been an accident. The declaration was appended to the brief of various petitioners in that court, but NAM was not a petitioner in the Sixth Circuit and did not join that brief. *See* 6th Cir. No. 15-3751, Dkt. 129-1, 129-2; *see also id.* Dkt. 129-2 at ECF page 45-46 (Declaration of Ross Evan Eisenberg) at ¶7 (declaring that NAM's members "have altered their behavior in response to the Final Rule"). To the extent this apparently mistaken filing appended to the brief of *other* parties is relevant, it confirms NAM's continued endorsement of the standing allegations it made in the district court.

majority opinion, two judges held that jurisdiction for challenges to the Rule lay in the circuit court under 33 U.S.C. §1369(b)(1)(F). En banc review was denied. This Court then granted certiorari.

SUMMARY OF THE ARGUMENT

Challenges to the Clean Water Rule belong in the courts of appeals. Section 509 of the Act provides that "any interested person" may petition the courts of appeals for "[r]eview of the Administrator's action … (E) in approving or promulgating any effluent limitation or other limitation under section 1311" or "(F) in issuing or denying any permit under section 1342." 33 U.S.C. §1369(b)(1). This Court's previous interpretations of section 1369(b)(1) look to the practical effects of agency action to determine whether the section's provisions apply. *See, e.g.*, *Crown Simpson*, 445 U.S. at 196 (holding that section 1369(b) covers EPA decisions with "the precise effect" of causing an NPDES permit to be denied, even if the action is not itself a permit denial). The Clean Water Rule is subject to review in the court of appeals under either subsection (E) or (F), but the simplest path to affirmance is the former. The Rule approves effluent and other limitations on dischargers like petitioner's members because it specifies that the fundamental prohibition of section 1311(a) applies to their discharges into certain waters.

Rather than acknowledge that the Clean Water Rule imposes such limitations, petitioner argues that the Rule has no direct effects on regulated entities at all. As we explain below, the Court could not accept that premise and grant petitioner relief, because the premise suggests that petitioner's case is not

justiciable. And in any event, the premise is not true, as petitioner itself has admitted in the district court action it seeks to protect here.

This case arises in a peculiar posture. Petitioner ultimately hopes to invalidate the Clean Water Rule, but here asks that petitions seeking to invalidate the Rule be dismissed—apparently frustrating its own primary objective. To the extent petitioner has any interest in the judgment it seeks, it is because it believes it can challenge the Rule in district court, and that a determination that the court of appeals erred in taking jurisdiction will allow it to shop this case to its favored forum in the Southern District of Texas at Galveston. *See* Tex. Compl. at 1.

But the arguments petitioner has chosen to press in its opening brief undermine the Court's ability to decide the question presented. In a rare turn for a party challenging administrative action, petitioner, echoing language from the Rule's preamble, argues that the Rule "'does not establish any regulatory requirements' and 'imposes no enforceable duty' on 'the private sector.'" Pet. Br. 29 (quoting 80 Fed. Reg. at 37,054, 37,102). But if the Court were to accept that characterization of the Rule, petitioner would likely be unable to seek review of the Rule at all. Instead, it would have to contend simultaneously with an apparent absence of (1) standing, (2) ripeness, and (3) final agency action. Without a justiciable challenge to the Rule, petitioner's interest in this proceeding would evaporate, along with the Court's jurisdiction over the petition for certiorari.

Because, in this Court, petitioner seeks to have the circuit-level petitions dismissed, it has little incentive to develop allegations in support of its

standing to challenge the Rule itself, along with other requirements for a justiciable case. But the standing allegations in petitioner's district court action in Texas make clear that petitioner understands the Clean Water Rule to have the effect of approving limitations on its members' discharges into water bodies covered by the Rule's jurisdictional definition. Indeed, petitioner's core standing allegation in district court is that its members are already "*abstaining* from certain activities in certain areas of land" and "have initiated or will soon initiate the process of" obtaining "NPDES permits … in order to *comply or mitigate the risk of noncompliance with the Rule*." Tex. Compl. at 13, ¶¶34-35 (emphasis added); *see also id.* at 14, ¶38 ("[T]he Rule *requires* members of the Plaintiffs either to alter their activities to *avoid discharges* to these features or to *obtain permits* when previously they would not have had to." (emphasis added)).

