## SUPREME COURT OF THE UNITED STATES

IN THE	SUPREME	COURT	OF	THE	UNITE	O STATES
					-	
NATIONAL ASSOC	IATION C	F			)	
MANUFACTURERS,					)	
	Petition	ner,			)	
v.					) No.	16-299
DEPARTMENT OF	DEFENSE,	et al	- <b>.</b>		)	
	Responde	ents.			)	
					_	

Pages: 1 through 63

Place: Washington, D.C.

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1	IN THE SUPREME COURT OF THE UNITED STATES
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3	NATIONAL ASSOCIATION OF )
4	MANUFACTURERS, )
5	Petitioner, )
6	v. ) No. 16-299
7	DEPARTMENT OF DEFENSE, et al. )
8	Respondents. )
9	
10	Washington, D.C.
11	Wednesday, October 11, 2017
12	
13	The above-entitled matter came on for oral
14	argument before the Supreme Court of the United State
15	at 10:04 a.m.
16	
17	APPEARANCES:
18	TIMOTHY S. BISHOP, Chicago, Illinois; on behalf of
19	the Petitioner.
20	ERIC E. MURPHY, State Solicitor for Ohio, Columbus,
21	Ohio; on behalf of the Respondents Ohio, et al.,
22	In support of the Petitioner.
23	RACHEL P. KOVNER, Assistant to the Solicitor General,
24	Department of Justice, Washington, D.C.; on behal
25	of the Respondents.

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1	PROCEEDINGS
2	(10:04 a.m.)
3	CHIEF JUSTICE ROBERTS: We'll hear
4	argument first this morning in Case 16-299, the
5	National Association of Manufacturers versus
6	Department of Defense, et al.
7	Mr. Bishop.
8	ORAL ARGUMENT OF TIMOTHY S. BISHOP
9	ON BEHALF OF THE PETITIONER
10	MR. BISHOP: Mr. Chief Justice, and
11	may it please the Court:
12	The Clean Water Act provides for
13	judicial review in the courts of appeals of
14	seven categories of action by the EPA
15	Administrator, and those are defined narrowly
16	and precisely in Section 1369(b)(1) of the Act.
17	Had Congress meant the courts of
18	appeals to review all national or definitional
19	rules, it would have said so, as it did in the
20	Clean Air Act, instead of listing a handful of
21	particular EPA actions down to the statutory
22	subsection.
23	Our textual approach to subsections
24	(b)(1) and (E) (b)(1)(E) and (F) results in
25	a comparatively clear jurisdictional rule that

- 1 would eliminate many duplicative filings and
- 2 years of litigation over where to litigate.
- 3 JUSTICE GINSBURG: What would happen
- 4 if two questions were presented? The first
- 5 involves whether the water in question fits
- 6 within "waters of the United States"; that's a
- 7 preliminary question. And then there's a
- 8 challenge to a grant -- a grant or denial of a
- 9 permit.
- 10 If you had those two combined, where
- 11 do they go?
- MR. BISHOP: Well, I -- I think,
- Justice Ginsburg, that the -- the Court has
- 14 never answered that question. In footnote 14
- of the DuPont, which involved 1304(b)
- 16 quidelines, this Court suggested that when you
- 17 have a challenge that includes actions covered
- by (E) or (F) and that are not covered by (E)
- or (F), that it may be possible to exercise
- 20 ancillary jurisdiction over the question not --
- 21 not covered. Of course, the (b)(2) preclusion
- 22 should not apply in that case.
- But, you know, in any event, the
- challenge here is to the waters rule by itself.
- 25 CHIEF JUSTICE ROBERTS: One of the

- things, putting -- I mean, obviously, your main
- 2 emphasis is, of course, on the statutory
- language, but one of the consequences that your
- 4 opponent points out is that if you're correct
- 5 and these actions are brought in the district
- 6 court, each of the district courts will have to
- 7 review the entire administrative record, and
- 8 presumably, you could have dozens of the
- 9 district courts engaged in that same activity,
- 10 and then it would have to be done all over
- 11 again when you get to the court of appeals.
- MR. BISHOP: Well, I mean, I think
- their argument is that that is inefficient,
- 14 right, but they're --
- 15 CHIEF JUSTICE ROBERTS: Well, you'll
- 16 agree that it's inefficient, won't you?
- 17 MR. BISHOP: Well, their -- their rule
- 18 -- I mean, their rule has its own efficiency
- 19 problem, which is that it's not clear. And
- 20 what you end up with under a rule that isn't
- 21 clear is extremely inefficient.
- 22 And, you know, here we have -- this
- 23 rule was promulgated in June of 2015. We
- 24 have --
- 25 CHIEF JUSTICE ROBERTS: But what about

- my efficiency concern? 1 2 MR. BISHOP: Well, I -- I think -- the point I'm trying to make there, Chief Justice, 3 4 is just that there are inefficiencies on both 5 side. This Court said in Sackett that 6 efficiency does not conquer all. We would like to litigate these issues in the district court 7 because we think that going through the 8 9 district courts and the courts of appeals will produce more accurate decision-making, will tee 10 the case up better for this Court to review. 11 12 CHIEF JUSTICE ROBERTS: But there're -- I -- I take it that means they're right, 13 14 that that's -- that that's what this would entail. 15 MR BISHOP: Well, I can --16 17 CHIEF JUSTICE ROBERTS: And the 18 district court, to do the correct job, would 19 have to look at the whole record, and as many 2.0 district courts as these actions have been
- MR. BISHOP: That's true. And this

21

22

24 has been filed in 11 district courts. I would

brought would have to do that. And then the

court of appeals would do it again all over.

say as a practical matter that what happens in

- 1 these cases, once the initial skirmishing is
- over, is that parties on different sides tend
- 3 to get together and dismiss certain cases and
- 4 then join the others.
- 5 JUSTICE SOTOMAYOR: I'm sorry -- why
- 6 -- why --
- 7 MR. BISHOP: In the water transfer
- 8 case, that is what happened, for example.
- 9 JUSTICE SOTOMAYOR: What would be the
- 10 inducement for that if we were to say this
- 11 needs to go to district court? Why would
- 12 parties run to the courthouse? They would
- 13 either wait for an enforcement proceeding or
- wait for a denial of a permit or just wait, and
- 15 the waiting would then result in the
- inefficiencies that the Chief Justice just
- 17 pointed to.
- 18 Even worse, because we would have a
- 19 rule being constantly challenged and never
- 20 truly finalized.
- MR. BISHOP: Justice Sotomayor,
- there's -- there's no chance that anyone will
- 23 wait to challenge a rule like this. There were
- 24 dozens of suits in the district court and
- 25 protective petitions filed within days of this

- rule coming out. This is a rule of critical 1 2 importance to --3 JUSTICE SOTOMAYOR: Let me ask you something. Is -- I don't think there's any res 4 5 judicata against the government, or is there? 6 Would a -- would a -- or collateral estoppel, it wouldn't be res judicata, could there be 7 collateral estoppel? 8 9 MR. BISHOP: I don't believe any of the conditions for estoppel for either issue, 10 11 preclusion or claim preclusion, would apply 12 here. If the government lost these cases, I assume at that point that it could -- it could 13 14 back away before it litigated the rest. And --15 JUSTICE GINSBURG: Can -- can you 16 explain to me, I know you have a textual 17 argument, but is there some sense in having 18 individual permit grant or denial go to the 19 court of appeals and a question of the 2.0 definition here of "waters of the United States" that goes to the district court? 21 22 would think it would be just the other way
- MR. BISHOP: Well, can -- can I say

23

around.

