

ON JUDICIAL REVIEW UNDER THE CLEAN WATER ACT IN
THE WAKE OF *DECKER V. NORTHWEST ENVIRONMENTAL
DEFENSE CENTER*: WHAT WE NOW KNOW AND WHAT WE
HAVE YET TO FIND OUT

BY

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*Judicial review under the Clean Water Act (CWA) is confusing and messy. Circuits are split on the scope of the CWA's direct judicial review provision, section 509, and any given circuit's own precedent is sometimes difficult to reconcile internally. Litigants are filing challenges to Environmental Protection Agency (EPA) decisions in the district courts and simultaneously "protectively" filing the same challenges in the courts of appeals. And defendants in citizen enforcement actions that implicate a regulatory regime are attempting to cast the litigation as direct challenges to EPA rules, time-barred under CWA section 509(b)'s strict 120-day period. Last term the United States Supreme Court had the opportunity, in *Decker v. Northwest Environmental Defense Center* (Decker), to provide guidance regarding the scope of section 509(b). While the Court addressed the "jurisdictional" issues, concluding that section 509(b) presented no bar to the Court's hearing the case, its opinion raised more questions than it answered. This Article explores the jurisdictional issues in Decker and the evolution—or perhaps more accurately described as sideways development—of the case law on section 509(b), and argues for a narrow interpretation of section 509 that stays true to the statute's text. This outcome would give effect to the precision with which Congress spoke when drafting this statutory provision, and it would avoid many significant consequences that would otherwise flow from an expansive interpretation, as evidenced by Decker itself.*

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I. INTRODUCTION

In *Decker v. Northwest Environmental Defense Center*,¹ the United States Supreme Court seemed poised to speak, after more than thirty years, on precisely what U.S. Environmental Protection Agency (EPA) actions were governed by the Clean Water Act's (CWA) strict 120-day appellate review provision,² section 509(b).³ In *Decker*, Northwest Environmental Defense Center (NEDC) brought a CWA section 505 citizen suit against state forestry officials and logging companies, seeking to hold them liable for discharging pollutants from logging roads into navigable waters of the United States without permits required by the CWA's National Pollutant Discharge Elimination System (NPDES).⁴ In response,

¹ (*Decker*) 133 S. Ct. 1326 (2013).

² *Id.* at 1334 (raising the issue of 120-day exclusive jurisdiction but stating only that exclusive jurisdiction was not applicable).

³ Federal Water Pollution Control Act, 33 U.S.C. § 1369(b) (2006).

⁴ *Decker*, 133 S. Ct. at 1333.

defendants claimed that EPA's Silvicultural Rule⁵ and the Phase I Stormwater Rule⁶ exempted them from having to obtain NPDES permits for such discharges.⁷ Very late in the litigation, they also argued that NEDC was attempting to invalidate these rules,⁸ which they claimed was improper because EPA rules that could have been challenged pursuant to section 509(b)(1) cannot "be subject to judicial review in any civil or criminal proceeding for enforcement."⁹

Though the question of CWA section 509(b) jurisdiction did not come into play until years into the litigation,¹⁰ and was only a very minor part of the Ninth Circuit's ruling below,¹¹ the issue played a much larger role in the briefing before the Supreme Court.¹² At the end of the day, the Supreme Court rejected the petitioners' arguments that CWA section 509(b) barred the citizen suit from proceeding.¹³ It did not, however, provide any guidance on which of the innumerable actions taken by EPA under the CWA on a regular basis are covered by section 509(b)(1) and must be directly challenged within 120 days in a federal court of appeals, if at all.¹⁴ Rather, the Court ruled that NEDC had properly brought suit under CWA section 505¹⁵ to enforce the statute and regulations; NEDC had not, according to the Court, sought to invalidate regulations.¹⁶ Accordingly, section 509(b) was no bar.¹⁷

Though the Court reached the correct result in this case, the opinion leaves many questions unanswered. This Article explores those questions, and argues for a narrow interpretation of section 509(b)(1) that stays true to the statute's text and, as a result, avoids many of the difficulties presented by the petitioners' arguments in *Decker*.¹⁸

⁵ 40 C.F.R. § 122.27 (2013).

⁶ *Id.* § 122.26(b)(14).

⁷ Brief for Petitioners at 6–11, 15–18, 29–32, *Georgia-Pacific West, Inc. v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326 (2013) (No. 11-347), [hereinafter *Georgia-Pacific West* Brief for Petitioners]; Brief for Petitioners at 7–10, 21–31, 46–47, *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326 (2013) (No. 11-338) [hereinafter *Decker* Brief for Petitioners].

⁸ *Georgia-Pacific West* Brief for Petitioners, *supra* note 7, at 50–51; *Decker* Brief for Petitioners, *supra* note 7, at 35.

⁹ Federal Water Pollution Control Act, 33 U.S.C. § 1369(b)(2) (2006).

¹⁰ See *infra* Part III (describing the development of the jurisdictional issues in *Decker*).

¹¹ *Nw. Env'tl. Def. Ctr. v. Brown (Brown)*, 640 F.3d 1063, 1068–69 (9th Cir. 2011), *rev'd and remanded sub nom. Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326 (2013).

¹² See Petition for Writ of Certiorari at 19–24, *Decker*, 133 S. Ct. 1326 (No. 11-338) [hereinafter *Decker* Petition]; Petition for Writ of Certiorari at 29–30, *Georgia-Pacific W., Inc.*, 133 S. Ct. 1326 (No. 11-347) [hereinafter *Georgia-Pacific West* Petition]; Order Granting Petition for Writ of Certiorari at 1, *Decker*, 133 S. Ct. 22 (2012) (No. 11-388); Order Granting Petition for Writ of Certiorari at 1, *Georgia-Pacific W., Inc.*, 133 S. Ct. 23 (2012) (No. 11-347); *Georgia-Pacific West* Brief for Petitioners, *supra* note 7, at 50–58; *Decker* Brief for Petitioners, *supra* note 7, at 31–35; Brief of Respondent at 17–30, *Decker*, 133 S. Ct. 1326 (Nos. 11-338 and 11-347); Brief for the United States as Amicus Curiae Supporting Petitioners at 15–19, *Decker*, 133 S. Ct. 1326 (Nos. 11-338 and 11-347).

¹³ *Decker*, 133 S. Ct. at 1334–35.

¹⁴ *Id.*

¹⁵ See Federal Water Pollution Control Act, 33 U.S.C. § 1365 (2006) (authorizing citizen suits); see also *infra* Part II.B (describing CWA enforcement provisions).

¹⁶ *Decker*, 133 S. Ct. at 1334–35.

¹⁷ *Id.* at 1334 (holding that section 509(b) does not bar the maintenance of a citizen suit when the suit is commenced to enforce regulations, not to challenge the regulations themselves).

¹⁸ See *infra* Parts IV–VI.

First, Part II of this Article explains the statutory and regulatory framework within which CWA jurisdictional questions have arisen. It discusses the text of section 509(b)(1) and the legislative history of the provision, with a particular focus on comparing section 509(b)(1) to a similar provision under the Clean Air Act.¹⁹ Congress drafted section 509(b)(1) with precision, listing only seven specific EPA actions that must be challenged within 120 days and in the courts of appeals.²⁰ Unfortunately, the legislative history of this provision sheds little light on why Congress chose to include these seven actions—and only these seven actions—within this judicial review provision.²¹ We do know, however, that Congress did *not* draw similar judicial review provisions in other statutes quite so narrowly.²² We also know that Congress considered, and then rejected, proposals to widen section 509(b)(1)'s reach.²³

Next, this Article analyzes the jurisdictional aspects of *Decker*. Part III describes the district court and Ninth Circuit proceedings and traces the pathway the jurisdictional questions took in the case. The relevance of section 509(b) was raised for the first time in passing in EPA's amicus brief at the Ninth Circuit.²⁴ The defendants themselves did not directly raise the argument that the Ninth Circuit lacked jurisdiction in light of the limitations in section 509(b) until their joint reply brief on their petitions for rehearing, and then, only in direct response to questions on which the Ninth Circuit panel ordered supplemental briefing.²⁵ Though most practitioners would not have predicted that section 509(b) would play any role in this section 505 enforcement action, from that point forward it was a central piece of the parties' arguments.²⁶

Because of section 509(b)'s prominence in the petitions for certiorari and merits briefing, guidance from the Supreme Court about the meaning and reach of section 509(b) seemed likely.²⁷ The Court *could have held* that the Ninth Circuit's ruling did not run afoul of CWA section 509(b) because that provision was simply inapplicable by its terms.²⁸ In other words, for section 509(b)(2) to pose any limit on a court's power to interpret or review the validity of an EPA rule, the rule must have been one of the EPA actions directly reviewable exclusively in the courts of

¹⁹ See *infra* Part II.

²⁰ 33 U.S.C. § 1369(b) (2006).

²¹ See H.R. REP. NO. 92-911, at 386–87 (1972) (showing absence of explanation); *infra* Parts II.B–C.

²² See, e.g., Clean Air Act, 42 U.S.C. § 7607(b) (2006); see also *infra* Part II.D (noting that Clean Air Act judicial review provision exceeds the scope of that contemplated under the CWA).

²³ See, e.g., H.R. REP. NO. 95-830, at 112 (1977); see *infra* Parts II.C–D.

²⁴ See Brief for the United States of America as Amicus Curiae Supporting Appellees at 12, 32, *Brown*, 640 F.3d 1063 (9th Cir. 2011) (No. 07-35266). See also *infra* note 133 and accompanying text.

²⁵ See Joint Reply in Support of Petition for Panel Rehearing or Rehearing En Banc by Defendants-Appellees and Intervenors-Appellees at 1, 10, *Brown*, 640 F.3d 1063 (No. 07-35266) (arguing that section 509(b) required that a challenge to EPA's interpretation of its regulations be brought directly to the court of appeals, and thus the court was without jurisdiction to hear arguments about the proper interpretation).

²⁶ See *supra* note 12.

²⁷ *Id.*

²⁸ See, e.g., Brief of Respondent, *supra* note 12, at 23–24; Brief for Law Professors as Amici Curiae on Section 1369(b) Jurisdiction Supporting Respondent at 9–11, *Decker*, 133 S. Ct. 1326 (Nos. 11-338 and 11-347) (arguing that by the plain text of 509(b), the provision is inapplicable to the regulations at issue in the case because those regulations are not among the EPA actions listed within section 509(b)(1)).

appeals under section 509(b)(1).²⁹ As noted, however, the Supreme Court rejected the petitioners' jurisdictional challenge, but did so by concluding that section 509(b) was not implicated because NEDC was seeking to enforce a rule rather than to invalidate it.³⁰ The Court's framing of the case—as NEDC urging the Court to adopt an interpretation of the regulations to bring them into harmony with the statute rather than an “implicit declaration that the . . . regulations were invalid”³¹—raises many questions about when a citizen suit crosses the line from enforcement to invalidation of a regulation. This Article explores those questions in Part IV.