Forcing petitioner to concretize its injuries in this Court thus helps to demonstrate the illogic of exempting petitioner's challenge from section 1369. As petitioner's district court complaint makes clear, the Clean Water Rule *right now* imposes section 1311(a)'s core limitation on "activities in certain areas of land" and requires NPDES permits for certain discharges into waters found on those lands. *See* Tex. Compl. at 13-14, ¶¶34-38. And that is sufficient to bring petitioner's challenge to the Rule within section 1369(b)(1)(E) and resolve this case against it.

Accordingly, despite petitioner's failure to demonstrate its case's justiciability in this Court, the Court should not dismiss the present petition, but

instead should resolve the question presented in consideration of the Rule's actual effects. Because petitioner's complaints about the Rule are justiciable and belonged in the court of appeals, this Court should affirm.

ARGUMENT

Both the text of section 1369 and this Court's previous interpretations of it compel the courts to look to the practical effects of agency action to determine whether it falls within the section's provisions. Applying that basic principle here demonstrates that the court of appeals is the appropriate court to decide challenges to the Clean Water Rule.

The statutory text provides that "any interested person" may petition the court of appeals for "[r]eview of 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, [or] (F) in issuing or denying any permit under section 1342 of this title." 33 U.S.C. §1369(b)(1). The "interested person" has 120 days to petition the court of appeals for review, unless its petition "is based solely on grounds which arose after such 120th day." *Id.* And if the party fails to go to the court of appeals for review when it was available—if "review could have been obtained under [§1369(b)](1)"—then the unreviewed action "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." *Id.* §1369(b)(2); *see also Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013) (where section 1369(b)(1) applies, it is exclusive).

Notably, this formulation is functionalist by its terms. Interested parties can seek review of "action[s]" taken "*in approving or promulgating* any effluent limitation or other limitation," or "*in issuing or denying* any permit," rather than review of "limitations" or "permits" as such. The difference may seem small but it is important. For example, the statutory text supports judicial review of actions that have the effect of approving limitations on regulated parties; the alternative formulation would support review of only "limitations" themselves.

Consistent with this textual distinction, this Court has twice endorsed a functionalist reading of this provision over a formalist one that would require courts to characterize the action itself as a "limitation" or "permit decision." First, in *E.I. du Pont*, this Court explained that the power to review individual permit decisions should necessarily encompass the power to review the basic rules that control them. It derided as "truly perverse" a "situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to §402 but would have no power of direct review of the basic regulations governing those individual actions." *E.I. du Pont*, 430 U.S. at 136. In *Crown Simpson*, this Court confronted an EPA decision with "the precise effect" of causing an NPDES permit to be denied, but that could not itself be characterized as a permit denial, because a State entity was the ultimate permitting authority. 445 U.S. at 194, 196. It held that this situation, too, was subject to judicial review under section 1369, because the Court was, again, "unwilling to read the Act as

creating such a seemingly irrational bifurcated system" of review. *Id.* at 197.

Importantly, petitioner's reading of section 1369 is not only inconsistent with the functionalist principle of these decisions, but also with the *holding* of *Crown Simpson*. Petitioner suggests that, whenever EPA does not "issue or deny" a permit, its action is not subject to review under section 1369(b)(1)(F). *See* Pet. Br. 22 ("The fact that the WOTUS Rule does not issue or deny permits should end the analysis."). But EPA *did not issue or deny a permit* in *Crown Simpson*. It is no answer to say that, by vetoing a State variance in the permit that was requested, the "precise effect" was to deny the permit. That is simply an acknowledgment that actions of the Administrator that do not themselves deny permits may fall within the textual grant of review for actions taken "in ... denying permits." And that is the point: To know what actions fall within the textual grants, the courts must consider the practical effects of those actions, instead of trying to characterize the actions themselves as "limitations," "permit denials," or the like. Accordingly, in the context of the Clean Water Rule, the question is whether the Rule's enactment has the effect of approving limitations on certain dischargers (for instance, petitioner or its members), or the effect of issuing or denying permits in certain circumstances.