25 two things about that, Justice Ginsburg? The

- 1 first is that Congress itself put the 1342 NPDS
- 2 permits into B(1), so those are reviewed in the
- 3 court of appeals. It did not do that with 1344
- 4 fill permits. So Congress itself had no
- 5 problem whatsoever with the idea that permit --
- 6 permits could be challenged in different
- 7 courts, even though exactly the same WOTUS
- 8 decision would be made in both of those types
- 9 of permit.
- 10 The second -- the second thing is that
- 11 this idea there is bifurcation here is, is
- 12 false.
- In fact, WOTUS decisions are litigated
- in the district court. They are litigated in
- 15 the district court when the rule is challenged,
- under our approach here, but they're also
- 17 litigated in the district court when a
- 18 particularized decision is made.
- 19 Riverside Bayview, SWANCC, Rapanos,
- 20 Carabel, Sackett, Hawkes, all of this Court's
- 21 cases addressing this question have come up
- 22 through the district courts. And these arise
- 23 in enforcement proceedings, in -- out of
- 24 compliance orders, or out of permits.
- 25 By the time that a party seeks an NPDS

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1 permit, it knows very well whether or not it
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- 2 has "waters of the United States" on its
- 3 property.
- 4 And if you think about your Miccosukee
- 5 case or the LA River case, I think it is clear
- 6 why. If you are building a huge pump as in
- 7 Miccosukee or if you have a constructive part
- 8 of the LA River, as in that case, you've
- 9 already had to get the fill permit before you
- 10 ever get to the NPDS proceeding.
- 11 As a practical matter nobody
- 12 challenges a WOTUS determination in a 1342
- permit proceeding. No one is ever going to go
- 14 through the incredible expense of that permit
- 15 without first having determined where the
- agency is or through one of these more formal
- 17 proceedings, like a J.D. at issue in Hawk,
- 18 which was reviewed, the J.D., as you said, in
- 19 Hawk is reviewed in the District -- no one is
- 20 going to do that unless they know whether they
- 21 have WOTUS.
- JUSTICE KAGAN: Mr. Bishop, could I
- 23 step back just for a bit? I mean, I understand
- 24 that your basic argument is the list is the
- list and what's on the list controls.

- 1 MR. BISHOP: Right.
- 2 JUSTICE KAGAN: But if I said to you
- 3 what was Congress's theory behind the list, do
- 4 you think Congress had one?
- 5 MR. BISHOP: To be honest, I do not --
- 6 I cannot explain that and I have never heard
- 7 anyone explain that to me. I mean, if you look
- 8 at -- if you look at the list, (b) -- (b) (1) (B)
- 9 references a provision that was never enacted,
- 10 that doesn't exist. (A) puts into the courts
- of appeals promulgation of any standard or
- performance under Section 1316, but (E) puts in
- any approval or promulgation of a limitation
- 14 under 1316.
- And I mean to me this, and this was a
- 16 great surprise to me, there is an article that
- 17 we cite in our brief, Mead and Fromherz, that
- 18 just goes through a lot of different
- 19 jurisdictional provisions that Congress comes
- 20 up with and explains that a lot of them are
- just not very carefully thought out. But what
- 22 I would say --
- JUSTICE KAGAN: So your basic view is,
- look, you should just resign yourself to
- 25 thinking of this as having no particular

1 rationale. Congress said what it said. Nobody

- 2 can figure out what the reasons are that
- 3 Congress included those things and not other
- 4 things. It's all a themeless pudding and
- 5 that's just what it is?
- 6 MR. BISHOP: And I think when you have
- 7 that sort of --
- 8 JUSTICE KAGAN: Is that -- is that the
- 9 idea?
- 10 MR. BISHOP: Yes. I think, you know,
- if someone can come up with an explanation of
- this that makes sense, I'm very happy to hear
- 13 it. I have yet to hear one.
- JUSTICE SOTOMAYOR: So, should we make
- 15 --
- 16 MR. BISHOP: And that's why you stick
- 17 to text of it --
- 18 JUSTICE SOTOMAYOR: Should we make
- 19 sense of it? Meaning, the government's
- 20 position at least with respect to (E) is very
- 21 simple. Once you define navigable waters you
- 22 say where an effluent limitation applies or
- 23 doesn't.
- 24 And so that's an effluent limitation.
- 25 It's attractive, simple. Certainly no more

- 1 complex than your position in terms of its
- 2 consequences. So --
- 3 MR. BISHOP: Well, I would disagree
- 4 with that, Justice Sotomayor. It's -- it --
- 5 what it does is it eats up the entire (b) (1)
- 6 statute, where there's -- and, Justice Kagan,
- 7 these are not -- these are not careful
- 8 provisions, I mean, I will give you that, but
- 9 they are precise, okay, they can be applied,
- 10 they are precise down to the last subsection in
- 11 many cases.
- 12 And so if you apply the statutory
- language, you have a clean jurisdictional rule.
- 14 If you take the government's --
- 15 JUSTICE SOTOMAYOR: But it doesn't
- 16 swallow up enforcement actions. It doesn't
- 17 swallow up the Army Corps permitting. There
- are some very big areas that it doesn't swallow
- 19 up.
- 20 MR. BISHOP: It would swallow up -- I
- 21 think it would swallow up Sackett. I -- I
- 22 disagree there. The compliance order in
- 23 Sackett, which went to the district court, told
- the Sacketts not to discharge to identified
- 25 "waters of the United States" and to restore

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1 the property.
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- Now, the government says enforcement
- 3 orders don't promulgate limitations within
- 4 Subsection (E). But if -- if an order like
- 5 that, that says this is a "waters of the United
- 6 States, " do not discharge to it, please restore
- 7 it, if that's not a limitation under (E), how
- 8 can a generalized definition of WOTUS possibly
- 9 be such a limitation.
- 10 I think that there are other, you
- 11 know, there are other more complex -- I think
- 12 that's an easy one -- there are other more
- 13 complex ways in which the government -- I mean,
- 14 the government's reading essentially is because
- of the breadth of 1311(a), the government's
- 16 reading is basically that anything that affects
- 17 effluent limitations under the statute comes in
- 18 under (E). And if you think about --
- 19 JUSTICE SOTOMAYOR: Could you just
- 20 give me one moment, because you just mentioned
- 21 the limitations.
- 22 Give me your interpretation of
- 23 effluent limitation or other limitation. What
- 24 would other -- give me concrete examples of
- 25 what would be an other limitation so that the

- two terms are not redundant?
- 2 MR. BISHOP: Other limitations means
- 3 the non-effluent limitations in the four listed
- 4 provisions. (E) --
- 5 JUSTICE SOTOMAYOR: Give me an
- 6 example, concrete example.
- 7 MR. BISHOP: Let me give you four
- 8 examples. Under 1311(b), and there are many
- 9 more, this is just a sampling, so under
- 10 1311(b), EPA is directed to promulgate
- 11 treatment standards for discharges to
- 12 publicly-owned treatment works.
- 13 Under 1312, which is the water quality
- 14 standards provision, it is directed to
- 15 promulgate alternative effluent control
- 16 strategies needed to meet water quality
- 17 standards.
- 18 1316 is all about new source
- 19 performance standards, and there, among the
- various things the EPA is told that it should
- do, you can come up with operating methods for
- the source, operating methods for the source to
- 23 meet these standards.
- 24 And then under 1345, which is the
- 25 sewage sludge -- toxic sewage sludge, EPA is

- 1 told that it can promulgate management
- 2 practices. And the way these fit together, if
- 3 there's an effluent limitation, is a specific,
- 4 usually numerical, limitation on the
- 5 quantities, rates, or concentrations of
- 6 pollutants. But you can -- you can just set
- 7 those numbers, but something else that you can
- 8 do is you can say, well, what comes first?
- 9 Before this pollutant comes out of the pipe,
- 10 what can we do to reduce the effluent in there?
- 11 And -- and these four provisions list
- 12 very precisely things like operating --
- JUSTICE SOTOMAYOR: So give meaning to
- the word "limitation."
- MR. BISHOP: A limitation --
- JUSTICE SOTOMAYOR: Well, because
- you're basically buying into the government's
- 18 argument that it's anything related to --
- MR. BISHOP: Not at all.
- 20 JUSTICE SOTOMAYOR: -- the effluent
- 21 limitation.
- MR. BISHOP: Absolutely not. It is
- 23 the -- a limitation is an effluent limitation
- 24 which is defined -- defined in 36-211, and
- 25 there are limitations listed in the four