After *Decker* we are left with an inconclusive picture of the Court's views on section 509(b) because the opinion contains almost no analysis of section 509(b)'s textual reach.³² The Court has since passed on other opportunities to shed light on the scope of this important statutory provision.³³ As discussed in more detail in Part V, the United States and others sought review of an Eleventh Circuit decision regarding section 509(b).³⁴ In its petition, the United States has called this a “question of exceptional importance concerning the time and manner of judicial challenges” to certain EPA actions under the CWA.³⁵ While the Eleventh Circuit's decision is well supported by the text of the statute,³⁶ there is no denying that questions regarding section 509(b)(1)'s reach are important and need to be resolved by the High Court. The Court has for the time being, however, decided not to provide such resolve.³⁷ Because these pressing matters are likely to continue to be litigated divisively in the lower courts, Part V of this Article discusses at length the significant body of case law under section 509(b) that has given rise to the current state of confusing affairs and attempts to make sense of it.

²⁹ See, e.g., Brief of Respondent, *supra* note 12, at 23–24 (arguing that for section 509 to apply, one of the several enumerated EPA actions in subsection 509(b)(1) must be met).

³⁰ *Decker*, 133 S. Ct at 1326, 1334–35 (2013).

³¹ *Id.* at 1335 (quoting *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 573 (2007)).

³² *Id.* at 1334–35.

³³ *EPA v. Friends of the Everglades*, No. 13-10, 2013 WL 3283503 (U.S. Oct. 15, 2013), denying petition for writ of certiorari; *U.S. Sugar Corp. v. Friends of the Everglades*, No. 13-6, 2013 WL 3283513 (2013), denying petition for writ of certiorari; *S. Fla. Water Management District v. Friends of the Everglades*, No. 13-23, 2013 WL 3341202 (2013), denying petition for writ of certiorari.

³⁴ See *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1286–89 (11th Cir. 2012); see also *supra* note 33. The court in *Friends of the Everglades* found that it lacked subject matter jurisdiction to grant review over an EPA rule that provided neither an effluent limitation nor the issuance of a permit under sections 509(b)(1)(E) and 509(b)(1)(F), the only portions of section 509 that were argued to grant the court jurisdiction.

³⁵ Petition for a Writ of Certiorari at 9, *Friends of the Everglades*, 699 F.3d 1280 (11th Cir. 2012). See also Petition for Writ of Certiorari at 8, *US Sugar Corp. v. Friends of the Everglades*, 699 F.3d 1280 (11th Cir. 2012) (calling this “a question of exceptional importance to the orderly and efficient administration of the Clean Water Act and its implementing regulations.”).

³⁶ See, e.g., Brief in Opposition on Behalf of Friends of the Everglades, Florida Wildlife Federation, Sierra Club, and Environmental Confederation of Southwest Florida at 7–10, *Friends of the Everglades*, 699 F.3d 1280 (11th Cir. 2012) (No. 13-10) (arguing that the Eleventh Circuit properly held EPA's Water Transfers Rule was not reviewable in the courts of appeals under CWA sections 509(b)(1)(E) or (F); but also arguing the Court should deny certiorari because, inter alia, in their view the question presented has little importance beyond their case). But see *infra* Parts IV–VII (arguing that the questions presented have far reaching implications).

³⁷ *EPA v. Friends of the Everglades*, No. 13-10, 2013 WL 3283503 (U.S. Oct. 15, 2013), denying petition for writ of certiorari; *U.S. Sugar Corp. v. Friends of the Everglades*, No. 13-6, 2013 WL 3283513 (2013), denying petition for writ of certiorari; *S. Fla. Water Management District v. Friends of the Everglades*, No. 13-23, 2013 WL 3341202 (2013), denying petition for writ of certiorari.

Despite the notion that section 509(b)(1) should be interpreted to apply only to those specific actions listed therein,³⁸ from the very beginning some courts seemed ready to move beyond the statute's text.³⁹ And despite the many opinions issued about section 509(b)(1) over the years, confusion in the courts persists to this day, with a sharp circuit split coming to light in the last few years regarding whether regulations governing the NPDES program fall within the scope of section 509(b)(1).⁴⁰ Part V of this Article discusses the development of the case law on section 509(b)(1), with a focus on the most litigated of the subsections—sections 509(b)(1)(E) and (F)—and discusses when and perhaps why some courts have gotten off track in their interpretations.⁴¹

Finally, Part VI of this Article attempts to synthesize the confusion in the lower courts and summarize the questions that remain unanswered regarding section 509(b)(1) in the wake of the *Decker* decision. Beyond uncertainty regarding section 509(b)(1)'s coverage of the two specific EPA actions at issue in *Decker*, we do not know, for example, whether section 509(b) reaches all EPA NPDES regulations, whether it requires direct appellate review of agency documents such as letters, and several other questions.⁴² Part VI of this Article suggests that a narrow interpretation of section 509(b)(1) would clear up much of the confusion in the courts and would alleviate many practical—even constitutional—difficulties, as discussed in Part IV, posed by an expansive reading of the provision.

II. STATUTORY AND REGULATORY BACKDROP

The purpose of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁴³ The CWA establishes an “interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife.”⁴⁴ To these ends, Congress developed both a technology-based⁴⁵ and water quality-based approach to regulating discharges of pollutants from point sources into waters of the United States.⁴⁶ And Congress provided a mechanism for citizens to enforce the requirements of the CWA against violators in

³⁸ See, e.g., *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 517 (2d Cir. 1976) (noting that “the complexity and specificity of section 509(b) in identifying what actions of EPA under the [CWA] would be reviewable in the courts of appeals suggests that not all such actions are so reviewable.”).

³⁹ See *infra* Part V.A (discussing a circuit split that developed on the issue, where the Second, Third, Fourth, Seventh, and D.C. Circuits exercised jurisdiction over effluent limitation guidelines, even though they were not listed in section 509(b)(1)).

⁴⁰ See *infra* Part V.C (discussing a circuit split that developed on the issue, where the D.C. Circuit found that section 509(b)(1)(E) applies to procedural rules governing NPDES permits and the Ninth and Eleventh Circuits came to the opposite conclusion).

⁴¹ See *infra* Part V.

⁴² See *infra* Part VI.A (discussing the questions the Court left open in *Decker* and considering how they might be resolved).

⁴³ Federal Water Pollution Control Act, 33 U.S.C. § 1251(a) (2006).

⁴⁴ *Id.* § 1251(a)(2).

⁴⁵ See *id.* § 1311(b) (imposing timetable for dischargers to meet technology-based effluent limitations).

⁴⁶ See *id.* § 1331(b)(1)(C) (imposing any more stringent limitations necessary to meet water quality standards); see also *id.* § 1313 (requiring the development and review of water quality standards and implementation plans).

the district courts,⁴⁷ as well as a mechanism for citizens to challenge certain EPA actions directly in the courts of appeals.⁴⁸

A. *The Clean Water Act's NPDES Program*

The CWA's central prohibition lies in section 301 of the statute.⁴⁹ Section 301 expressly prohibits the discharge of pollutants⁵⁰ into waterways unless such discharges comply with the terms of any applicable permits and sections 301, 302, 306, 307, 318, 402, and 404 of the CWA.⁵¹ Section 402 of the CWA establishes the statutory permitting framework for regulating industrial wastewater and stormwater discharges.⁵² The NPDES permitting scheme is the primary means by which discharges of pollutants are controlled.⁵³ NPDES permits must include conditions that will ensure compliance with the CWA.⁵⁴ At a minimum, NPDES permits must include technology-based effluent limitations,⁵⁵ any more stringent limitations necessary to meet water quality standards,⁵⁶ and monitoring and reporting requirements.⁵⁷

As part of its 1987 amendments to the CWA, Congress directly addressed point source discharges of stormwater.⁵⁸ These amendments gave EPA discretion whether to require NPDES permits for stormwater from "relatively de minimus sources."⁵⁹ But Congress clearly provided that stormwater discharges "associated with industrial activity" require permits.⁶⁰ Federal regulations define stormwater as "storm water runoff, snow melt runoff, and surface runoff and drainage."⁶¹ EPA's regulation of stormwater was the underlying issue in *Decker*.⁶²

Although EPA is the primary administrator of the CWA, section 402 of the CWA authorizes EPA to delegate its authority to states to implement and

⁴⁷ *Id.* § 1365(a).

⁴⁸ *Id.* § 1369(b).

⁴⁹ *Id.* § 1311(a).

⁵⁰ "Discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). Pollutant is broadly defined to include, among other things, "solid waste . . . garbage . . . and industrial waste." *Id.* § 1362(6). A point source is "any discernible, confined and discrete conveyance." *Id.* § 1362(14). And navigable waters are broadly defined as "the waters of the United States." *Id.* § 1362(7).

⁵¹ *Id.* § 1311(a).

⁵² *Id.* § 1342(p).

⁵³ See *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) ("The primary means for enforcing [effluent limitations and water quality standards] is the NPDES.").

⁵⁴ 33 U.S.C. § 1342(a)(1)(A) (2006).

⁵⁵ *Id.*

⁵⁶ *Id.* Water quality standards establish the water quality goals for a water body. 40 C.F.R. § 131.2 (2013). They serve as the regulatory basis for the establishment of water quality-based controls over point sources, as required under section 301 and section 306 of the CWA. *Id.* Once water quality standards are established for a particular water body, any NPDES permit authorizing discharges of pollutants into that water body must ensure that the applicable water quality standard will be met at all times. 33 U.S.C. § 1311(b)(1)(C) (2006); 40 C.F.R. §§ 122.41(d), (i), 122.44(d) (2013).

⁵⁷ 33 U.S.C. §§ 1311, 1318, 1342 (2006).

⁵⁸ *Id.* § 1342(p).

⁵⁹ *Brown*, 640 F.3d 1063, 1083 (9th Cir. 2011).

⁶⁰ 33 U.S.C. § 1342(p)(3)(A) (2006).

⁶¹ 40 C.F.R. § 122.26(b)(13) (2013).

⁶² *Decker*, 133 S.Ct. 1326, 1330 (2013).

administer the CWA.⁶³ At this point, EPA has authorized most states to administer the NPDES program.⁶⁴

B. Citizen Enforcement and Judicial Review under the CWA

In section 505 of the CWA, Congress established a basic right of enforcement for citizens.⁶⁵ Section 505(a)(1) authorizes citizens to bring suit against any person, including a corporation, who is alleged to be in violation of an effluent standard or limitation under the CWA.⁶⁶ Effluent limitation is defined broadly for purposes of section 505 to include “a permit or condition thereof issued under [section 402] of this title,” and “an unlawful act under subsection (a) of [section 301] of this title.”⁶⁷ Thus, a citizen can bring suit against the holder of an NPDES permit for violating the terms of the permit, and a citizen can bring suit against any person unlawfully discharging without an NPDES permit.⁶⁸ NEDC invoked this latter category in *Decker*.⁶⁹ Under the citizen suit provision, district courts are authorized to issue injunctions to enforce the applicable effluent standards and limitations, to apply civil penalties, and to award litigation costs, including expert fees, and reasonable attorneys’ fees to prevailing or substantially prevailing parties.⁷⁰

Section 509 contains the Act’s second judicial review provision.⁷¹ This provision pertains only to actions of the Administrator⁷²—unlike section 505, which is commonly used against regulated entities.⁷³ Further, section 509 pertains only to a limited set of EPA actions,⁷⁴ the legislative history of which is discussed in detail below.⁷⁵ For this limited set of EPA actions, section 509(b)(1) provides that:

[r]eview . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such

⁶³ 33 U.S.C. § 1342(b) (2006).