That question has a particularly straightforward answer under section 1369(b)(1)(E). In enacting the Clean Water Rule, the Administrator approved a limitation on dischargers under section 1311(a) itself. That is, in fact, the principal effect of the Rule. The most fundamental limitation in the Clean Water Act

is section 1311's edict that, "[e]xcept as in compliance" with other enumerated sections of the Act, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. §1311(a). And the statute defines "discharge of a pollutant" to mean a discharge into "navigable waters," or "waters of the United States." *Id.* §§1362(7), (12). Accordingly, the "precise effect" of the Clean Water Rule is to impose a "limitation under section 1311" on those who discharge into waters deemed jurisdictional by the Rule.[4] Additionally, the Clean Water Rule (in the statute's words) "approves" other limitations under section 1311, including effluent limitations, on discharging entities. That is because, by specifying where section 1311(a)'s limitation applies, the Rule also imposes on dischargers many further limitations, including "effluent limitations," that apply to them only through this central prohibition and its animating role in the Act. *See supra* p.4 (explaining that, in general, the Act's limitations are made applicable to dischargers through the permitting process and section 1311(a)).

This becomes all the more clear when a central premise of petitioner's argument is rejected, as it must be. To make it seem that the Clean Water Rule neither imposes limitations ("effluent" or "other"-wise) nor directly affects permitting decisions,

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[4] The Rule itself can also be considered the promulgation of a limitation under section 1311, because it limits where dischargers can dispose of pollutants without complying with the Act under section 1311(a).

petitioner argues that the Rule has no direct effects on regulated entities at all. As explained below, the Court could not accept that premise and grant petitioner relief, because the premise suggests that petitioner's case in this Court is not justiciable. And in any event, the premise is not true, as petitioner itself has admitted in the district court action it seeks to protect here.

I. Petitioner's Premises, If Accepted, Would Suggest That It Lacks Any Justiciable Challenge To The Clean Water Rule.

In a typical administrative law action, a challenger will take pains to demonstrate that the agency action at issue directly causes the party to suffer concrete injuries that a court can redress by adjudicating the party's case. That is because the challenging party must overcome three closely related statutory and constitutional limitations on the courts' power to review an administrative decision. In particular, the party must assure the court that it has Article III standing, *see, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), that its challenge has ripened into a sufficiently concrete controversy, *see, e.g.*, *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003), and that it challenges "final agency action" rather than an interim step in the agency's activities that does not yet settle the party's legal rights. *See* 5 U.S.C. §704; *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

Because of petitioner's unusual posture in this case, these issues require some excavation. Petitioner and its supporting respondents want to challenge the

Clean Water Rule, but are asking this Court to dismiss all challenges to the Clean Water Rule that have been brought in the courts of appeals. Typically, only *defendants* want an action dismissed, but justiciability concerns like standing and ripeness impose requirements that *plaintiffs* must meet before a court can take jurisdiction over their suits. *See, e.g.*, *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011) ("To state a case or controversy under Article III, a *plaintiff* must establish standing." (emphasis added)). It thus may seem unnatural to ask petitioner, which seeks dismissal here, to satisfy the Court about its concrete stake in the underlying controversy.

Petitioner must still comply with these requirements, however, because it is appealing the judgment below, and so must establish a "personal stake" in seeing that judgment overturned. *See, e.g.*, *Camreta v. Green*, 563 U.S. 692, 702 (2011).[5] Here, that personal stake depends on there being a valid district court action petitioner could use to bring its challenge in lieu of the court of appeals procedure. Otherwise, this Court's decision to dismiss challenges to the Rule could hardly provide petitioner with any redress.