- 1 provisions, 1311, 1312, 1316, and 1345. Those
- 2 are very precise. That is not anything that
- 3 affects a -- the -- the -- an effluent
- 4 limitation. It is precise, non-effluent
- 5 limitation actions that Congress directed EPA
- 6 to take to reduce effluents.
- 7 And you don't need to go beyond those
- 8 four -- those four provisions qualify the
- 9 reference to other limitations. And what you
- don't do is look at 1311(a), which is the
- 11 overarching, foundational provision of the
- 12 statute, where if that is what defines what
- goes to the court of appeals under (E), you
- 14 basically have -- everything -- everything
- 15 comes in.
- 16 Let me just give one more example. I
- gave the example of Sackett. But it's -- you
- 18 know, 1313 is the water quality provision,
- 19 TMDLs. It tells -- it drives effluent
- 20 limitations. You set the water quality for a
- 21 segment of water, and once you've set that, it
- 22 drives the effluent limitations that can be
- granted for point sources there.
- 24 That -- it is inconceivable that that
- doesn't fall under the government's view of

- 1 things that affect effluent limitations. But
- 2 the -- the government has twice persuaded
- 3 courts of appeals that 1313 lies outside (E)
- 4 using textual grounds.
- 5 What the government's position does is
- 6 to make a horrible mess of this statute. And
- 7 that mess can only be fixed in one way. And
- 8 that's by looking at the precise language that
- 9 is set out in (b)(1) and in (E) and (F).
- 10 And if I can reserve the rest of my
- 11 time for rebuttal.
- 12 JUSTICE GINSBURG: May I just ask you
- 13 a question about if -- if, as seems likely, the
- 14 rule, the "waters of the United States"
- definitional rule is rescinded, is this case
- 16 moot?
- 17 MR. BISHOP: Well, I think it's just
- 18 too early to say when or if it will be
- 19 rescinded, Justice Ginsburg. The comments came
- in on September 27th. There were thousands of
- 21 them. We don't know what the timetable is. We
- don't know what the government will do.
- JUSTICE GINSBURG: But they -- the
- 24 notice -- as I understand it, notice and
- 25 comment period has concluded.

- 1 MR. BISHOP: It has concluded. There
- were thousands of comments. At some point, the
- 3 government will take action. We don't know if
- 4 it will -- the agency will rescind the rule or
- 5 not.
- It is clear that -- the -- the
- 7 environmental groups have said in the press
- 8 that they will challenge any withdrawal
- 9 immediately. And I would suggest that while
- 10 that challenge, doubtless with a stay request
- 11 attached, is pending, then the fate of the
- 12 WOTUS rule is still up in the air.
- 13 If I can reserve my time.
- 14 CHIEF JUSTICE ROBERTS: Thank you,
- 15 Counsel.
- Mr. Murphy.
- 17 ORAL ARGUMENT OF ERIC E. MURPHY
- 18 ON BEHALF OF RESPONDENTS OHIO, ET AL.,
- 19 IN SUPPORT OF THE PETITIONER
- MR. MURPHY: Mr. Chief Justice, and
- 21 may it please the Court:
- I'd like to begin with Justice Kagan's
- 23 question about the overarching theory. I think
- there is a theory that explains both subsection
- 25 (E) and the entire statute, and that theory is

- 1 Congress went through and it looked at the
- 2 specific delegations of authority in -- in each
- of these statutes. In each of these provisions
- 4 that is listed here in the seven sections,
- 5 Congress directs EPA to do a specific type of
- 6 activity. Subsection (A), standards of
- 7 performance, that's one provision in 1316. It
- 8 tells EPA promulgate these standards. And
- 9 that's true for each one of these, including
- 10 subsection (E).
- 11 And I think that gives meaning to what
- 12 effluent limitation or other limitation should
- mean because words are known by the company
- 14 they keep. Effluent limitation or other
- limitation, under the four listed sections, it
- seems to me it's talking about the types of
- 17 limitations that those four sections
- 18 specifically tell EPA: Go engage in
- 19 rule-making. Go do these types of activities.
- 20 And each one of those is a distinct type of
- 21 activity.
- JUSTICE KAGAN: In the -- in the
- government's brief, they ask -- they say, well,
- 24 what if we had just done it the following way?
- We, you know, issued a rule saying don't

- 1 discharge -- you can't discharge more than a
- 2 certain amount of a certain pollutant in these
- 3 following waters.
- 4 And just list the waters in the rule
- 5 that says how much of the pollutant you can't
- 6 discharge. And they say, under your rule, that
- 7 would come out differently, but it shouldn't
- 8 come out differently.
- 9 MR. MURPHY: I -- I think it would in
- 10 this sense: Nothing in subsection or, excuse
- me, nothing in Section 1311 directs them to do
- 12 that. That would be the agencies acting under
- their general rule-making authority, which
- 14 would be in Section 1361(a). That's the
- 15 catchall. It says, the agencies, you can issue
- 16 rules to implement the Act. That's exactly
- what the WOTUS rule is designed to accomplish.
- 18 It's under that authority. Nothing in Section
- 19 1311 either tells the EPA to do that type of
- 20 action or the WOTUS rule here.
- JUSTICE KAGAN: So let me make sure I
- 22 understand. On -- on -- on that rule, if the
- 23 -- if somebody challenged that rule, where
- 24 would it qo?
- MR. MURPHY: That would -- so I

- 1 assume, the -- the hypothetical was --
- 2 JUSTICE KAGAN: You -- you can't
- 3 discharge more than X amount of Y pollutant in
- 4 the following waters.
- 5 MR. MURPHY: Okay. So I think that
- 6 that -- it was just defining waters. That
- 7 would -- that would strike me closer to an
- 8 effluent limitation because of the actual
- 9 limitation, but I still don't think it would be
- 10 under 1311. 1311 directs the EPA to set
- 11 effluent --
- 12 JUSTICE KAGAN: Well, it's an effluent
- limitation, but you say it's not under 1311.
- 14 MR. MURPHY: Because it would be under
- 15 1361.
- 16 JUSTICE KAGAN: So then it goes to the
- 17 district court?
- 18 MR. MURPHY: Yes. Yes. It would go
- 19 to the district court, I think. In -- but the
- 20 common theme of all four of these provisions, I
- 21 think, is it tells the EPA to undertake
- 22 specific types of actions. 1311, the
- 23 technology-based limitations for existing
- sources; 1312, switches to water quality-based
- 25 standards; 1316, new source standards; and then

- 1 1345, sewage sludge. So I think that there's
- 2 precise language directing EPA to engage in
- activity, but there is nothing in the statute
- 4 that you can find that -- in any of these four
- 5 that says EPA, please promulgate a definition
- of "waters of the United States."
- 7 JUSTICE ALITO: But do you think that
- 8 the EPA has the power to issue the type of rule
- 9 that Justice Kagan described?
- 10 MR. MURPHY: They very may not have
- 11 the power. If the -- if the power exists,
- 12 however, I do not think it would be a power
- 13 under 1311. I think it would -- the power
- would flow from 1361, which is the general
- 15 authority to implement the Act.
- 16 I'd also like to turn briefly to the
- 17 Chief Justice's concerns with efficiency. We
- 18 recognize there are efficiency concerns on the
- 19 other side, but -- but as DuPont itself
- 20 recognized in Footnote 26, there's a competing
- 21 wisdom to having things percolate up with more
- 22 review. There's a greater chance of having a
- 23 correct result.
- 24 And I think this -- there's a national
- 25 rule of -- everybody would agree it's very

2.4

- 1 important. Everybody would agree that it's
- 2 important to get things right. And I also
- 3 think that -- that there are both efficiency
- 4 concerns and fairness concerns on -- on our
- 5 side.
- 6 Efficiency concerns, this Court has
- 7 repeatedly said, repeatedly said, including in
- 8 Hertz and many other cases, that we should
- 9 establish clear jurisdictional rules. This
- 10 case is an example of why that presumption
- 11 should exist. We've been litigating this
- 12 jurisdictional issue for two years now.
- 13 This is litigation that, as Hertz
- indicates, is better spent on litigating the
- merits of the rule versus litigating where to
- 16 sue. I think our rule, following the plain
- 17 text, adopts the clear rule. So for all sorts
- of future cases, it's much more likely
- 19 individuals will know where to go. Issuing and
- denying a permit, if it actually means issuing
- 21 or denying a permit, that's a --
- 22 JUSTICE GINSBURG: You have -- do you
- 23 have any reason -- Mr. Bishop was candid in
- telling us there doesn't seem to be any rhyme
- or reason to this allocation.