⁶⁴ EPA remains the permit-issuing agency in American Samoa, District of Columbia, Guam, Idaho, Johnston Atoll, Massachusetts, Midway Island, New Hampshire, New Mexico, Northern Mariana Islands, Puerto Rico, and Wake Island. See EPA, *National Pollutant Discharge Elimination System State Program Status*, <http://cfpub.epa.gov/npdes/statestats.cfm> (last visited Nov. 23, 2013).

⁶⁵ 33 U.S.C. § 1365(a) (2006).

⁶⁶ *Id.* § 1365(a)(1).

⁶⁷ *Id.* § 1365(f).

⁶⁸ *Id.* § 1365(a)(1), (f).

⁶⁹ Section 505 also authorizes a limited category of suits against the Administrator of EPA. Section 505(a)(2) authorizes suit “against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.” *Id.* § 1365(a)(2). This “failure to act” section is not to be confused with section 509(b), as discussed below, which provides for appellate court review of certain actions of the Administrator. *Id.* § 1369(b).

⁷⁰ *Id.* § 1365(a), (d).

⁷¹ *Id.* § 1369(b).

⁷² Although the statute uses the term Administrator, this Article uses the terms EPA and Administrator interchangeably.

⁷³ 33 U.S.C. § 1365(a)(1), (f) (2006).

⁷⁴ *Id.* § 1369(b)(1)(A)–(G).

⁷⁵ See *infra* text accompanying notes 81–82.

determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.⁷⁶

Importantly, section 509(b)(2) then goes on to provide:

[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.⁷⁷

Thus, section 509(b) and provisions like it in other statutes are considered rather harsh.⁷⁸ If an EPA action is on the list of enumerated actions, petitioners must sue within 120 days or forever lose their right to do so.⁷⁹

C. Congressional (In)action on Section 509

Congress enacted section 509 in 1972 as part of its sweeping reform of the Federal Water Pollution Control Act of 1948.⁸⁰ As originally enacted, section 509(b)(1) vested in the courts of appeals the authority to review six EPA Administrator actions:

- (A) in promulgating any standard of performance under section 306,
- (B) in making any determination pursuant to section 306(b)(1)(C),
- (C) in promulgating any effluent standard, prohibition, or treatment standard under section 307,
- (D) in making any determination as to a State permit program submitted under section 402(b),
- (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306, and
- (F) in issuing or denying any permit under section 402.⁸¹

The legislative history for the 1972 amendments reveals little about Congress's intent behind the CWA's judicial review provisions. One committee report notes that section 509 was needed to "establish a clear and orderly process for judicial review" of the large number of complex administrative determinations, and that section 509 "ensure[d] that administrative actions [were] reviewable, but

⁷⁶ 33 U.S.C. § 1369(b)(1) (2006).

⁷⁷ *Id.* § 1369(b)(2).

⁷⁸ See generally, Christopher D. Man, *Restoring Effective Judicial Review of Environmental Regulations in Civil and Criminal Enforcement Proceedings*, ENVTL. LAW, Sept. 1998, at 665, 686–92 (discussing how the "Judicial Review Provisions of Environmental Statutes Place A Heavy Burden on the Rights of Defendants"); see also *Chrysler Corp. v. EPA*, 600 F.2d 904, 913 (D.C. Cir. 1979) (noting that, in the context of the Clean Air Act's judicial review provision, "[t]he express preclusion of review at the enforcement stage creates a highly unusual and unnecessary [sic] harsh restriction on the right to challenge the validity of a regulation to which one is subject.").

⁷⁹ 33 U.S.C. § 1369(b)(1)(G) (2006).

⁸⁰ An Act to Amend the Federal Water Pollution Control Act, Pub. L. No. 92-500, § 509, 86 Stat. 816, 891 (1972).

⁸¹ *Id.* at 891–92. A year later, in 1973, Congress changed the word "treatment" in section 509(b)(1)(C) to "pretreatment." An Act to Amend the Federal Water Pollution Control Act, As Amended, Pub. L. No. 93-207, § 1(6), 87 Stat. 906, 906 (1973).

that the review [would] not unduly impede enforcement.”⁸² The 1972 legislative history provides no insight, however, into Congress’s choices regarding *which* EPA actions it would include in its efforts to “establish a clear and orderly process for judicial review.”⁸³

In 1977, Congress adopted another significant round of amendments to the CWA.⁸⁴ Both the House and the Senate considered amendments that would have broadened the scope of section 509.⁸⁵ The proposed bill from the Senate Committee on Environment and Public Works contained no amendments to section 509,⁸⁶ but Senators Kennedy and Javits proposed an amendment to the bill on the floor of the Senate to designate the Court of Appeals of the District of Columbia as the court with jurisdiction over qualifying EPA actions of national scope, and the local courts of appeals with jurisdiction over qualifying section 509 actions of a more regional or state-specific scope.⁸⁷ The amendment also proposed to expand section 509(b)(1) to cover EPA’s action in “promulgating any regulation issued under sections 301 or 402,” “promulgating any regulation under section 311 or any standard or regulation under section 312(b) and (c),” “in making any determination as to a State water quality standard, or promulgating a water quality standard, under section 303,” and “in issuing or denying any permit under section 402 or in objecting to any permit pursuant to section 402(d)(2).”⁸⁸ The Congressional discussion on this proposal appeared to focus only on which courts of appeal should have jurisdiction over which actions listed in section 509.⁸⁹ There does not appear to have been any discussion of the amendments to section 509(b)(1), and the entire proposal was ultimately not adopted.⁹⁰

Similarly, the House bill proposed to expand the scope of section 509(b)(1) by including, as part of the list of EPA actions subject to direct review in the courts of appeals, “the decision of the Administrator to approve a State certification program pursuant to section (b) of the new subsection 214 of the Act,” and the “Administrator’s actions in promulgating or revising regulations, providing guidelines for effluent limitations, under section 304(b) of the Act.”⁹¹ In Conference, however, House amendments to section 509(b)(1) were omitted as “unnecessary” and the provision was left unchanged.⁹²

Then in 1987, Congress added a seventh action—promulgating any individual control strategy under section 304(l)—to the list of EPA actions directly reviewable in courts of appeals under section 509(b)(1).⁹³ At the same time Congress also

⁸² H.R. REP. NO. 92-911, at 136 (1972).

⁸³ *Id.*

⁸⁴ *See generally* An Act to Amend the Federal Water Pollution Control Act to Provide for Additional Authorizations, and for other Purposes, Pub. L. No. 95-217, 91 Stat. 1566 (1977) (not amending section 509).

⁸⁵ 123 CONG. REC. S26,754 (daily ed. Aug. 4, 1977); H.R. REP. NO. 95-830, at 112 (1977) (Conf. Rep.).

⁸⁶ 123 CONG. REC. S26,758 (daily ed. Aug. 4, 1977).

⁸⁷ *Id.* at 26,754.

⁸⁸ *Id.*

⁸⁹ *Id.* at 26,754–61.

⁹⁰ *See id.* at 26,761.

⁹¹ H.R. REP. NO. 95-830, at 112 (1977) (Conf. Rep.).

⁹² *Id.*

⁹³ An Act to Amend the Federal Water Pollution Control Act to Provide for the Renewal of the Quality of the Nation’s Waters, and for Other Purposes, Pub. L. No. 100-4, § 308(b), 101 Stat. 7 (1987).

added CWA section 405 to the list of statutory provisions covered by section 509(b)(1)(E),⁹⁴ extended the amount of time to file a petition in the courts of appeals from ninety to 120 days,⁹⁵ and added an additional jurisdictional requirement that persons can bring suit in courts of appeals in districts where they transact business “directly affected by such action.”⁹⁶ Section 509(b) then provided direct review in the courts of appeals of EPA actions:

- (A) in promulgating any standard of performance under section 1316 of this title,
- (B) in making any determination pursuant to section 1316(b)(1)(C) of this title,
- (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title,
- (D) in making any determination as to a State permit program submitted under section 1342(b) of this title,
- (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title,
- (F) in issuing or denying any permit under section 1342 of this title, and
- (G) in promulgating any individual control strategy under section 1304(l) of this title⁹⁷

Congress has not amended section 509(b)(1) since 1987.⁹⁸ Thus, this remains the current version of section 509(b)(1).

D. Clean Air Act Section 307’s Far Greater Reach

CWA section 509(b)(1)’s limited list of actions subject to judicial review in the courts of appeals stands in stark contrast to the similar judicial review provision in the Clean Air Act (CAA), section 307(b).⁹⁹ Congress enacted CAA section 307 in 1970, limiting direct review of EPA’s actions to a list of actions specified in that section.¹⁰⁰ In 1977—the same year in which Congress declined to broaden the scope of CWA section 509—Congress vastly expanded the scope of CAA section 307. In the CAA, Congress added to the list of EPA actions subject to direct review by the D.C. Circuit “other nationally applicable regulations promulgated, or final action[s] taken[.]”¹⁰¹ Some have argued that Congress was focused on the national applicability aspect of section 307 to ensure that the validity of national actions

⁹⁴ *Id.* § 406(d)(3).

⁹⁵ *Id.* § 505(a)(2).

⁹⁶ *Id.* §§ 406(d)(3), 505(a)(1).

⁹⁷ Federal Water Pollution Act 33 U.S.C. § 1369(b)(1)(A)–(G) (2006).

⁹⁸ 33 U.S.C. § 1369(b)(1) was last amended in 1987 by Pub. L. No. 100-4 §§ 308(b), 406(d)(3), 505(a) (substituting “transacts business which is directly affected by such action” for “transacts such business,” “120” for “ninety,” “120th” for “ninetieth,” “1316, or 1345 of this title” for “or 1316 of this title” in cl. (E), and adding cl. (G)).

⁹⁹ 42 U.S.C. § 7607(b)(1) (2006).

¹⁰⁰ See An Act to Amend the Clean Air Act to Provide for a More Effective Program to Improve the Quality of the Nation’s Air, Pub. L. No. 91-604, § 12(a), 84 Stat. 1676, 1708 (1970) (codified as amended at 42 U.S.C. § 7607(b)(1) (2006)).

¹⁰¹ An Act To Amend the Clean Air Act, and for Other Purposes, Pub. L. No. 95-95, § 305(c)(1), 91 Stat. 685, 776 (1977) (codified as amended at 42 U.S.C. § 7607(b)(1) (2006)).

would be determined by one court with expertise in both administrative law and the CAA.¹⁰² For local or regional actions subject to review in other courts of appeals, Congress expanded the scope of section 307 to include “any other final action of the Administrator under this Act which is locally or regionally applicable.”¹⁰³

The 1977 amendments also added extremely detailed requirements for CAA rulemakings.¹⁰⁴ Within this subsection, Congress spelled out precisely what constitutes “the record for judicial review,”¹⁰⁵ and added a requirement that persons may only seek judicial review for issues that have been raised with specificity during the rulemaking process.¹⁰⁶ Congress also added section 307(e), emphasizing the wide reach of section 307(b) by providing that “[n]othing in [the CAA] shall be construed to authorize judicial review of regulations or orders of the Administrator under [the CAA], except as provided in this section.”¹⁰⁷

Finally, in 1990, Congress added the following language to CAA section 307(b): “Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).”¹⁰⁸ This specific amendment is notable, given the absence of such a provision in the CWA and litigation over this very question under the CWA.¹⁰⁹

CWA section 509, in contrast, has remained quite limited. Most notably, Congress did not include an “any other action” catch-all provision in CWA section 509(b)(1).¹¹⁰ It also did not explicitly provide for review of agency decisions such as the decision to defer action.¹¹¹ It also neither established requirements to raise issues with specificity, nor defined the record for judicial review.¹¹² Though one walks a dangerous path in attempting to draw conclusions from Congressional inaction,¹¹³ the differences between the CAA and CWA suggest that Congress

¹⁰² See, e.g., Brief for the Petitioners at 8 n.3, *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007) (No. 05-848).