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[5] This would have been a much simpler matter if petitioner had proceeded in the normal course—*i.e.,* appealing an adverse judgment or order in its own district court case. Ordinarily, a party is not allowed to appeal a judgment as "adverse" simply because of its precedential effect in another case. *See, e.g.*, *Parr v. United States*, 351 U.S. 513, 516 (1956) ("Only one injured by the judgment sought to be reviewed can appeal.").

Nonetheless, petitioner's temporary focus on winning dismissal of the Clean Water Rule challenges that were brought in the court of appeals has led it to make allegations incompatible with these justiciability requirements. It is easier for petitioner to cast section 1369 as inapplicable to the Clean Water Rule if it minimizes the Rule's concrete effects on, and "direct and appreciable legal consequences" for, petitioner's members. *See U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1814 (2016) (quoting *Bennett*, 520 U.S. at 178). Thus, in a particularly arresting passage for any seasoned administrative lawyer, petitioner trumpets certain passages from the Rule's preamble and the opinion below stating that "the Rule … 'does not establish any regulatory requirements,'" "'imposes no enforceable duty' on 'the private sector,'" "'is definitional only,'" and "'does not *directly* impose any restriction or limitation.'" Pet. 29 (quoting 80 Fed. Reg. at 37,054, 37,102 and Pet. App. 15a (McKeague, J.)). These allegations form the entire support for petitioner's primary submission that the Clean Water Rule "is not a 'limitation' in any ordinary sense of the word," Pet. Br. 28, and so falls outside the scope of section 1369. *See also* Pet. Br. 17 (claiming the Rule "limits no action"). But these statements would be just as much at home in a brief arguing that petitioner lacks a justiciable challenge to the Rule at all.[6]

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[6] Petitioner also suggests that the Rule is not a limitation because "by itself" it requires no action, and instead imposes

In truth, such allegations are not credible; petitioner contradicts them in its district court action, as it must. Nor are they true: The Rule had obvious impacts immediately upon taking effect—that is one reason the Rule is now *stayed*. Moreover, even if petitioner's allegations were true, this Court could not accept them as a premise for providing petitioner with the judgment it seeks. That is because, if the Court were to accept them here, that would poison petitioner's claim in district court, leaving petitioner with no interest in obtaining the reversal it seeks here, and dissolving this Court's certiorari jurisdiction.

This is so with respect to all three justiciability requirements described above. First, with regard to standing, this Court's familiar test requires that "three conditions [be] satisfied: The petitioner must

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obligations only "in conjunction with other, separate statutory concepts"—such as whether the activity also involves a "point source." *See* Pet. Br. 6-7, 9. But that argument proves too much: The same could be said even of limitations that are, strictly speaking, "effluent limitations." For example, an effluent limitation also applies only to "point sources." *See, e.g.*, 40 C.F.R. §401.10 (explaining that "[p]oint sources" are required to comply with applicable regulations prescribing effluent limitation guidelines). Put otherwise, creating obligations on parties "only when multiple additional statutory terms … apply," Pet. Br. 17, is something the Clean Water Rule has *in common* with effluent limitations. Indeed, as explained above, many "effluent limitations" and "other limitations" also limit parties only through the mechanism of section 1311(a) and the permitting process—just as the Clean Water Rule does. *See supra* p.4.

show that he has 'suffered an injury in fact' that is caused by 'the conduct complained of' and that 'will be redressed by a favorable decision.'" *Camreta*, 563 U.S. at 701 (quoting *Lujan*, 504 U.S. at 560-61). Here, petitioner and its members seek to challenge the Clean Water Rule as regulated parties. But if the Rule does not require them to do or refrain from doing anything—if "it limits no action" and is not for them "a 'limitation' in any ordinary sense of the word," Pet. Br. 17, 28—then they have apparently suffered no harm traceable to the Rule, and can obtain no redress from its vacatur.

Likewise, taking petitioner's claims at face value would cast doubt on whether it is "aggrieved" by "final agency action." 5 U.S.C. §§702, 704. As this Court recently explained in the context of jurisdictional determinations under the Clean Water Act, this means the action complained of "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Hawkes*, 136 S. Ct. at 1813 (quoting *Bennett*, 520 U.S. at 177-78). It seems unlikely that "rights or obligations have been determined" if, as petitioner claims, the Rule "'imposes no enforceable duty' on 'the private sector.'" Pet. Br. 29 (quoting 80 Fed. Reg. at 37,054, 37,102).