1	MR. MURPHY: Well, I do think that
2	the rhyme or reason I came up with is, if you
3	look at the seven actions, each of the sections
4	that is listed promulgate a standard of
5	performance. Under Section 306, a toxic
6	effluent standard; under 1317, make a
7	determination with respect to a state permit
8	program these are all specific delegations
9	of authority to the agency to engage in the
10	specific types of actions that are listed.
11	JUSTICE KAGAN: Do you do you think
12	general I mean, does your interpretation
13	depend very much on a specific understanding of
14	the word "under"? In other words, you are
15	reading this to say something like, under the
16	specific authority of Section 1311, 1312. But
17	"under" is a kind of nebulous word. It doesn't
18	say under the specific authority here. It just
19	says "under."
20	You might read "under" a little bit
21	differently. You might read "under" to say
22	something like limitations regulating actions
23	taken under Sections 1311, 1312, et cetera.
24	So why should we read "under" your
25	way rather than in some other way?

1 MR. MURPHY: Yes, because I think you -- "under" is absolutely -- the Court has said 2 it is a chameleon, but I think that when you 3 4 look at it in the entire phrase, promulgate or approve an effluent limitation or under 5 limitation under these things, I think that our 6 position relies on the entire phrase. 7 8 And when you say "promulgate a 9 limitation under," that means that you are enacting a regulation that is a restriction and 10 it is under these provisions. I just --11 12 JUSTICE KAGAN: But how about -- how about, I take the point, but how about 13 promulgating a limitation, regulating actions 14 taken under 1311, 1312? If you did it that 15 16 way, it would come out the government's way. 17 MR. MURPHY: I'm not certain that it would, because this still would not qualify as 18 19 a limitation, it seems to me. I think their 20 approach would have to be affecting a limitation that exists within, because that's 21 22 essentially what they're arguing, that by 23 defining the "waters of the United States" they are triggering -- triggering the ban on 24 discharges in 1311(a) and that's sufficient. 25

- 1 But the statute says "promulgate a
- 2 limitation." When you hear the phrase
- 3 "promulgate a limitation," the thing being
- 4 promulgated itself must be the restriction.
- 5 But they don't rely --
- 6 JUSTICE KAGAN: Yes, but, on -- on the
- 7 other hand, you, yourself, treat this rule as
- 8 very much limiting your activities. It is a
- 9 limitation on activities. It's combined with
- 10 another limitation, to -- to say you can't
- 11 discharge pollutants where you want to
- 12 discharge pollutants, but it is very much part
- and parcel of the limitation that you're
- 14 objecting to.
- MR. MURPHY: So, I think the
- limitation is 1311(a). That's why they have to
- 17 always change the verb from promulgate to
- impose or -- it certainly has a practical
- 19 effect of triggering a limitation, but so did
- 20 the compliance order in Sackett. And that
- 21 flowed out of the district court.
- I just think the practical effect
- test, if you're going to adopt that, it's going
- to be unclear in most cases whether something
- 25 has a practical effect of triggering a

- 1 limitation under 1311(a). So I think if we're
- in the Hertz world where we're thinking of
- 3 what's the clearer rule, I think we provide a
- 4 clear rule. It's going to be easily
- 5 administrable in the range of cases.
- 6 Under the government's approach,
- 7 because it's vague, I think it is going to lead
- 8 to a lot of additional litigation over where to
- 9 sue.
- I guess the final point I would make
- is we don't just have efficiency concerns on
- 12 our side. We have fairness concerns on our
- side as well because of the (b)(2) ban on
- 14 raising things that could have been raised
- under this jurisdictional provision, and later
- 16 civil or criminal enforcement proceedings.
- 17 Justice Powell when talking about a
- 18 very similar review preclusion provision
- 19 suggested that he would interpret it narrowly
- 20 if he could.
- In the Clean Air Act, it's quite
- 22 broad. It's impossible to interpret it
- 23 narrowly. But I think the presumption of
- 24 agency action review that was at issue in
- 25 Sackett would trump the government's position,

- 1 given the unfairness that could arise.
- 2 And the Court should keep in mind that
- 3 every one of the Court's cases that it has
- 4 considered the "waters of the United States"
- 5 rule, those are cases that have arisen in
- 6 enforcement proceedings or other type of
- 7 district court review.
- 8 All of those under the government's
- 9 approach could now not be allowed if the
- 10 government's approach is allowed, because if
- 11 circuit review exists, then the (b)(2)
- 12 provision kicks in and it says that you cannot
- 13 have review and later criminal or civil
- 14 enforcement proceedings.
- 15 And I think that's unfair. I think
- 16 that's -- Sackett clearly indicated that the
- 17 presumption of agency action review extends to
- 18 this Act and it expressly said that that
- 19 presumption is a repudiation of the principle
- that efficiency of agency action should trump
- 21 all. And so I think that fairness concern
- 22 equally applies here.
- I also think that there are due
- 24 process concerns as well. Thank you.
- 25 CHIEF JUSTICE ROBERTS: Thank you,

2	Ms. Kovner.
3	ORAL ARGUMENT OF RACHEL P. KOVNER
4	ON BEHALF OF RESPONDENTS
5	MS. KOVNER: Mr. Chief Justice, and
6	may it please the Court:
7	In order for a person to know what
8	they are prohibited from doing under Section
9	1311, they need to know both numerical
10	constraints that apply under that provision and
11	geographical constraints under that section.

- 12 A broad definition of "waters of the
- 13 United States" imposes broader limitations
- 14 under Section 1311. And a narrower definition
- imposes narrower limitations under Section
- 16 1311.

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Counsel.

- 17 Indeed, the challenges are here today
- 18 challenging the rule precisely because they
- 19 submit it's going to impose broader
- 20 restrictions on their conduct under Section
- 21 1311.
- 22 And any doubt about whether
- 23 geographical limitations like this ought to be
- treated as limitations under Section 1311 and
- 25 subject to Circuit Court review is resolved by

- this Court's cases interpreting this very
- 2 provision, which indicate that the provision
- 3 should be interpreted to avoid the irrational
- 4 bifurcation of similar or related decisions.
- 5 And none of the challengers here have
- 6 explained throughout the briefing or here today
- 7 why it is that Congress would want to bifurcate
- 8 the geographic aspects of limitations under
- 9 Section 1311 from the numerical aspects.
- 10 Indeed, I think as some -- some of the
- 11 questioning points out, this is the equivalent
- of a rule that does those two things together,
- that simply says a person shall not in the
- 14 following locations discharge pollutants
- 15 without a permit.
- 16 JUSTICE ALITO: Is there anything in
- 17 the definitional section that will not
- indirectly affect something that is listed in
- 19 1369(b)? And if that's the case, why didn't
- 20 Congress just include the definitional section
- in the list of covered actions?
- MS. KOVNER: Well, I think the key
- 23 here is that there are -- Section 1311, there
- 24 are actually only a handful of critical terms
- and we're defining one of those critical terms.