¹⁰³ 91 Stat. at 776. The legislative history for the 1977 CAA amendments provides little insight as to why Congress chose to expand the scope of the CAA. The House Report noted that the amendments to the Administrator's action “in large measure” was Congress's approval of recommendations from the Administrative Conference of the United States. H.R. REP. NO. 95-294, at 324 (1977); see also Daniel P. Selmi, *Jurisdiction to Review Agency Inaction Under Federal Environmental Law*, 72 IND. L.J. 65, 103-06 (1996) (discussing the legislative history of the 1970 CAA, 1972 CWA, and 1977 CAA, and CWA amendments, and noting the lack of legislative history regarding the judicial review provisions).

¹⁰⁴ 42 U.S.C. § 7607(d) (2006).

¹⁰⁵ *Id.* § 7607(d)(7)(A).

¹⁰⁶ *Id.* § 7607(d)(7)(B).

¹⁰⁷ *Id.* § 7607(e).

¹⁰⁸ *Id.* § 7607(b)(2); An Act To Amend the Clean Air Act to Provide for Attainment and Maintenance of Health Protective National Ambient Air Quality Standards, and for Other Purposes, Pub. L. No. 101-549, § 707(h), 104 Stat. 2399, 2683-84 (1990) (codified as amended at 42 U.S.C. § 7607(b)(2) (2006)).

¹⁰⁹ See, e.g., *Pa. Dep't of Env'tl. Res. v. EPA*, 618 F.2d 991, 994-95 (3d Cir. 1980) (rejecting section 509(b)(1)(A) jurisdiction over petition challenging EPA's deferral of regulations); *Natural Res. Def. Council v. EPA*, 683 F.2d 752, 759-60 (3d Cir. 1982) (exercising CWA section 509(b)(1)(C) jurisdiction over EPA action indefinitely postponing the effective date of final amendments to regulations because the amendments had been published “in final form as a ‘final rule’”).

¹¹⁰ See 33 U.S.C. § 1369(b)(1) (2006).

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (“Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from

intended section 509(b) to apply to far fewer EPA actions and that Congress did not anticipate as many direct challenges under the CWA as it expected under the CAA. If Congress wanted to broaden CWA section 509(b) as it did with CAA section 307, it easily could have done so.

III. THE *DECKER* CASE: HOW A SECTION 505 CITIZEN SUIT BROUGHT SECTION 509 JURISDICTIONAL QUESTIONS TO THE UNITED STATES SUPREME COURT

In 2006, NEDC filed a citizen suit that—while presenting some issues of first impression, to be sure¹¹⁴—was rather simple in its legal theory: The defendants were discharging polluted sediment from point sources into waters of the United States without an NPDES permit, in violation of the statutory prohibition in CWA section 301(a).¹¹⁵ This bedrock theory of CWA liability has formed the basis of innumerable citizen enforcement actions for decades.¹¹⁶ It seemed that NEDC properly brought such an enforcement action in the district court pursuant to the CWA's citizen suit provision, section 505.¹¹⁷ Section 509(b)'s requirement for direct appellate review of certain EPA actions was, accordingly, on no one's mind.

The case was initially resolved at the district court level on a motion to dismiss.¹¹⁸ There, the court ruled that NEDC did not have a claim against the defendants because the pollution at issue was nonpoint source rather than point source pollution, and thus not covered by the CWA's NPDES program.¹¹⁹ In short, the district court agreed with the defendants' argument that the Silvicultural Rule¹²⁰ did not exempt defendants' discharges from the NPDES program.¹²¹ The district

such inaction, including the inference that the existing legislation already incorporated the offered change.") (internal quotation marks omitted).

¹¹⁴ See Brief of Respondent, *supra* note 12, at 1 ("This case presents an issue of first impression: whether the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permit requirement applies to pipes, ditches, and channels that collect polluted stormwater from active-hauling logging roads and discharge it into navigable waters.").

¹¹⁵ First Amended Complaint at 21, *Nw. Env'tl. Def. Ctr. v. Brown*, 476 F. Supp. 2d 1188 (D. Or. 2006) (No. 06-1270-KI) [hereinafter Complaint].

¹¹⁶ See Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 352–54 (1990) (discussing the predominance of CWA citizen enforcement actions); see also, Ben McIntosh, Note, *Standing Alone: The Fight to Get Citizen Suits Under the Clean Water Act Into the Courts*, 12 MO. ENVTL. L. & POL'Y REV. 171, 175 (2005) (same); Martin A. McCrory, *Standing in the Ever-Changing Stream: The Clean Water Act, Article III Standing, and Post-Compliance Adjudication*, 20 STAN. ENVTL. L.J. 73, 75–76 (2001) (same).

¹¹⁷ See Complaint, *supra* note 115, at 2 (citing CWA section 505). It is well established that citizens can bring suit against private entities for discharging without an NPDES permit, even when state or federal agencies do not believe a permit is required. See, e.g., *S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 706 (9th Cir. 2007) ("The purpose of the citizen suit provision of the CWA is to permit citizens to enforce the Clean Water Act when the responsible agencies fail or refuse to do so.") (citation omitted); *Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1011–12 (9th Cir. 2002) (explicitly rejecting the argument that citizens cannot bring a CWA enforcement case for unpermitted discharges when the state agency has determined no permit is required).

¹¹⁸ *Nw. Env'tl. Def. Ctr. v. Brown*, 476 F. Supp. 2d 1188, 1191 (D. Or. 2007).

¹¹⁹ *Id.* at 1197.

¹²⁰ The Silvicultural Rule defines what silvicultural related point sources are subject to the NPDES program. The Silvicultural Rule specifically exempts nonpoint source silvicultural activities, including "road construction and maintenance from which there is natural runoff" from the NPDES program. 40 C.F.R. § 122.27 (2007).

¹²¹ *Brown*, 476 F. Supp. 2d at 1197.

court concluded that the defendants' "road/ditch/culvert" system constituted nonpoint source pollution.¹²² NEDC appealed.¹²³

On August 17, 2010, the Ninth Circuit issued a ruling in NEDC's favor.¹²⁴ First, the Ninth Circuit reversed the district court's conclusion regarding the point source question.¹²⁵ The court concluded that it should read the Silvicultural Rule in a way that would make it consistent with the statute.¹²⁶ That is, the "Silvicultural Rule does not exempt from the definition of point source discharge . . . stormwater runoff from logging roads that is collected and channeled in a system of ditches, culverts, and conduits before being discharged into streams and rivers."¹²⁷ Second, the court addressed the defendants' arguments regarding the Phase I Stormwater Rule,¹²⁸ which the district court had not addressed.¹²⁹ The Ninth Circuit held that the Phase I Stormwater Rule also did not exempt from the NPDES program stormwater that was channelized from logging roads before being discharged into

¹²² *Id.*

¹²³ *Nw. Env'tl. Def. Ctr. v. Brown*, 617 F.3d 1176 (9th Cir. 2010), *opinion withdrawn and superseded on denial of reh'g*, 640 F.3d 1063 (9th Cir. 2011), *rev'd and remanded sub nom. Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326 (2013). Unless otherwise noted herein, all citations hereinafter to the Ninth Circuit opinion are to the superseding opinion.

¹²⁴ *Brown*, 617 F.3d at 1198.

¹²⁵ *Brown*, 640 F.3d at 1080.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ As noted above, Congress directed the EPA to require permits for stormwater discharges "associated with industrial activity." Federal Water Pollution Control Act, 33 U.S.C. § 1342(p)(2)(B) (2006). The statute does not define what discharges are associated with industrial activity, but EPA promulgated a regulation providing:

Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from . . . immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility[.]

40 C.F.R. § 122.26(b)(14) (2012). This is typically referred to as the Phase I Stormwater Rule (or by the Supreme Court in *Decker* as the Industrial Stormwater Rule). *Decker*, 133 S.Ct. at 1332. Three days before oral argument in *Decker*, EPA amended the Phase I Stormwater Rule. NPDES Program Requirements, 77 Fed. Reg. 72,974, 72,974–75 (Dec. 7, 2012). As the Supreme Court explained in *Decker*:

The amendment was the agency's response to the Court of Appeals' ruling now under review. The amended version seeks to clarify the types of facilities within Standard Industrial Classification 24 that are deemed to be engaged in industrial activity for purposes of the rule.

....

It is fair to say the purpose of the amended regulation is to bring within the NPDES permit process only those logging operations that involve the four types of activity (rock crushing, gravel washing, log sorting, and log storage facilities) that are defined as point sources by the explicit terms of the Silvicultural Rule.

Decker, 133 S.Ct. at 1332–33. Unless otherwise noted herein, this Article refers to the rule quoted above, which is prior to its December 2012 amendment.

¹²⁹ *Brown*, 640 F.3d at 1080–81.

waterways.¹³⁰ The court concluded that “[t]his collected runoff constitutes a point source discharge of stormwater ‘associated with industrial activity’ under the terms of [CWA] § 502(14) § 402(p).”¹³¹

On October 5, 2010, the defendants petitioned for rehearing and rehearing en banc.¹³² The defendants, of course, took issue with both aspects of the Ninth Circuit’s ruling.¹³³ Interestingly, the issues surrounding the court’s jurisdiction also started to creep into the case at this point for the first time in its then four-year history.¹³⁴ The timber industry defendants argued that the Ninth Circuit should grant rehearing en banc to avoid a conflict with the circuit’s earlier ruling in *Northwest Environmental Advocates v. EPA*.¹³⁵ They did not *directly* argue that the district court lacked jurisdiction, and therefore the Ninth Circuit lacked jurisdiction on appeal, to hear NEDC’s case; nor did they *directly* argue that NEDC’s case should have been brought pursuant to CWA section 509 within 120 days of the underlying rule(s)’ adoption.¹³⁶ Rather they suggested that the Ninth Circuit’s ruling had allowed “litigants to overturn agency regulations without even naming the agency as a party to the litigation,” and that NEDC was attempting to pursue a “collateral attack [on EPA’s rule] in the guise of a citizen suit.”¹³⁷

Several weeks later, the court requested supplemental briefing on its jurisdiction to hear the case.¹³⁸ Specifically, the court directed the parties to answer:

(1) Can a suit challenging EPA’s interpretation of its regulations implementing the Clean Water Act’s permitting requirements be brought under the Act’s citizen suit provision, [section 505(a)]?

(2) Must a suit challenging EPA’s decision to exempt discharges of a pollutant from the Clean Water Act’s permitting requirements be brought under the Act’s agency review provision, [section 509(b)]?¹³⁹

¹³⁰ *Id.* at 1085.