Third, petitioner's litigating position in this Court would, if accepted, raise ripeness problems, even though ripeness is typically no obstacle in a case like this. Substantive rules that "require[] the plaintiff to adjust his conduct immediately" are ripe for review "at once." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). But in this Court, petitioner appears to deny that the Clean Water Rule imposes

immediate limitations. In fact, petitioner seems to suggest that its own challenge to the Rule is unripe in language that remarkably parallels the governing standards. *Compare, e.g.*, *Gardner v. Toilet Goods Ass'n, Inc.*, 387 U.S. 167, 171 (1967) (finding challenge to color-additive regulations ripe because the regulations were "self-executing" and had "an immediate and substantial impact upon the [challengers]") *with* Pet. Br. 29 ("The Rule … 'is not self-executing.'") *and* Pet. Br. 11 (quoting the agencies' economic analysis as finding that the Rule "is not designed to 'subject' any entities of any size to any specific regulatory burden").

The justiciability trap that petitioner has set for itself would disappear if petitioner would acknowledge that the Clean Water Rule imposes immediate limitations on its members' conduct. NRDC and NWF have certainly acknowledged the Rule's effects in *their* challenges. In particular, NRDC and NWF object to some of the Rule's provisions limiting the Clean Water Act's reach, *see* 6th Cir. No. 15-3751, Dkt. 130 at 5 (Opening Br. of NRDC et al.), and thus imposing the limitations of the Act too narrowly—effectively allowing discharges that will harm water bodies NRDC's and NWF's members use and enjoy. Petitioner, meanwhile, in its district court action, seeks to challenge the Rule on the inverse ground that the Rule injures its members by applying the Act's limitations and permit requirements too broadly, and by including certain features petitioner argues should not be covered by the law. Tex. Compl. ¶¶3, 38. Neither challenge should present justiciability problems or escape section 1369.

As further explained below, petitioner's own pleadings in the district court action it favors reveal that, in enacting the Clean Water Rule, EPA *did* approve "limitation[s] under section 1311" on petitioner and its members. Most obviously, the agency applied, to the features the Rule covers as "waters of the United States," the Act's core limitation under section 1311(a), which prohibits "the discharge of any pollutant by any person" into those waters "[e]xcept as in compliance with" the Act. 33 U.S.C. §1311(a); *id.* §§1362(7), (12). Petitioner should either acknowledge these concrete effects or articulate an alternative explanation of its standing. Any reasonable explanation of the Rule's effects demonstrates the justiciability of this case and the propriety of jurisdiction in the court of appeals under section 1369(b)(1)(E).

II. Petitioner's Allegations In District Court Reveal That Its Challenge Is Covered By Section 1369.

Petitioner's allegations in the district court litigation it prefers acknowledge far more candidly the consequences of the Clean Water Rule. In plain English, petitioner's complaint is that the Rule limits what its members can do on their land, and it asks the courts to redress its injuries by lifting those limitations. At a minimum, that clearly brings the effects of the Rule within section 1369(b)(1)(E).

Here is how petitioner puts it in its district court complaint. Devoting three full pages to standing allegations, *see* Tex. Compl. at 12-14, ¶¶30-42, petitioner begins with the fundamental limitation that 33 U.S.C. §1311(a) imposes on its members—