- 1 So it is not our submission that any term that
- 2 was defined throughout the statute is going to
- 3 affect limitations under Section 1311.
- But here where you're defining, in
- 5 effect, discharge of a pollutant, which is
- 6 defined as discharge into the "waters of the
- 7 United States, " you are expanding or
- 8 contracting the scope of the prohibition under
- 9 Section 1311.
- 10 And that's why it is the equivalent of
- 11 a rule that says on the following waters you
- 12 shall not discharge pollutants under Section
- 13 1311.
- 14 That would certainly be a limitation
- that's promulgated under Section 1311 and it's
- 16 exactly what's happened here.
- 17 JUSTICE KENNEDY: So your position is
- 18 that interpreting a definitional phrase is
- 19 necessarily a limitation?
- 20 MS. KOVNER: I think it's --
- 21 JUSTICE KENNEDY: And is that a
- 22 correct way to characterize your argument or
- 23 not -- not correct?
- 24 MS. KOVNER: I think I might
- 25 characterize it a different way. I think we

- 1 have a clear rule that's derived from just what
- 2 is a limitation. And we think a limitation,
- 3 the dictionary definition is it's a
- 4 restriction.
- 5 So the rule has to impose a
- 6 restriction under Section 1311. That -- this
- 7 rule does that. It is the equivalent of a rule
- 8 saying you shall not discharge pollutants into
- 9 the following locations except in compliance
- 10 with the terms of Section 1311.
- 11 So, I mean, there has been a lot of
- talk of clear jurisdictional rules on the other
- 13 side. I think our rule is very clear. It's
- just, does it impose a limitation under Section
- 15 1311?
- I took our friend, you know,
- 17 Petitioner to get up and say essentially he
- 18 agrees with that. You look to is it a
- 19 limitation and then you look to is it a
- 20 limitation that arises under one of the
- 21 enumerated provisions?
- 22 CHIEF JUSTICE ROBERTS: It seems -- it
- 23 seems more natural to regard the WOTUS rule,
- though, as not imposing a limitation but
- 25 telling you where whatever limitations are

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1 imposed, will apply.
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- 2 It -- it is not a specific limitation.
- 3 It kind of sets the -- the -- the canvass and
- 4 the rules kind of tell you what -- what that
- 5 means.
- 6 MS. KOVNER: I think they are the
- 7 equivalent. They're doing exactly the same
- 8 thing here. You could phrase it as it is a
- 9 definition that tells you where the limitations
- 10 apply or you could phrase it as just part of
- 11 the limitation, is it's a limitation that
- 12 applies only in certain places.
- 13 And if you look to this Court's cases
- in DuPont, and Crown Simpson, I think they tell
- 15 you two things: first, you look to whether a
- 16 functionally similar rule would have gone to
- 17 the Courts of Appeals.
- 18 And if it does, and I think, you know,
- 19 I think this -- a functionally similar rule
- 20 would go to the Court of Appeals here if it
- just included the geographic scope in the rule.
- 22 CHIEF JUSTICE ROBERTS: Well, Crown
- 23 Simpson really was a denial of a permit. I
- think you're trying to get too much out of
- 25 that.

- 1 In vetoing the state's grant of a
- permit, it denied those permits.
- MS. KOVNER: That's right. But I
- 4 think what -- the reasoning that the Court uses
- 5 is it says is this functionally similar to a
- 6 rule that would go to the court of appeals?
- 7 And here this is functionally similar to a rule
- 8 that says the effluent limitations that were
- 9 promulgating apply in the following places.
- 10 You shall not discharge in the following places
- 11 without a permit.
- 12 JUSTICE GINSBURG: What goes -- what
- goes to the district court under your reading?
- 14 MS. KOVNER: No, Your Honor. I think
- if the EPA promulgated a restriction that said,
- for instance, you shall not discharge more than
- 17 a thousand parts per million of a certain
- 18 pollutant into the following waters, that would
- 19 be a classic effluent limitation that would go
- 20 to the court of appeals.
- 21 And I'm not sure --
- JUSTICE GINSBURG: I'm asking what
- 23 goes to the district court?
- 24 MS. KOVNER: So things that go to the
- 25 district court include decisions on one

- 1 particular type of permits, fill permits. Your
- 2 Honor's opinion in NRDC lists a number of
- 3 additional actions that go -- you know, things
- 4 that aren't effluent limitations, but are other
- 5 kinds of rules. For instance, rules for
- 6 grant-making, rules for certain kinds of vessel
- 7 waste. Those aren't effluent limitations. And
- 8 those are the kinds of things that go to the
- 9 district court.
- 10 JUSTICE BREYER: Well, what is the --
- 11 CHIEF JUSTICE ROBERTS: The most -- it
- seems to me the most basic question, are these
- 13 "waters of the United States," if you are -- if
- 14 you are a farmer somewhere and you don't think
- these are "waters of the United States," and
- 16 you go to the district court, they're going to
- tell you, well, sorry, you are out of luck
- 18 because you didn't challenge this within 120
- 19 days of the promulgation.
- MS. KOVNER: Well, I think -- so, I
- 21 think if you were challenging whether a
- 22 particular land was a water of the United
- 23 States, you could go to the district court and
- 24 get a jurisdictional determination applying to
- 25 the particular facts of your case.

37

CHIEF JUSTICE ROBERTS: Yeah, yeah,

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but if you think that's -- the definition is --
 2
      is what you want to challenge, not whether the
 3
      definition applies to your land.
 4
 5
               MS. KOVNER: It's -- it's just like,
 6
      Your Honor, if that farmer wanted to challenge
      the -- the numerical constraints that applied,
 7
      they ought to go to the court of appeals to
 8
 9
      challenge the numerical constraints.
               Now, I do think there's the separate
10
      question that the other side raises of what if
11
12
      there is a enforcement action and you want to
      contest as a defense in an enforcement action
13
14
      the definition of "waters of the United
      States"? And I think what Harrison indicates,
15
16
      interpreting exactly the same sort of type of
17
      scheme in the Clean Air Act, is there may be --
      if there is any due process issue, if that
18
19
      farmer needs to have a venue to challenge the
2.0
      rule as a defense, that's -- that's an issue
      with enforcement of (b) -- (b)(2). That's an
21
      issue with the enforcement of the bar to raise
2.2
      in that kind of challenge.
23
24
               CHIEF JUSTICE ROBERTS: Well, I don't
      know what you mean is an issue. Does that mean
25
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- 1 he can challenge it, in an enforcement action? 2 MS. KOVNER: It means that if there's any due process problem, the appropriate way to 3 4 address that is by a narrow interpretation of 5 (b) (2), that permits an enforcement action. 6 CHIEF JUSTICE ROBERTS: Well, what 7 else do you need to know to tell me whether there's a due process problem or not? 8 9 thinks the definition is not appropriate --MS. KOVNER: Okay. 10 CHIEF JUSTICE ROBERTS: -- under --11 under the statute. That you're enforcing it 12 against him. Does he get to challenge it or 13 14 not? MS. KOVNER: So --15 16 CHIEF JUSTICE ROBERTS: He's not a

- 17 lobbyist. He's a farmer in Kansas. And all of
- a sudden, you come in and you're telling him 18
- 19 that he can't, you know, discharge whatever
- 20 into the lake. And -- and he says, well, I
- don't think that's the right definition. And 21
- 22 you say, well, you should have come to
- Washington four years ago. 23
- 24 MS. KOVNER: So the Court has reserved
- in Harrison, in interpreting essentially the 25

same provision, whether there is a due process 1 2 issue that somebody needs to be able to bring a 3 challenge when there's an enforcement action. If there is, Your Honor, it's not a --4 limiting the definition of effluent limitation 5 6 is not going to solve that problem because there are inevitably some limitations that are 7 going to be covered by (b)(1). So if there is 8 9 a due process limitation, the way to address that has to be to say whatever those 10 limitations are that are covered by (b)(1) --11 12 JUSTICE ALITO: Well, if you will not say whether a person in that situation would be 13 able to challenge it in a permitting -- in a 14 permitting proceeding, then I take your answer 15 16 to be that the -- the position of the United 17 States is that the person cannot challenge it. 18 That's the position you would take in that 19 situation. 2.0 I'm -- I'm not sure, Your MS. KOVNER: I don't think we have taken a position 2.1 on that because the Court has reserved it. I 2.2 think the cases the Court would look to are 23 cases like Yakus and Adamo Wrecking, and I

think it might depend on the position of --

24

- JUSTICE ALITO: Well, I don't
- 2 understand how you can make the argument that
- 3 you're making today without knowing what the --
- 4 what your answer is to that question.
- 5 MS. KOVNER: I think --
- 6 JUSTICE ALITO: But you won't answer
- 7 that question.
- 8 MS. KOVNER: I think the reason, Your
- 9 Honor, is that -- I think what the Court has
- 10 expressly said about it is that to the extent
- 11 there's a due process problem, the appropriate
- way to address that, the Court said in Note 9
- of Harrison, is by narrowing the definition of
- (b)(2), by narrowing the preclusion provision.
- 15 And that's what the Court would have to do
- 16 because any limitation that's promulgated under
- 17 (b) (1) is going to raise --
- JUSTICE BREYER: So it says here that
- 19 there is a definition of effluent limitation.
- MS. KOVNER: Yes.
- JUSTICE BREYER: The definition of
- 22 effluent limitation is, "a restriction
- established by the administrator on quantities,
- 24 rates, and concentrations." Well, once you
- 25 have that in mind, it's hard to agree with you.