¹³¹ *Id.*

¹³² See Petition for Panel Rehearing or Rehearing En Banc by Defendants-Appellees Hampton Tree Farms, Inc., Stimson Lumber Co., Georgia-Pacific West LLC, and Swanson Group, Inc., and Intervenor-Appellees Oregon Forest Industries Council and American Forest and Paper Association, *Brown*, 640 F.3d 1063 (No. 07-35266) [hereinafter Timber Petition for Rehearing]; State Appellees’ Petition for Rehearing or Rehearing en Banc, *Brown*, 640 F.3d 1063 (No. 07-35266).

¹³³ See Timber Petition for Rehearing, *supra* note 132, at i; State Appellees’ Petition for Rehearing or Rehearing en Banc, *supra* note 132, at i.

¹³⁴ Timber Petition for Rehearing, *supra* note 132, at 12–13. Prior to this, the only reference the jurisdictional issues—that would later play such a prominent role in the case—appears to have been a passing reference in EPA’s amicus brief on the merits before the Ninth Circuit. There EPA argued briefly that NEDC cannot bring a time barred challenge to EPA’s Silvicultural Rule. See Brief for the United States of America as Amicus Curiae Supporting Appellees, *supra* note 24, at 12–13.

¹³⁵ *Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008); Joint Reply in Support of Petition for Panel Rehearing En Banc by Defendants-Appellees and Intervenor-Appellees at 12–13, *Brown*, 640 F.3d 1063 (No. 07-35266) [hereinafter Timber Reply Petition]. See also *id.* at 13 n. 5 and accompanying text (discussing *Northwest Environmental Advocate*, 537 F.3d 1006 (2008)).

¹³⁶ Timber Reply Petition, *supra* note 135, at 12 (“As in *NRDC*, Plaintiff was required to file its challenge to validity of the Phase I rule directly in the Court of Appeals under section 1369(b)(1)(F). The district court (and this Court on appeal) thus lacked jurisdiction to reject EPA’s reasoned interpretation of its own rules in this case.”).

¹³⁷ *Id.* at 12–13.

¹³⁸ Order to File a Response to the Petitions for Rehearing and Rehearing En Banc at 2, *Brown*, 640 F.3d 1063 (No. 07-35266).

The parties' final briefs on the petitions for rehearing then proceeded to address the court's questions regarding jurisdiction. NEDC argued that section 509 was irrelevant because NEDC was seeking to enforce a regulation through a section 505 citizen suit rather than challenge or invalidate the regulation.¹⁴⁰ In their joint reply brief, the state and the timber industry defendants directly argued, for the first time, that the district court lacked jurisdiction to hear the case, and therefore the Ninth Circuit lacked jurisdiction on appeal.¹⁴¹ Interestingly, EPA—who had been the first party to raise the specter of section 509 (albeit in passing) in its amicus brief on the merits—answered the court's questions by concluding that section 509 did not present a jurisdictional hurdle.¹⁴² In EPA's view, NEDC's citizen suit "could properly challenge a non-contemporaneous agency interpretation set forth for the first time in an amicus brief, such as EPA's interpretation [of the Silvicultural Rule] here."¹⁴³

On May 17, 2011, the Ninth Circuit denied the petitions for rehearing, withdrew its October 2010 opinion,¹⁴⁴ and issued a new opinion, which remained unchanged except for the court's brief discussion of the jurisdictional issues.¹⁴⁵ The court's jurisdictional analysis concluded that section 509 did not bar NEDC's suit.¹⁴⁶ But the court's decision was not based on the text of section 509(b)(1) or on any conclusions regarding when an effort to enforce a regulation morphs into an impermissible challenge to that regulation.¹⁴⁷ Rather, the Ninth Circuit concluded that NEDC's case falls within section 509(b)'s exception for grounds arising after the otherwise applicable 120-day limitations period.¹⁴⁸ As noted above, section 509(b) provides that review of the EPA actions enumerated under subsections (A) through (G) may be had after 120 days "only if such application [for review] is based solely on grounds which arose after such 120th day."¹⁴⁹ The court reasoned that EPA's interpretation of the Silvicultural Rule, announced for the first time in its amicus brief in that case, could constitute such new information to invoke the exception to the 120-day rule.¹⁵⁰ The court then went on to conclude that it had jurisdiction under section 505.¹⁵¹

This conclusion is puzzling. Even assuming that EPA's position in its amicus brief could constitute new grounds within the meaning of section 509,¹⁵² NEDC's case should have been filed directly in the court of appeals as a challenge to an

¹³⁹ *Id.* at 2.

¹⁴⁰ Plaintiff-Appellant's Opposition to the Petitions for Rehearing and Rehearing En Banc at 9, *Brown*, 640 F.3d 1063 (No. 07-35266).

¹⁴¹ See Timber Reply Petition, *supra* note 135, at 2.

¹⁴² Brief for United States Responding to the Court's Questions as Amicus Curiae at 60, *Brown*, 640 F.3d 1063 (No. 07-35266).

¹⁴³ *Id.*

¹⁴⁴ *Brown*, 640 F.3d at 1066.

¹⁴⁵ *Id.* at 1068–69.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ 33 U.S.C. § 1369(b)(1) (2006).

¹⁵⁰ *Brown*, 640 F.3d at 1069.

¹⁵¹ *Id.*

¹⁵² See Marie Kyle, *The Forest Road Case: A Stormy Approach to Judicial Review of Environmental Regulations*, 37 VT. L. REV. 437, 450–53 (2012) (arguing that the Ninth Circuit misapplied the "arising after" exception to section 509(b)(1)).

EPA action rather than as a citizen suit in the district court.¹⁵³ It simply does not follow that *section 509's* “arising after” exception gives the district court—and in turn the Ninth Circuit on appeal—jurisdiction under *section 505*.

The state and the timber industry defendants then sought review in the Supreme Court.¹⁵⁴ Both sets of defendants asked the Court to review the Ninth Circuit’s rulings on the merits, and they both sought review of the jurisdictional issues that came to light at the tail end of the Ninth Circuit proceedings.¹⁵⁵ On the latter, the state defendants’ first question presented to the Supreme Court was framed as follows:

Congress has authorized citizens dissatisfied with the Environmental Protection Agency’s (EPA’s) rules implementing the Clean Water Act’s (CWA’s) National Pollutant Discharge Elimination System (NPDES) permitting program to seek judicial review of those rules in the Courts of Appeals. *See* 33 U.S.C. § 1369(b). Congress further specified that those rules cannot be challenged in any civil or criminal enforcement proceeding. Consistent with the terms of the statute, multiple circuit courts have held that if a rule is reviewable under 33 U.S.C. § 1369, it is exclusively reviewable under that statute and cannot be challenged in another proceeding.

Did the Ninth Circuit err when, in conflict with those circuits, it held that a citizen may bypass judicial review of an NPDES permitting rule under 33 U.S.C. § 1369, and may instead challenge the validity of the rule in a citizen suit to enforce the CWA?¹⁵⁶

The timber industry petition did not list the jurisdictional issue as one of the “Questions Presented,” but it did argue that the jurisdictional issues were reason for the Court to accept review.¹⁵⁷ Specifically, the Georgia-Pacific petition argued that “[b]ecause of errors it made in interpreting the Silvicultural Rule and stormwater amendments and rules, the Ninth Circuit also erred in exercising subject matter jurisdiction.”¹⁵⁸ It went on to urge the Court to accept the case because:

A court may not disregard EPA’s regulations and rule interpretations, invent ambiguity where none exists, and thereby resurrect a woefully untimely rule challenge. To allow the Ninth Circuit to do so here would destroy the repose Congress granted in [section 509(b)(1)] and bring uncertainty to every longstanding EPA regulation. This serious error too warrants this Court’s review.¹⁵⁹

The Supreme Court granted certiorari and consolidated the cases.¹⁶⁰ On review, the state and timber petitioners, joined by many amici, pursued their jurisdictional arguments with vigor. Both sets of petitioners asked the Court to broadly interpret section 509(b)(1) to cover every NPDES regulation promulgated

¹⁵³ *See* 33 U.S.C. § 1369(b)(1) (2006).

¹⁵⁴ *Decker* Petition, *supra* note 12; *Georgia-Pacific West* Petition, *supra* note 12.

¹⁵⁵ *Decker* Petition, *supra* note 12, at 1; *Georgia-Pacific West* Petition, *supra* note 12, at 3.

¹⁵⁶ *Decker* Petition, *supra* note 12, at i.

¹⁵⁷ *Georgia-Pacific West* Petition, *supra* note 12, at 29–30.

¹⁵⁸ *Id.* at 29.

¹⁵⁹ *Id.* at 30.

¹⁶⁰ *Decker*, 133 S. Ct. 1326, 1334 (2012).

by EPA, including regulations exempting discharges from the NPDES program.¹⁶¹ The petitioners even went as far as arguing that the courts of appeals must directly hear challenges to the validity of *all* EPA-promulgated CWA regulations.¹⁶² Because they claimed that section 509(b) had this great a reach, NEDC's case should have been brought as a challenge to the rules themselves in the court of appeals decades ago.¹⁶³

The petitioners' arguments regarding jurisdiction overlapped, or were sometimes indistinguishable from, their arguments regarding statutory and regulatory interpretation and deference. The timber industry petitioners argued:

The Ninth Circuit interpreted the rules to reach a contrary result [to EPA's interpretation] only because it thought EPA's reading inconsistent with the CWA, and thus unenforceable. The appropriate way to look at its decision is that the Ninth Circuit *invalidated* important aspects of rules of long standing, substituting alternative rules of its own creation. A court cannot escape the strictures of Section 509(b) by first invalidating a regulation and then promulgating a different one in its place in the name of "interpretation."¹⁶⁴

Similarly, the state argued:

[I]nstead of granting deference to EPA's interpretation, the court of appeals jettisoned EPA's rules and replaced them with the court's own—and self proclaimed more correct—interpretation. That the court cannot do. Congress granted EPA, not the Ninth Circuit, the authority to promulgate rules to carry out the CWA. Because EPA's rules were entitled to deference, the court was not permitted to replace EPA's rules with its own. That error also led the court to exceed the scope of review in a citizen's suit. . . . Rejecting what should have been a controlling interpretation of the agency's rules is tantamount to invalidating those rules, a result that the court of appeals is not entitled to reach in a citizen suit.¹⁶⁵

For its part, the United States argued that the Court had jurisdiction because the Ninth Circuit did not invalidate EPA's rules.¹⁶⁶ It noted its view that the Ninth Circuit's treatment of the Silvicultural Rule presented a closer question—i.e., the Ninth Circuit walked closer to the line of invalidation rather than interpretation—than its treatment of the Phase I Stormwater Rule, but that the court still had not crossed the blurry line.¹⁶⁷ In the United States' view, the Ninth Circuit erred in applying doctrines of administrative law and interpretation, rather than running

¹⁶¹ *Decker* Brief for Petitioners, *supra* note 7, at 13; *Georgia-Pacific West* Brief for Petitioners, *supra* note 7, at 51.

¹⁶² *Decker* Brief for Petitioners *supra* note 7, at 32; *Georgia-Pacific West* Brief for Petitioners *supra* note 7, at 52. See also Brief for Chamber of Commerce as Amicus Curiae Supporting Petitioners at 3, *Decker* 133 S.Ct. 1326 (2013) (Nos. 11-338 and 11-347) ("Section 1369(b) provides for review of the lawfulness of EPA's rules."); See also Brief for Arkansas et al. as Amicus Curiae Supporting Petitioners at 4, *Decker* 133 S.Ct. 1326 (2013) (Nos. 11-338 and 11-347) ("Congress allowed judicial review of EPA rules under the CWA when it provided that '[a]ny interested person' may seek review of an EPA action in approving or promulgating any effluent limitation or other limitation.").