namely, that they cannot engage in "unauthorized 'discharges'" on "land areas" that they "own" or where they "work" if these "constitute 'waters of the United States' under the Rule" and thus "are jurisdictional." Tex. Compl. at 12, ¶30; *see also id.* at 2, ¶2 ("The Clean Water Act (CWA) with limited exceptions prohibits 'discharging … any pollutant' (33 U.S.C. § 1311(a)) without a Section 402 permit for discharges covered by the National Pollution Discharge Elimination System[.]"). This limitation, the complaint then explains, is backed up by civil and criminal sanctions, Tex. Compl. at 12, ¶32, and can be enforced through citizen suits without the intervention of EPA or any other governmental authority, *id.* at 12-13, ¶33. Accordingly, petitioner says, its "[l]aw-abiding members … have incurred or will imminently incur continuing economic costs as they *alter their activities* (in particular, *by abstaining* from certain activities in certain areas of land) to accommodate the possibility that their activities will be deemed discharges." *Id.* at 13, ¶34 (emphasis added). In fact, some members "have initiated or will soon initiate the process of obtaining … NPDES permits … *to comply … with the Rule*." *Id.* at 13, ¶35. The sum of these allegations is that the Rule *itself* has limited how petitioner's members can use water bodies on their land and has required them to obtain permits they would not otherwise have sought.

One paragraph of petitioner's complaint exposes particularly clearly why this case appropriately belongs in circuit court under the Act:

> 38. The Rule purports to establish the Agencies' jurisdiction over a wide range of features (such as ephemerally flowing ditches and streams) that

> would not have been deemed jurisdictional before promulgation of the Rule under the Supreme Court's prior interpretations of the Agencies' jurisdiction. Accordingly, *the Rule requires* members of the Plaintiffs either to alter their activities *to avoid discharges* to these features *or to obtain permits* when previously they would not have had to. Vacatur of the Rule would therefore remedy each Plaintiff's members' ongoing injuries, including by relieving them of continuing expenses, preventing arbitrary enforcement of the CWA, and allowing them more fully to use and enjoy various land and water features on their land and at their places of work.

Id. at 14, ¶38 (emphasis added).

Petitioner is here because it thinks the Rule "requires" its members to limit discharges on their lands and obtain NPDES permits they did not need before. And it thinks vacatur of the Rule will redress its members' injuries by lifting the Rule's limitations, which (they allege), have "unlawfully *hinder[ed]*" and "unlawfully *inhibit[ed]* their productive use and enjoyment of land and water features on their lands and at their places of work." *Id.* ¶36 (emphasis added). A party that swore these allegations in court cannot seriously claim that the same Rule "limits no action." Pet. Br. 17.

In this way, the justiciability requirements petitioner at least attempted to meet in its district court litigation lead the jurisdictional inquiry under section 1369 much more easily to the right result. There, petitioner acknowledged that it seeks relief from the Rule's imposition of limitations on its

members, and from the permits they will need issued "to comply … with the Rule." Tex. Compl. at 13, ¶35. At a minimum, section 1369(b)(1)(E) thus directs petitioners to make an application airing their complaints to the court of appeals, where "[r]eview of the Administrator's action … in approving or promulgating any effluent limitation or other limitation under section 1311 … may be had by any interested person." 33 U.S.C. §1369(b)(1).

III. Petitioner's Rule Does Not Provide The Clarity It Promises, And Leads To Untenable Results.

In contrast to the clarity that comes from focusing on the Rule's concrete effects, petitioner's ostensibly literalist approach to section 1369 does not actually provide the certainty it says is so important for jurisdictional rules. *See* Pet. Br. 44-48; *id.* at 47-48 (urging the Court to help end duplicative filing in different courts).

First, any step that tends to restrict court of appeals jurisdiction under section 1369(b)—which is the outcome petitioner advocates—will still result in cautious attorneys filing a protective, duplicative case there, because the far greater risk comes from missing the 120-day window for exclusive review in the court of appeals. A reasonably capacious understanding of jurisdiction under section 1369(b) would tend to reduce duplicative filings, because then attorneys with some confidence that their challenge belongs in the court of appeals would forgo the simultaneous district court challenge (understanding they can always fall back on a still-timely district court action if a court later disagrees). Conversely,

because jurisdiction can always be decided *sua sponte*, even attorneys who strongly suspect they belong in district court under petitioner's narrow reading will remain bound by professional obligation to file in both venues and maintain both cases all the way to a judgment final on direct appeal through this Court, especially if they are at all confused by petitioner's preferred reading of the statute.