- 1 Because it looks as if, given the fact that we
- 2 have (A), (C), (D), and then (E), which refer
- 3 to those four sections, it would seem to do two
- 4 things: (F) says if they issue -- you know,
- 5 you don't -- you want them to issue a permit
- and they won't, to you, go ahead, you can go to
- 7 the court of appeals. A little unusual since
- 8 it's fact-based, but nonetheless.
- 9 And then the other four that I just
- 10 mentioned seem to say if there are standards,
- 11 which are like rules, and they're related to
- the specific definition I told you about or the
- equivalent because "standards of performance,"
- 14 after all, is a different set of words than
- 15 "effluent limitations." But the "other
- 16 limitations" means something like that.
- 17 And if that isn't the correct
- 18 interpretation, then what in heaven's name are
- 19 (A), (C), (D), and (F) -- or what are (A), (C),
- and (D) doing there? Because you don't need
- 21 them? Indeed, your view, which makes sense,
- 22 because maybe all rules should be reviewed in a
- court of appeals, but that isn't what it says.
- 24 And -- and I am rather stuck with
- 25 that. And you say, well, why did Congress do

- 1 it? The reason they did it is because they
- were worried about getting review of effluent
- 3 limitations, or the equivalent, as defined up
- 4 there in a court of appeals fast. And as to
- 5 the rest of it, the rest of what the EPA does,
- 6 they didn't care or at least they didn't care
- 7 here. Or at least the hearings weren't about
- 8 that. Or at least the members of Congress
- 9 weren't thinking about that. That's why
- 10 they're left out.
- 11 All right. Now, that's -- that's how
- 12 I read it. And -- and what is it that you want
- to say that will disabuse me of that reading?
- MS. KOVNER: Sure. So let me give you
- 15 first a textual response and then a response
- that goes to, I think, what Congress indicated
- 17 it was thinking.
- 18 JUSTICE BREYER: Yeah.
- 19 MS. KOVNER: So with respect to text,
- 20 I mean, it says "effluent or other" --
- JUSTICE BREYER: Oh, I know that.
- "Other" means the same --
- MS. KOVNER: Right.
- 24 JUSTICE BREYER: -- roughly speaking,
- as effluent limitations but in respect to those

things that aren't strictly labeled effluent

- 2 limitations.
- 3 MS. KOVNER: So I think -- I guess I
- 4 would have two responses to that, Your Honor.
- 5 The first is that's not how this Court has
- 6 interpreted parallel language in the Clean Air
- 7 Act. So in Harrison, Your Honor, the Court
- 8 looks at a statute that's a -- same -- the same
- 9 kind of list, a bunch of other enumerated
- 10 actions, and then a "and any other action of
- 11 the administrator" catch-all at the end. And
- the Court gives the catch-all its ordinary
- meaning. It doesn't apply the canons Your
- 14 Honor's talking about, things like ejusdem
- 15 generis.
- 16 And the second thing I would say, Your
- 17 Honor, is even if you want to apply sort of an
- 18 effluent-related label I think like Your Honor
- is suggesting, a closely related, closely
- 20 connected limitations label, this is the first
- 21 one in line because this is the limitation that
- 22 tells you exactly where the effluent
- 23 limitations apply. It's as closely connected
- 24 as you can get.
- JUSTICE SOTOMAYOR: So, Ms. Kovner --

- 1 MS. KOVNER: And then just to go to
- 2 what Congress was -- indicated it was thinking.
- I think if you look to the legislative history,
- 4 it thought it was sending most national rules
- 5 to the courts of appeals, not the district
- 6 courts --
- JUSTICE SOTOMAYOR: Are --
- 8 JUSTICE BREYER: And if it is that, if
- 9 it is that, if the -- Learned Hand once said
- 10 you have to read these things like music. And
- 11 -- the word "other limitations" certainly
- doesn't sound like a big catch-all; it sounds
- 13 like a little catch-all.
- So if that's true, your reading,
- though, why did they bother writing this other
- 16 stuff? Because after all, they would be up
- 17 there in the court of appeals anyway under what
- 18 you see as a big catch-all.
- 19 MS. KOVNER: Well, I think, Your
- 20 Honor, if you -- if Your Honor is inclined to
- 21 give it a narrow reading, we would say just
- 22 apply the principles that this Court has
- applied in other cases to construe how big that
- 24 exception is, what its scope is. And what the
- 25 Court has said is avoid the bifurcation of

- 1 closely related decisions.
- 2 And something that tells you the
- 3 geographic scope of what effluent limitations
- 4 are is just as closely related as you can get
- 5 to -- to effluent limitations. So --
- 6 JUSTICE SOTOMAYOR: So, Ms. Kovner --
- 7 JUSTICE GINSBURG: Ms. Kovner, you
- 8 mentioned the Clean Air Act. But that does
- 9 have a provision that makes rules of national
- 10 scope go to the court of appeals. That's
- 11 what's missing here.
- MS. KOVNER: Your Honor, we agree that
- this provision is narrower than the Clean Air
- 14 Act provision and that there are many rules
- 15 that are going to be promulgated that don't go
- 16 to the courts of appeals. So we're not reading
- 17 this as though it said "and any other action of
- 18 the Administrator, " like the Clean Air Act.
- 19 What we do think it says is effluent or any
- 20 other limitations under Section 1311. So if
- 21 it's imposing a limitation under Section 1311,
- that's all we're saying is what goes to the
- 23 courts of appeals.
- JUSTICE SOTOMAYOR: So, basically, you
- 25 agree with your adversary that -- that "other

- 1 limitation" means any limitation? Is there any
- 2 -- otherwise, what limitations don't exist?
- MS. KOVNER: We -- we agree that
- 4 it means just the ordinary meaning, restricted
- 5 --
- 6 JUSTICE SOTOMAYOR: Of any limitation?
- 7 MS. KOVNER: Yes. But I think we
- 8 would also say, Your Honor, that if you were to
- 9 take Justice Breyer's approach and say it has
- 10 to be an effluent-related limitation, somehow
- 11 connected to effluent limitations, we still win
- 12 because this is the kind of limitation you need
- to know in order to know where the effluent
- 14 limitations apply.
- 15 It's as closely connected as you can
- 16 get --
- 17 CHIEF JUSTICE ROBERTS: Ms. --
- 18 Justice Kagan.
- 19 JUSTICE KAGAN: Let's assume for --
- 20 for a moment that your view of any other
- 21 limitation is right, that it's quite a broad
- 22 phrase, but General Murphy, as I understood it,
- 23 made -- made a point that said, well, still, I
- 24 mean, there's this under these following
- 25 sections.