¹⁶³ *Georgia-Pacific West* Petition, *supra* note 12, at 30.

¹⁶⁴ *Georgia-Pacific West* Brief for Petitioners, *supra* note 7, at 54.

¹⁶⁵ *Decker* Brief for Petitioners, *supra* note 7, at 18–19.

¹⁶⁶ Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 12, at 11.

¹⁶⁷ *Id.* at 19.

afoul of section 509(b)(2).¹⁶⁸ In what NEDC described as an “about-face” from its position in the court of appeals and in response to the petitions for certiorari,¹⁶⁹ the United States argued that, while it presented no jurisdictional hurdle, section 509(b) precludes this Court from rejecting EPA’s interpretation of ambiguous regulations “based on [this Court’s] view that a different construction is necessary to prevent a conflict with the governing statute.”¹⁷⁰

NEDC, agreeing in part with the United States, argued that its case was properly brought as a citizen suit to enforce rather than to invalidate a regulation.¹⁷¹ And thus, NEDC argued, under *Environmental Defense v. Duke Energy Corp.*,¹⁷² the Court could permissibly read the regulation to bring it in line with the CWA.¹⁷³ NEDC also argued that section 509(b) did not present a jurisdictional obstacle because it simply did not apply.¹⁷⁴ NEDC argued the Silvicultural Rule and the Phase I Stormwater Rules were not EPA actions in issuing or denying an NPDES permit or in promulgating an effluent limitation or other limitation, which were the only grounds offered by the petitioners for coverage under CWA section 509(b)(1).¹⁷⁵ Notably, NEDC did not attempt to defend the Ninth Circuit’s ruling that EPA’s amicus brief constituted new information arising after the 120-day limitations period.¹⁷⁶

The Supreme Court found that “the instant suit is an effort not to challenge the Silvicultural Rule but to enforce it under a proper interpretation.”¹⁷⁷ The Court continued:

For jurisdictional purposes, it is unnecessary to determine whether NEDC is correct in arguing that only its reading of the Silvicultural Rule is permitted under the Act. It suffices to note that NEDC urges the Court to adopt a “purposeful but permissible reading of the regulation . . . to bring it into harmony with . . . the statute.” *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 573 (2007). NEDC does not seek “an implicit declaration that the . . . regulations were invalid as written.” *Ibid.* And, as a result, [section 509] is not a jurisdictional bar to this suit.¹⁷⁸

This relatively short analysis by the Court, while correct in its conclusion, sheds little light on the scope of section 509, and as discussed below, may raise more questions than it answers.¹⁷⁹ The only reason the Court found that section 509

¹⁶⁸ *Id.* at 20.

¹⁶⁹ Brief of Respondent *supra* note 12, at 19. *See also Decker* Brief for Petitioners *supra* note 7, at 20, (arguing that “the court committed two distinct yet intertwined legal errors: the court failed to afford EPA’s interpretations of its rules the controlling weight to which they are entitled and, by replacing EPA’s rules with new, court-crafted rules, ultimately exceeded the scope of its review in a citizen suit”).

¹⁷⁰ Brief of the United States as Amicus Curiae Supporting Petitioners, *supra* note 12, at 21–22 (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)).

¹⁷¹ Brief of Respondent, *supra* note 12, at 18–22.

¹⁷² 549 U.S. 561 (2007) (holding permissible the court’s interpretation of a regulation that leaves it in harmony with the statute).

¹⁷³ Brief of Respondent, *supra* note 12 at 19–23.

¹⁷⁴ *Id.* at 23.

¹⁷⁵ *Id.* at 23–30.

¹⁷⁶ *See id.* at 17–18 (making jurisdictional arguments but not referring to Ninth Circuit’s “arising after” conclusion).

¹⁷⁷ *Decker*, 133 S. Ct. 1326, 1334 (2012).

¹⁷⁸ *Id.* at 1335.

¹⁷⁹ *See infra* Part V.

presented no bar was because it concluded NEDC was not implicitly seeking to invalidate a regulation.¹⁸⁰ The Court did not conclude that section 509 is simply inapplicable, as NEDC also argued, because the rules underlying *Decker* were not among section 509(b)(1)'s narrow and precise list of EPA actions.¹⁸¹

Beyond this threshold jurisdictional issue, the Court went on to conclude that the Ninth Circuit should have deferred to EPA's own interpretation of the Phase I Stormwater Rule regarding the meaning of stormwater discharges associated with industrial activity.¹⁸² The Court also concluded it need not reach the question of whether the discharges were point source discharges within the meaning of the CWA.¹⁸³

IV. WHEN DOES A CITIZEN SUIT BECOME AN IMPROPER COLLATERAL ATTACK ON AN AGENCY'S REGULATION?

Perhaps one of the most confusing and potentially far reaching aspects of *Decker* is the concept that an attempt to enforce a regulation through a citizen suit can morph into, or be construed as, an improper attempt—or a collateral attack—to invalidate that regulation.

As described above, the *Decker* petitioners argued that section 509(b) presented an obstacle to the interpretative pathways the Supreme Court could take to resolve the citizen suit.¹⁸⁴ In other words, in their view the Court could not assess whether EPA's interpretation was consistent with the statute authorizing the regulations at issue, because that analytical framework would effectively allow NEDC to challenge the validity of the regulations.¹⁸⁵ Such a suit, according to the petitioners, is subject to the exclusive jurisdictional review provisions of section 509(b) and is therefore time barred.¹⁸⁶ Thankfully, the Court seemed to resolve that particular argument relatively easily. The Court stated that NEDC's case was properly a citizen suit because it involved "a claim to enforce what is at least a permissible reading of the Silvicultural Rule."¹⁸⁷ The Court went on to characterize NEDC's suit as an effort to enforce the rule under a proper interpretation, and noted that "[i]t is a basic tenet that 'regulations, in order to be valid, must be consistent with the statute under which they are promulgated.'"¹⁸⁸ Thus, the Supreme Court has confirmed that courts can look to the authorizing statute to interpret a rule, and they can do so within the citizen suit context.¹⁸⁹

¹⁸⁰ *Decker*, 133 S. Ct. at 1335.

¹⁸¹ *Id.* Cf. Brief of Respondent *supra* note 12, at 23–30, Brief for Amici Curiae Law Professors on Section 1369 Jurisdiction *supra* note 28, at 6–7.

¹⁸² *Decker*, 133 S. Ct. at 1338.

¹⁸³ *Id.* On remand, the Ninth Circuit issued a decision affirming that the Supreme Court's ruling did not invalidate the Ninth Circuit's earlier holding on the point source question. *See* *Nw. Env'tl. Def. Ctr. v. Decker*, No. 07-35266, 2013 WL 4618311, at *1 (9th Cir. Aug. 30, 2013); *see also* Paul Kampmeier's introductory essay page 757.

¹⁸⁴ Brief for Petitioners, *supra* note 7, at 35.

¹⁸⁵ *See Decker* Brief for Petitioners, *supra* note 7, at 18–19.

¹⁸⁶ *Id.* at 13.

¹⁸⁷ *Decker*, 133 S. Ct. at 1334.

¹⁸⁸ *Id.* (quoting *United States v. Larionoff*, 431 U.S. 864, 873 (1977)).

¹⁸⁹ *Id.* at 1334–35.

We have learned that simply because a litigant relies on the statute to advocate for its interpretation of a rule in an enforcement context does not itself turn the case into an attempt to invalidate a rule.¹⁹⁰ While this conclusion seems rather obvious on the one hand, the Court's ruling here may go a long way toward stemming the tide of future litigation advancing this "implicit invalidation" theory. The arguments made by the *Decker* petitioners, had they been accepted, could have had far reaching consequences, given that citizen suit enforcement actions might regularly call on courts to interpret agency rules in order to enforce them.¹⁹¹ It could have been open season for arguing that any citizen suit is a collateral attack on the rule itself simply because the plaintiff does not agree with the agency's interpretation of the rule. To be fair, the *Decker* petitioners did not appear to believe that the courts must *always* simply accept the agency's interpretation.¹⁹² The petitioners suggested that under *Auer v. Robbins*,¹⁹³ the Ninth Circuit could have rejected EPA's interpretation of the rules at issue if that interpretation conflicted with prior EPA interpretations or the text of the rules themselves.¹⁹⁴ It was only the Ninth Circuit's reliance on the statute that was apparently offensive to the petitioners.¹⁹⁵ The majority opinion in *Decker*, while still wholeheartedly embracing *Auer* deference to agency interpretations of rules,¹⁹⁶ appeared to find it entirely unremarkable that a court could look to the statute in its process of assessing the agency's interpretation without turning the case into an improper rule challenge.¹⁹⁷

But the Supreme Court's rejection of the petitioners' arguments does not appear to close the door to that concept. The Court quotes approvingly from its earlier decision in *Duke Energy* in which it held that the Fourth Circuit's "construction" of CAA regulations amounted to "implicit invalidation" of the regulations, which implicated CAA section 307(b)'s limitations on seeking judicial review.¹⁹⁸ In *Duke Energy*, the Court explained that "no precise line runs between a purposeful but permissible reading of the regulation adopted to bring it into harmony with the Court of Appeals' view of the statute, and a determination that the regulation as written is invalid."¹⁹⁹

It is also worth considering how the case would have turned out if the Court had first addressed whether the rules at issue were covered by section 509. Let us assume the Court answered that question in the negative—that is, EPA's

¹⁹⁰ See *id.* at 1334 (explaining that NEDC was not challenging the rule; it was merely trying to enforce the rule under the proper interpretation).

¹⁹¹ See, e.g., *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007) (discussing interpretation of EPA regulation in enforcement context).

¹⁹² *Decker* Brief for Petitioners, *supra* note 7, at 36.

¹⁹³ 519 U.S. 452 (1997).

¹⁹⁴ *Decker* Brief for Petitioners, *supra* note 7, at 36.

¹⁹⁵ *Id.*

¹⁹⁶ See *Decker*, 133 S. Ct. 1326, 1339 (Scalia, J. dissenting) (criticizing majority's reliance on *Auer* and discussing *Auer*'s "flaws"); see also Dan Mensher's article on *Auer* deference stating that "the majority of the Court deferred to EPA's interpretation with little apparent hesitation." page 851.

¹⁹⁷ *Decker*, 133 S. Ct. at 1334–45 (rejecting petitioners' jurisdictional argument and noting that "[i]t is a basic tenet that 'regulations, in order to be valid, must be consistent with the statute under which they are promulgated.'" (quoting *United States v. Larionoff*, 431 U.S. 864, 873 (1977)). Respondents merely sought a "purposeful but permissible reading of the regulation").

¹⁹⁸ *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 581 (2007).

¹⁹⁹ *Id.* at 573.

Silvicultural Rule and Phase I Stormwater Rule do not fall within the scope of any action listed in section 509(b)(1) and are thus not required to be challenged in the courts of appeals within 120 days.²⁰⁰ Had the Court so concluded, and had the Court agreed with NEDC's interpretation of the rules, arguably a ruling in NEDC's favor could have effectively invalidated EPA's rules. The question then remains whether that invalidation would have been proper.