And confusion is easy to come by under petitioner's approach. Petitioner describes its interpretation as a "plain text" reading of the statute (Pet. Br. 44), but its State allies concede this reading is not "hyperliteral" (Respondent Ohio et al. Br. 32). For one thing, petitioner's preferred meaning depends on restricting section 1369(b)'s "other limitations" language to "effluent-like" limitations, *see* Pet. Br. 45, a neologism that does not even make grammatical sense. (The limitation *itself* is presumably not supposed to be "effluent-like," unless petitioner is advocating slippery limitations. But if it means "limitations on *things that are like* effluent" that is also unclear—because what things, exactly, are *like* effluent without *being* effluent?).

For another, petitioner's preferred meaning is transparently not a "plain text" interpretation of section 1369(b)(1)(E), because the Clean Water Rule fits comfortably within any literal reading of that section. The Rule approves a limitation under section 1311(a) on discharges into the waters specified in the Rule; its enactment was thus, quite literally, an "action ... approving ... any ... other limitation under section 1311." To escape that plain text reading, petitioner relies entirely on the dubious "no limitation" allegations discussed above, *see* Pet. Br.

28-29, before quickly fleeing from the text to various canons of construction and arguments for why Congress must have meant less than what it said when it used the expansive term "other limitation." Pet. Br. 29-31; *see also id.* at 33 (suggesting that the government's interpretation of section 1369 in another context would "shock" the statute's drafters). Requiring attorneys to guess at how narrowly Congress meant to circumscribe the broad words it picked for section 1369(b)(1)(E) will not enhance jurisdictional clarity or discourage protective filings—particularly compared to simply reading the whole clause for what it says.

Petitioner's brief also wobbles between using different verbs connecting the agency action to the relevant effluent or effluent-esque limitation: At one point, petitioner says the agency action must "impos[e]" such limitations, Pet. Br. 39; at another that it must "issue[]" them. Pet. Br. 45. Neither of those words are in the statute, *see* 33 U.S.C. §1369(b)(1)(E) (jurisdiction applies to agency actions taken "in approving or promulgating" limitations), but they might make a difference in some future case (although not necessarily this one). For example, enactment of the Clean Water Rule both "imposed" the limitation found in section 1311(a) on petitioner's members as to the specified water bodies, and also "issued" a limitation by describing where parties cannot discharge without a permit. Other rules, however, might be formalistically labeled as doing only one or the other. At the very least, smart attorneys will not forgo court of appeals filings when the relevant rule "imposes" limitations on a party, even if it arguably does not "issue" them. If the Court

is interested in eliminating duplication, it should simply reinforce the practical approach courts have long taken to section 1369, and direct parties to go to the court of appeals when the effect of the Rule that injures them appears in the statutory list.

In fact, petitioner's rule leads to a result that is not only confusing, but fundamentally incompatible with the congressional policy enacted in section 1369(b)(2). The statute sends parties who are immediately injured by the listed agency actions to the courts of appeals, and gives them 120 days to raise objections. Parties cannot sit on their hands with respect to such agency action and then raise a challenge later in an enforcement proceeding. 33 U.S.C. §1369(b)(2). Here, petitioner's district court pleading reveals that, even according to petitioner itself, EPA has already approved limitations—even "effluent" or "effluent-like limitations"—on what petitioner's members can do on their lands and work sites by enacting the Rule. As a result, in keeping with the text and policy of section 1369(b)(2), petitioner must bring its challenge to the Rule in the court of appeals.

Put otherwise, if an agency action has *already* imposed limitations on the discharges a party can make, as petitioner apparently believes is true with respect to the Clean Water Rule, it must take that dispute to the applicable court of appeals within 120 days. Any interpretation of section 1369 that suggests otherwise cannot claim to be "clear." Petitioner's challenge thus belonged in the court of appeals under at least section 1369(b)(1)(E), and this Court should affirm.

CONCLUSION

For the foregoing reasons, and others provided in the brief of the United States, this Court should affirm.

Respectfully submitted,

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