1	And suppose he's right, that in the
2	context of this whole provision, which starts
3	out about "promulgating limitations," that
4	"under" is is best taken to mean under the
5	specific authority of.
6	MS. KOVNER: Yes.
7	JUSTICE KAGAN: So if do you have
8	any argument that this rule was promulgated
9	under the authority of Section 11, or was it
10	pretty clearly promulgated under the authority
11	of Section 1361?
12	MS. KOVNER: We think it's promulgated
13	under both. Whenever EPA promulgates a rule on
14	interpreting the statute, it's implying it's
15	applying, in part, the general rule-making
16	authority provision that Mr. Murphy alludes to.
17	But it's also here relying on the
18	ambiguity that exists. It's just you know,
19	that that a statutory term is ambiguous
20	indicates that Congress was delegating to the
21	agencies some authority to resolve ambiguities
22	in the statute. Here it's relying on 1311,
23	which contains these terms that the EPA has the
24	authority to define under the statute.
25	JUSTICE KAGAN: Now, in your own brief

- in responding to some other argument in a
- 2 footnote, you say the CWA authorized the
- 3 administrator to issue the Clean Water Rule,
- 4 and then you have a citation. And it gives
- 5 1361 as the authority for that.
- And that seems, you know, pretty right
- 7 to me, that you were relying on general
- 8 rule-making authority, rather than relying on
- 9 the provision that talked about specific
- 10 effluent restrictions.
- MS. KOVNER: Well, just to be clear,
- 12 Your Honor, Section -- for everything that we
- do under Section 1311, every kind of limitation
- 14 we promulgate or approve, we are relying on
- 15 that general rule-making authority.
- 16 I think it's important that Section
- 17 1311 itself never says the EPA shall promulgate
- 18 effluent limitations. I mean, it's simply, you
- 19 know, relying on our Section 1361 rule-making
- authority to say we're the entity that gets to
- 21 define what the limitations are going to be.
- We're relying on our general rule-making
- 23 authority to give content to definitions that
- 24 the statute, you know, indicated are going to
- 25 be defined terms and are going to impose

- 1 limitations.
- 2 For example, you know, other places in
- 3 1361, they talk about best pollution control
- 4 technology as defined by the administrator.
- 5 Well, I think if we define best pollution
- 6 control technology more stringently, it's
- 7 pretty clearly going to be imposing an
- 8 additional limitation under Section 13 --
- 9 JUSTICE BREYER: Why? Because if you
- 10 say, if it's like effluent limitation, how --
- 11 you say we need an end because this is close
- 12 enough -- but it's defined as a, as I said,
- 13 quantities, rates, and concentrations of
- 14 constituents which are discharged.
- Now, how is a geographical regulation,
- 16 a geographical limitation or expansion, how is
- 17 that related to, why, that doesn't sound like a
- 18 restriction on quantities, rates, and
- 19 concentrations of discharges.
- 20 MS. KOVNER: Sure. It's a limitation
- 21 that's very closely bound up with quantities
- 22 and rates because you need to know the scope of
- 23 the definition of -- the scope of --
- 24 JUSTICE BREYER: The discharge from a
- 25 point --

- 1 MS. KOVNER: Yes.
- 2 JUSTICE BREYER: -- so a geographical
- 3 limitation.
- 4 MS. KOVNER: Yes.
- 5 JUSTICE BREYER: Is -- okay, I get it.
- 6 MS. KOVNER: So, in order to know the
- 7 scope of that obligation of the limits on rates
- 8 or points, you need to know where those
- 9 limitations apply. And it's literally
- 10 something you need to know both in order to
- 11 know why you're --
- JUSTICE BREYER: I see the point, I'll
- 13 think about it.
- 14 JUSTICE GINSBURG: May I ask you about
- the mootness problem? Isn't it so that and now
- 16 the government is poised to moot this case
- 17 anytime it wants. It has announced that it is
- 18 rescinding this rule and go back to the old
- 19 rule, and it has no disincumbent, and tomorrow
- it could say no more new "waters of the United
- 21 States" rule.
- 22 MS. KOVNER: I -- I think my friend on
- 23 the other side's description of the state of
- 24 affairs is correct in that we've completed the
- 25 notice and comment receiving phase and the

- 1 agency is now evaluating that -- those comments
- 2 that it's received.
- And it is possible that the agency
- 4 will, after that, decide, as it's proposed to
- 5 do, decide to rescind the existing rule.
- I do think it points up, Your Honor,
- 7 the sort of practical implications here. I
- 8 mean, for example, the agency received about
- 9 500,000 comments about the new proposed rule.
- 10 It received, I think, about twice as many
- 11 comments, it assembled a 350,000 page
- 12 administrative record about the old rule.
- 13 JUSTICE SOTOMAYOR: So just
- 14 realistically, is it possible this case would
- be mooted this term or is this process one that
- innately will take longer than this term?
- 17 MS. KOVNER: I don't know the answer
- 18 to that question. When -- when it became a
- 19 possibility that the rule would be rescinded,
- 20 we advised the Court and suggested it might
- 21 want to consider holding the case in abeyance
- to see what happens, but the Court elected to
- 23 proceed with the case. And we don't have any
- 24 sort of different information now aside from
- 25 that the notice and comment has concluded.

1	CHIEF JUSTICE ROBERTS: Nothing in the			
2	pending proceedings addresses the			
3	jurisdictional issue that's before us right			
4	now, does it?			
5	MS. KOVNER: The jurisdictional issue			
6	would arise again, yes, under a new so I			
7	think if I tend to agree that if the Court			
8	rescinded the rule that is at issue here, this			
9	case would become moot, but the issue would			
10	arise again in the context of the new "waters			
11	of the United States" rule.			
12	And, you know, I think what you would			
13	have, to allude to the practical consequences			
14	that Your Honor discussed earlier, as this case			
15	exemplifies, you'd have people go into dozens			
16	of district courts. Those courts would be			
17	reviewing hundreds of thousands of pages of			
18	administrative records.			
19	It would get to the courts of appeals.			
20	They would do that again with no deference to			
21	the initial district court decision.			
22	It's really inimical to what this			
23	Court indicated in Crown Simpson and in other			
24	cases was the purpose of this provision, which			
2.5	is to give clarity.			

- JUSTICE GORSUCH: Well, Counsel, under
  Hertz, we -- we prefer a clear rule.
  MS. KOVNER: Yes.
- 4 JUSTICE GORSUCH: And if that's the
- 5 thumb on the scale, I thought you had a pretty
- 6 interesting argument that, you know, it would
- 7 go to the courts of appeals and that would be
- 8 more efficient, until your interaction with the
- 9 Chief Justice and Justice Alito where you --
- 10 you indicated you wouldn't necessarily
- 11 foreclose district court actions either.
- So where does that leave us in terms
- of a clear rule?
- MS. KOVNER: Yeah, I -- the Court has
- indicated clear rules are important. We think
- 16 we have the clear rule here. You just look to
- 17 --
- JUSTICE GORSUCH: But you wouldn't --
- 19 you wouldn't -- you wouldn't stand by that rule
- 20 when pressed by -- by my colleagues.
- MS. KOVNER: Oh, I don't think so. I
- think the person who's bringing a civil suit,
- absolutely, under (b)(1), has to go to the
- 24 court of appeals.
- 25 The issue that this Court has reserved

- is, well, what if you are -- what if you're the
- 2 defendant in an enforcement action.
- JUSTICE GORSUCH: Right.
- 4 MS. KOVNER: Harrison indicates it's a
- 5 separate question and any issue that arises
- 6 would be an issue in (b)(2).
- 7 JUSTICE GORSUCH: So if we're going to
- 8 be in district court anyway, what's -- what's
- 9 the efficiency gained here by your rule?
- 10 MS. KOVNER: Well, I think, you know,
- 11 this case exemplifies when a major rule like
- this is promulgated, you have many, many people
- who want to challenge the rule.
- 14 Here, you had 15 people, you know, 15
- 15 parties walk in, and the question is are those
- 16 challenges going to be routed to a single court
- of appeals that can quickly resolve, you know,
- 18 these challenges, or are they going to be
- 19 considered in 15 different district courts or a
- dozen different district courts and then go up
- to the courts of appeals and have that 350,000
- 22 page record considered anew.
- We think it's inimical to the
- 24 objective of obtaining certainty about what the
- 25 scope of people's obligations are under Section

- 1 1311.
- JUSTICE SOTOMAYOR: I'm sorry.
- 3 Perhaps you can focus in.
- 4 MS. KOVNER: Yes.
- 5 JUSTICE SOTOMAYOR: What would be the
- 6 difference? Let's assume we say this goes to
- 7 the court of appeals and the court of appeals
- 8 says, whatever, the rule is okay.
- 9 MS. KOVNER: Yes.
- 10 JUSTICE SOTOMAYOR: Now an enforcement
- 11 action comes in and someone, some farmer says I
- 12 don't -- I shouldn't fit under this rule
- because this really can't be navigable waters.
- 14 What happens then?
- Does the Court say, well, that was
- 16 litigated or should have been litigated before,
- so we're just not going to pay attention to
- 18 this challenge?
- 19 MS. KOVNER: So I think then the
- 20 question would be, notwithstanding whatever
- 21 this Court has said about (b)(1), is there a
- 22 (b) (2) due process exception?
- 23 That question is going to be a live
- 24 question no matter what this Court decides
- about the scope of (b)(1), because there are