The petitioners in *Decker* contended that there are only two viable options for judicial review under the CWA: One where "parties seeking to challenge the substance of EPA's rules may do so through a rule review process," and another for "parties seeking enforcement of those regulations [through] citizen-suit provisions."²⁰¹ But is this view too simplified? Are there not other possibilities? The idea that the legality of CWA regulations may only be evaluated in a section 509 facial challenge to a rule would mean that the Supreme Court has overstepped in several seminal CWA cases. For example, the Court has considered on three occasions, seemingly without hesitation, a threshold legal question underlying the issuance of an NPDES permit: What is the scope of CWA regulations defining waters of the United States?²⁰² These were EPA-issued CWA regulations that did not come to the Court via direct review under section 509.²⁰³ Yet the Court squarely considered the regulations' legality.²⁰⁴

Even more recently, the Court evaluated the scope of the CWA regulations governing "fill material" under section 404 and the new source performance standards (NSPS) issued under section 306.²⁰⁵ The respondents in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council* brought suit against the Corps arguing that a CWA permit issued under section 404 was illegal because the discharge of mining slurry into a pond was subject to section 402.²⁰⁶ The heart of the respondents' claim was that EPA failed to apply the NSPS regulations, promulgated pursuant to CWA Section 306(b), to the mining slurry discharge.²⁰⁷ A sweeping interpretation of section 509 would have barred the Court's decision in *Coeur Alaska*. This is because the respondents there did not bring a facial challenge

²⁰⁰ See 33 U.S.C. § 1369(b) (2006) (providing that review of listed rules must be undertaken within 120 days).

²⁰¹ *Decker* Brief for Petitioners, *supra* note 7, at 31–32 (emphasis omitted); see also Brief for Chamber of Commerce as Amicus Curiae Supporting Petitioners at 2, *Decker* 133 S. Ct. 1326 (2013) (Nos. 11-338 and 11-347) ("[C]ourts sitting to hear citizen suits enjoy jurisdiction only to enforce EPA's rules, not to invalidate them.") (emphasis omitted); Brief for Mountain States Legal Foundation as Amicus Curiae Supporting Petitioners at 5, *Decker* 133 S. Ct. 1326 (2013) (Nos. 11-338 and 11-347) ("It is axiomatic that the purpose of citizen suits is to enforce EPA regulations, not to invalidate them.")

²⁰² *Rapanos v. United States*, 547 U.S. 715, 724 (2006) (evaluating jurisdiction over wetlands adjacent to tributaries, 33 C.F.R. § 328.3(a)(5) and (a)(7)); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 171–72 (2001) (invalidating the Corps' and EPA's extension of the language "other waters" in 33 C.F.R. § 328.3(a)(3) to include waters whose sole jurisdictional characteristic was the presence of migratory birds); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) (considering "adjacent wetlands" under 33 C.F.R. § 328.3(a)(7)).

²⁰³ These decisions cite to the Corps regulations. *Rapanos*, 547 U.S. at 724; *SWANCC*, 531 U.S. at 163; *Riverside Bayview*, 474 U.S. at 129. The Corps regulations are identical to the jointly issued EPA regulations on these issues. See 40 C.F.R. § 122.2 (2012) (EPA); 33 C.F.R. § 328.3(a) (2012) (Corps).

²⁰⁴ See *Rapanos*, 547 U.S. at 724–26, 729 (discussing the Court's holding in *Riverside Bayview* and *SWANCC*, and identifying the question presented in *Rapanos*).

²⁰⁵ *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009).

²⁰⁶ *Id.* at 261.

²⁰⁷ *Id.* (citing 40 C.F.R. § 440.104(b)(1) (2012)).

to the NSPS regulations, governing “process wastewater” and not exempting “fill material,” when the regulations were promulgated in 1982.²⁰⁸ The Court in *Coeur Alaska* explained that it only became clear that section 404 could trump the application of section 402 until several years after the NSPS regulations were promulgated.²⁰⁹ Indeed, if any lawsuit asserting the applicability of an NPDES regulation were to fall within section 509(b)(1), *Coeur Alaska* would have been closer than *Decker*. That is because regulations promulgated under section 306 are at least on the list of regulations subject to review under section 509(b)(1).²¹⁰

The Eleventh Circuit’s first decision in *Friends of the Everglades v. South Florida Water Management District*²¹¹ (*Friends of the Everglades I*) is also instructive. This case was a precursor to *Friends of the Everglades II*, discussed herein, in which the Eleventh Circuit held that section 509(b)(1) did not apply to EPA’s Water Transfers Rule.²¹² *Friends of the Everglades I* was actually a citizen suit enforcement action, much like *Decker*, in which the plaintiffs sued the defendant under CWA section 505 for discharging pollutants without an NPDES permit.²¹³ While the case was pending, EPA promulgated the Water Transfers Rule.²¹⁴ When the Eleventh Circuit decided the enforcement case, it then had a rule in front of it that would have exempted the discharges at issue from the NPDES program.²¹⁵ The Eleventh Circuit proceeded to determine whether the statute was ambiguous and whether the Water Transfers Rule was reasonable under *Chevron*.²¹⁶ Because it concluded the rule was reasonable, it found the defendant was not liable for the CWA violation.²¹⁷ Presumably, if the court did not believe the Water Transfers Rule was reasonable, the water management district would have been liable for discharging without an NPDES permit, and the court’s ruling would have amounted to the effective invalidation of an EPA regulation.²¹⁸ The point is the Eleventh Circuit did not seem to hesitate walking down that path—nothing was standing in the way of the court effectively determining the validity of an EPA rule in the context of a citizen enforcement action for a violation of the CWA.

²⁰⁸ See Ore Mining and Dressing Point Source Category Effluent Limitations Guidelines and New Source Performance Standards, 47 Fed. Reg. 54,598, 54,602 (Dec. 3, 1982) (listing the three objections industry raised on practical and procedural grounds).

²⁰⁹ Two important events occurred after the 1982 regulations were promulgated. First, EPA and the Corps defined “fill material” using an “effects-based test” in 2002. See Final Revisions to the Clean Water Act; Regulatory Definitions of “Fill Material” and “Discharge of Fill Material,” 67 Fed. Reg. 31,129, 31,132 (May 9, 2002). Second, the agencies analyzed whether mine tailings slurry could be subject to a section 404 permit, and clarified the relationship between Sections 1342 and 1344, in the 2004 Regas Memorandum. See *Coeur Alaska*, 557 U.S. at 283–84.

²¹⁰ See 33 U.S.C. § 1369(b)(1)(E) (2006) (requiring review of an “Administrator’s action . . . in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of [Title 33]”).

²¹¹ (*Friends of the Everglades I*), 570 F.3d 1210 (11th Cir. 2009).

²¹² *Friends of the Everglades v. EPA (Friends of the Everglades II)*, 699 F.3d 1280, 1287 (11th Cir. 2012).

²¹³ *Friends of the Everglades I*, 570 F.3d at 1214.

²¹⁴ *Id.* at 1213.

²¹⁵ See *id.* at 1218–19.

²¹⁶ *Id.* at 1219, 1227–28; *Chevron U.S.A., Inc., v. Natural Res. Def. Council (Chevron)*, 467 U.S. 837, 843–44 (1984).

²¹⁷ *Friends of the Everglades I*, 570 F.3d at 1228.

²¹⁸ But see *id.* at 1228 (noting that because the regulation is reasonable, “[u]nless and until the EPA rescinds or Congress overrides the regulation, we must give effect to it.”).

These decisions highlight an important point. The right of action to seek immediate, facial review of the validity of certain EPA CWA actions is the exception to the otherwise applicable assumption that agency rules may be evaluated on an as-applied basis.²¹⁹ As EPA itself has explained, provisions like section 509 “supersed[e] ordinary rules of prudential ripeness that might otherwise bar prompt review of promulgated regulations.”²²⁰ Section 509(b) is consistent with the Administrative Procedure Act (APA)²²¹ in this respect. Section 509(b)(2) provides that agency actions subject to review in the courts of appeals under section 509(b)(1) shall not be subject to review in an enforcement proceeding,²²² which suggests that the inverse is also true. In other words, if an agency action does not fall within section 509(b)(1)’s reach, then it can be subject to review in an enforcement proceeding. APA section 703 reinforces this: “Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.”²²³ Yet, the concept that a regulation could be invalidated years after its promulgation seems difficult for some to accept.²²⁴

A reading of section 509(b) that stays true to the statute’s text—requiring review in the courts of appeals within 120 days of only the precise actions listed in the statute—gives effect to the notion that this narrow provision is indeed an exception to the general rule providing as-applied challenges.²²⁵ A narrow interpretation of section 509(b) would result in fewer requests for courts to grapple with the line between interpreting and invalidating CWA rules.²²⁶ If section 509(b)(1) is properly limited to the seven categories of actions it covers, then the 120-day limitation period and concerns regarding running afoul of it fall away in all other cases.²²⁷ For the time being, however, the Supreme Court has yet to explicitly reach this issue.²²⁸

V. ON THE HORIZON: CONTINUED CONFUSION IN THE COURTS ABOUT SECTION 509(b)?

As discussed above, although the Supreme Court had the opportunity to interpret section 509 in *Decker*, and again after *Friends of the Everglades II*, it

²¹⁹ See *supra* note 80; see also *Dunn-McCambell Royalty Interest v. Nat’l Park Serv.*, 112 F.3d 1283, 1288 (5th Cir. 1997) (discussing as-applied challenges to agency rules).

²²⁰ Brief for the United States as Amicus Curiae Supporting Petitioners, Responding to the Court’s Questions of October 21, 2010 *supra* note 142, at 56 n.2 (citing *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990)).

²²¹ Administrative Procedure Act, 5 U.S.C. §§ 703 (2006).

²²² Federal Water Pollution Control Act, 33 U.S.C. § 1369(b)(2) (2006).

²²³ 5 U.S.C. § 703 (2006).

²²⁴ See, e.g., *Georgia-Pacific West* Brief for Petitioners, *supra* note 7, at 3 (“This is an out-of-time, filed-in-the-wrong-court and against-the-wrong-defendant rule challenge for which jurisdiction is lacking.”).

²²⁵ See, e.g., *Brown*, 640 F.3d at 1069 (following a textual reading of section 509).

²²⁶ Cf., *Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 573, 581 (2007) (discussing the difficulty of defining a bright line between permissible reading a rule and invalidating it, in the context of Clean Air Act judicial review provisions covering far more EPA actions).

²²⁷ See, e.g., *Brown*, 640 F.3d at 1069 (finding the 120-day limitation inapplicable).

²²⁸ See *Decker*, 133 S. Ct. 1326, 1335 (2013).

chose not to do so.²²⁹ Thus, the question still remains: What is the scope of section 509(b)? This question likely arose in *Decker* at least in part because of the confusion in the lower courts as to what EPA actions fall within the scope of the section 509(b), creating room for the implicit invalidation arguments discussed above. In navigating what is likely to be a hotly litigated issue for the foreseeable future, it is instructive to look back to the large body of case law surrounding section 509 and examine how courts have strayed from Congress's intended narrow interpretation of the statute.