- 1 always going to be challenges that farmer could
- 2 bring.
- JUSTICE GORSUCH: So, in every
- 4 enforcement action, we're going to be having
- 5 district courts decide this question anyway
- 6 eventually.
- 7 MS. KOVNER: No, no, I think the next
- 8 question the Court will need to address, and it
- 9 will need to address no matter what it decides
- in this case about the scope of effluent
- 11 limitations is, is there a due process
- 12 requirement that in an enforcement proceeding
- somebody will be able to challenge something
- 14 that, you know, was promulgated through a rule.
- 15 It's going to arise on either side's -- on
- 16 either side's view of what the scope of
- 17 effluent limitations are.
- 18 JUSTICE ALITO: Could I ask you about
- 19 clause (F)? What is your textual argument
- 20 relating to that?
- 21 MS. KOVNER: Sure. So I think it -- I
- think our argument derives in large part from
- 23 what this Court said about (F) in Crown
- 24 Simpson, which is this Court indicated the
- 25 provision should be construed not simply to

- 1 sort of reach decisions that issue or deny a
- 2 permit but also decisions that are so closely
- 3 related that it would be irrational to divide
- 4 them up.
- 5 And so then I think it goes to the
- 6 point that Justice Ginsburg made and what this
- 7 Court said in DuPont, which is if the
- 8 individual -- if this decision, when in the
- 9 context of an individual proceeding would go to
- 10 the court of appeals and, you know, here, in
- 11 the context of an individual permitting
- 12 decision, a "waters of the United States"
- decision would go to the court of appeals, then
- it doesn't make sense for a categorical rule
- about that to go to the district court.
- 16 And courts of appeals sort of starting
- from Crown Simpson have adopted that approach.
- 18 And so they've said sort of the basic rules
- 19 that are sort of thresholds to whether you can
- 20 get a permit or not go to the courts of
- 21 appeals.
- JUSTICE ALITO: So the -- so the
- 23 argument would be that the definition issues or
- 24 denies a permit because it has an important
- effect on the issuance and denial of permits?

Т	MS. KOVNER: It's It's a threshold
2	for a permit to be issued that it has to be a
3	water of the United States. And if that
4	decision is made in an individual permitting
5	action, it will go to the court of appeals.
6	But I do think, Your Honor, looking at
7	that decision, if you look at the sort of
8	functionally similar or identical language the
9	Court relied on and said if it's functionally
10	similar then it should go to the court of
11	appeals, it has a lot of relevance under (E)
12	because this is the equivalent of a rule that
13	says, you know, you cannot discharge pollutants
14	on the following locations.
15	If that goes to the court of appeals,
16	then a rule that just specifies the geographic
17	piece should also go to the courts of appeals.
18	And, Your Honor, I do think it's worth
19	highlighting that the approach that we're
20	proposing of avoiding irrational bifurcation is
21	an approach this Court set out about 40 years
22	ago.
23	Since then the courts of appeals have
24	been applying it. They have a construction of
25	limitation that they are looking to, you know,

- 1 does this restrain industry?
- 2 And they've been applying this sort of
- 3 does this bifurcate decisions that are closely
- 4 related analysis. They have been doing that
- 5 for 40 years. In that time, Congress has
- 6 amended this provision, but they haven't
- 7 expressed any disapproval of that approach.
- 8 And, in fact, whenever Congress has
- 9 spoken about this provision, they've indicated
- 10 they understand that national rules are
- generally going to go to the courts of appeals.
- JUSTICE SOTOMAYOR: But we do have
- 13 confusion just in this case.
- MS. KOVNER: I think your --
- 15 JUSTICE SOTOMAYOR: The Circuit and
- 16 District Courts would. So something about our
- 17 rule is not clear.
- 18 MS. KOVNER: You're -- I think Your
- 19 Honor is correct.
- 20 JUSTICE SOTOMAYOR: So tell me what we
- 21 do to make it clear. How do we --
- MS. KOVNER: Yes.
- JUSTICE SOTOMAYOR: -- explain this to
- the courts below so that they have a clearer
- idea of what it is that's in and what's out?

1 MS. KOVNER: Yes. I think the clear

- 2 rule, Your Honor, is to say if a rule imposes
- 3 limitations under Section 1311, then it goes to
- 4 the courts of appeals.
- 5 And I think if -- if the Court reaches
- 6 --
- 7 JUSTICE SOTOMAYOR: That has to do
- 8 with whether it imposes a limitation on any of
- 9 the words of 1311.
- 10 MS. KOVNER: I -- I think --
- 11 JUSTICE SOTOMAYOR: Because that's how
- 12 you limited it before.
- MS. KOVNER: Sure. So I think --
- 14 JUSTICE SOTOMAYOR: Discharge of any
- 15 pollutant in navigable waters. What other
- 16 words are at issue?
- 17 MS. KOVNER: So, for instance, courts
- of appeals have consistently treated rules that
- interpret other provisions -- other words in
- 20 1311 like "pollutant" or "point source," those
- 21 have also been going to the courts of appeals.
- JUSTICE KAGAN: And -- and,
- 23 Ms. Kovner, suppose that the -- the rule had
- 24 restricted the class of "waters of the United
- 25 States".

1	MS. KOVNER: Yes.				
2	JUSTICE KAGAN: Would that still count				
3	as a limitation under your view?				
4	MS. KOVNER: It would, Your Honor,				
5	because we don't think the right baseline is				
6	what was the pre-existing rule. We think you				
7	look at the rule by itself. The easiest way to				
8	see that I think is an analogy to numerical				
9	limits. So, if the rule is, initially, you can				
10	only discharge 16,000 parts per million of a				
11	chemical, and the rule is changed so now it's				
12	you can discharge 18,000, it's a more lenient				
13	limitation, but you would still say that's an				
14	effluent limitation that goes to the courts of				
15	appeals.				
16	If there are no further questions.				
17	CHIEF JUSTICE ROBERTS: Thank you,				
18	Counsel.				
19	Two minutes, Mr. Bishop.				
20	REBUTTAL ARGUMENT OF TIMOTHY S. BISHOP				
21	ON BEHALF OF THE PETITIONER				
22	MR. BISHOP: So the government's just				
23	conceded that it's been pushing this functional				
24	argument, functional effects argument, for the				
25	last 40 years, which is true, and some courts				

- 1 have accepted that and not all have by any
- 2 means.
- But the result has been that, for 40
- 4 years, people have been filing duplicative
- 5 actions and then litigating about where to
- 6 litigate. This is the third case I've had like
- 7 this. My clients have had dozens of cases
- 8 where they've spent millions of dollars
- 9 litigating about where to litigate. The answer
- 10 to this is to look at the clear language of the
- 11 statute, which is the only way to get a -- a
- 12 bright-line rule here.
- 13 And just to -- part of that is the
- 14 word "under," Justice Kagan. And I -- I think
- 15 when you look at the -- although this is a
- 16 chameleon, when you look at the cases, two
- 17 clear meanings for "under" that come out. One
- is authorized by, as you mentioned. And this
- is not authorized by. It's a footnote that you
- indicated, and the government's brief concedes,
- 21 is authorized by 1361(a), not by 1311.
- 22 Another meaning is as specified in.
- 23 And that meaning is important here because
- 24 where the -- because the second clause in (E)
- 25 specifies limitations under these four

1	provisions. And those four provisions, as
2	Justice Breyer noted, list both effluent
3	limitations and other types of limitations that
4	cut back on what comes out of the pipe but are
5	not themselves effluent limitations.
6	That is a perfectly clear meaning of
7	(E) that does not reach a broad geographical
8	definition of this type. Thank you.
9	CHIEF JUSTICE ROBERTS: Thank you,
10	counsel. The case is submitted.
11	(Whereupon, at 11:02 a.m., the case
12	was submitted.)
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