The plain meaning of section 509(b)(1) supports the conclusion that Congress did not intend for the courts of appeals to have direct judicial review over all of EPA's CWA-related actions. Congress has identified seven EPA actions that fall within the scope of section 509(b)(1).²³⁰ Congress's precision and clarity demonstrates that the courts of appeals only have direct judicial review over the actions expressly listed in section 509.²³¹ As the Ninth Circuit has noted in the context of section 509(b)(1), "[n]o sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions, while meaning to imply a more general and broad coverage than the statutes designated. In this case, *expressio unius est exclusio alterius*."²³² Despite this principle, circuits—including the Ninth Circuit itself—as well as courts within individual circuits, have been varied in the breadth that they are willing to read into section 509(b)(1).

There is widespread recognition that section 509(b)(1) limits direct judicial review in the courts of appeals to the actions expressly listed in the statute.²³³ For example, in *City of Baton Rouge v. EPA*,²³⁴ the Fifth Circuit rejected section 509(b)(1)(E) jurisdiction over review of a CWA section 309 compliance order because "[n]one of the specific clauses in § 1369(b)(1) describe the EPA's issuance of an order pursuant to § 1319(a)(3) requiring compliance with a NPDES permit."²³⁵ However, courts have interpreted the breadth of the listed actions differently. Some courts interpret the actions narrowly, consistent with the view that Congress clearly and precisely listed the actions under section 509(b)(1) because it felt that only those specific actions should qualify for direct judicial review in the courts of appeals.²³⁶ Other courts have only paid lip service to the limited nature of section 509(b)(1), and instead have interpreted the actions broadly

²²⁹ *Id.*

²³⁰ 33 U.S.C. § 1369(b)(1)(A)–(G) (2006).

²³¹ *See id.*

²³² *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992). *Expressio unius est exclusio alterius* is a principle of statutory interpretation that means "when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Id.* at 1312–13 (quoting *Raleigh & Gaston Ry. Co. v. Reid*, 80 U.S. (13 Wall.) 269, 270 (1871)).

²³³ *See, e.g., Westvaco Corp. v. EPA*, 899 F.2d 1383, 1387 (4th Cir. 1990) (commenting that the court's jurisdiction to "review agency action under the CWA is limited to the categories of agency action identified in [section 509(b)(1)]").

²³⁴ 620 F.2d 478 (5th Cir. 1980).

²³⁵ *Id.* at 480. Parties to other cases where section 509 jurisdiction is contested have also argued that all EPA-promulgated CWA regulations are subject to section 509. *See Decker* Brief for Petitioners, *supra* note 7, at 32; *Georgia-Pacific West* Brief for Petitioners, *supra* note 7, at 51–52.

²³⁶ *See, e.g., Friends of the Everglades II*, 699 F.3d 1280, 1287–88 (11th Cir. 2012) (holding the court did not have original jurisdiction to review a permanent exemption from the permit program under either section 509(b)(1)(E) or 509(b)(1)(F)).

to include actions not actually listed in the statute.²³⁷ This dichotomy is most apparent when reviewing case law considering the application of sections 509(b)(1)(E) and 509(b)(1)(F), the provisions under which parties most often seek direct judicial review.

A. The Early Cases: Setting Sail on a Sinking Ship

Despite the seeming clarity with which Congress drafted section 509(b)(1), from very early on confusion arose as to which EPA actions were subject to direct judicial review in the courts of appeals. This confusion over section 509(b)(1) has never been resolved.

Within the first four years of the CWA's existence, a circuit split arose as to whether EPA had authority, pursuant to section 301, to promulgate effluent limitations by regulation for existing point sources. The answer to this question was the "jurisdictional linchpin" for whether review of such regulations could be had in the courts of appeals under section 509(b)(1)(E).²³⁸ The Second, Third, Seventh, and D.C. Circuits each found that EPA had authority to issue effluent limitations by regulation under section 301, and thus that such regulations—which included both the actual effluent limitations and the section 304 effluent limitation guidelines—were reviewable in the courts of appeals under section 509(b)(1)(E).²³⁹ The Fourth Circuit, without deciding whether section 301 authorized EPA to promulgate effluent limitations by regulation, found that it had jurisdiction over a challenge to such regulations because of the relationship between sections 301 and 304.²⁴⁰ Thus, these circuits exercised jurisdiction over section 304 effluent limitation guidelines, even though section 304 was not one of the expressly listed statutes in section 509(b)(1)(E).²⁴¹ In contrast, the Eighth Circuit found that EPA lacked authority under section 301 to promulgate effluent limitations by regulation and that the regulations were instead promulgated solely under section 304.²⁴² Thus, the Eighth Circuit found that the regulations were not subject to section 509(b)(1)(E) because that provision does not mention section 304.²⁴³

²³⁷ See, e.g., *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 933 (6th Cir. 2009) (holding that the court has jurisdiction under section 509(b)(1)(F) "at a minimum" over challenge to a permanent exemption from the NPDES program).

²³⁸ *Hooker Chems. & Plastics Corp. v. Train*, 537 F.2d 620, 624 (2d Cir. 1976).

²³⁹ See *id.* at 628; *Natural Res. Def. Council v. EPA*, 537 F.2d 642, 645 (2d Cir. 1976); *Am. Iron & Steel Inst. v. EPA*, 526 F.2d 1027, 1042 (3d Cir. 1975); *Am. Meat Inst. v. EPA*, 526 F.2d 442 (7th Cir. 1975); *Am. Frozen Food Inst. v. Train*, 539 F.2d 107, 126–27 (D.C. Cir. 1976); *Am. Paper Inst. v. Train*, 543 F.2d 328, 336–37 (D.C. Cir. 1976). See also *Am. Petroleum Inst. v. Train*, 526 F.2d 1343, 1345–46 (10th Cir. 1975) (reserving judgment on whether EPA has authority under section 301 to issue effluent limitations, but finding that the courts of appeals have jurisdiction over challenges to EPA's promulgation of regulations imposing effluent limitations); *Am. Petroleum Inst. v. EPA*, 540 F.2d 1023, 1029–30 (10th Cir. 1976) (finding that EPA has authority to promulgate effluent limitations under section 301).

²⁴⁰ *E.I. du Pont de Nemours & Co. v. Train (du Pont)*, 528 F.2d 1136, 1142 (4th Cir. 1975), *cert. granted*, 430 U.S. 112 (1976) (commenting that even if section 301 did not authorize EPA to promulgate effluent limitations, "any action taken by the [EPA] under § 304(b) should properly be considered to be pursuant to the provisions of § 301 and, therefore, reviewable by this court under § 509").

²⁴¹ Federal Water Pollution Control Act, 33 U.S.C. § 1369(b)(1)(E) (2006).

²⁴² *CPC Int'l, Inc. v. Train*, 515 F.2d 1032, 1043 (8th Cir. 1975).

²⁴³ *Id.*

B. The Supreme Court Tests the Waters

In 1976, the Supreme Court had its first opportunity to discuss the scope of section 509.²⁴⁴ In *E.I. du Pont de Nemours & Co. v. Train (du Pont)*,²⁴⁵ the Court considered the issues that had divided the courts of appeals: whether EPA had authority under section 301 to issue industry-wide regulations limiting discharges from existing plants, and the subsidiary issue of whether the courts of appeals had jurisdiction under section 509(b)(1)(E) to review “industry-wide regulations imposing . . . precise [effluent] limitations” on dischargers.²⁴⁶ The Supreme Court, after determining that EPA had authority to promulgate effluent limitations under section 301, found that this determination “necessarily resolve[d]” the jurisdictional question because the courts of appeals plainly have jurisdiction over such section 301 regulations under section 509(b)(1)(E).²⁴⁷ Thus, the Supreme Court easily resolved the jurisdictional question, as the Court had only to look to the plain language of the statute to see that section 509(b)(1) applied to EPA’s promulgation of effluent limitations under section 301. In rejecting the argument that the courts of appeals lacked direct judicial review, the Supreme Court expressed concern that such an interpretation would result in a “truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to [section] 402 but would have no power of direct review of the basic regulations governing those individual actions.”²⁴⁸ As discussed below, courts of appeals have since relied on the “perverse situation” to justify findings that broaden the scope of section 509(b)(1) to include EPA actions not expressly listed in the statute.²⁴⁹

In addition, the *du Pont* Court acknowledged the probability that section 304 effluent limitation guidelines, if promulgated alone, were not directly reviewable in the courts of appeals: “If industry is correct that the regulations can only be considered [section 304] guidelines, suit to review the regulations could probably be brought only in the District Court, if anywhere.”²⁵⁰ Thus, even though effluent limitations and effluent limitation guidelines are closely linked, the Supreme Court recognized that the courts of appeals would probably not have jurisdiction over section 304 effluent limitation guidelines promulgated independently of effluent limitations, because section 304 is not expressly listed in section 509(b)(1)(E). Despite Congress’s clear intention that section 304 guidelines were not subject to direct judicial review in the courts of appeals, neither the Supreme Court nor the courts of appeals considered the possibility that section 304 effluent limitation

²⁴⁴ Earlier in 1976, the Supreme Court heard a case based on section 509 jurisdiction, but the question of whether section 509 jurisdiction existed, while contested at the court of appeals, was not pursued before the Court. *See* *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 210 & n. 20 (1976). The Supreme Court has heard other cases that relied on section 509 jurisdiction, but did not include a challenge to section 509’s applicability, including *EPA v. National Crushed Stone Ass’n*, 449 U.S. 64 (1980), *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), and *National Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007).

²⁴⁵ 430 U.S. 112 (1977).

²⁴⁶ *Id.* at 115. These were the issues on which the courts of appeals were split. *See supra* Part V.A.

²⁴⁷ *du Pont*, 430 U.S. at 136.

²⁴⁸ *Id.*

²⁴⁹ *See infra* Part V.C.2.b.

²⁵⁰ *du Pont*, 430 U.S. at 125.

guidelines, when promulgated together with section 301 effluent limitations, still did not qualify for section 509(b)(1)(E) review.²⁵¹

The Supreme Court weighed in again on section 509 three years later in *Crown Simpson Pulp Co. v. Costle* (*Crown Simpson*).²⁵² In *Crown Simpson*, petitioners sought direct judicial review in the Ninth Circuit over EPA's objection to state-issued NPDES permits.²⁵³ The Supreme Court found that the Ninth Circuit had direct judicial review under section 509(b)(1)(F) over EPA's objection to a state-issued NPDES permit because EPA's objection was "functionally similar" to EPA's denial of an NPDES permit.²⁵⁴ The Court's understanding of functional similarity was narrow, only finding that EPA's objection to a state-issued NPDES permit—which at the time of EPA's veto had the "precise effect" of denying the permit²⁵⁵—was "functionally similar" to EPA's denial of a permit.²⁵⁶ Notably, the Supreme Court's decision in *Crown Simpson* rested on an old version of the CWA. Congress amended the CWA in 1977 to authorize EPA to issue a permit itself if a state does not meet the terms of EPA's objections.²⁵⁷ As discussed *infra* at Part V.C.2.a., several circuits have found that, because of the 1977 amendment, EPA's objection to a state-issued permit is no longer "functionally similar" to EPA's denial of a permit,²⁵⁸ and parties and some courts have taken *Crown Simpson* out of its limited context of state-issued NPDES permit to argue for a broader interpretation of what EPA actions are subject to section 509(b)(1).²⁵⁹

C. *After du Pont and Crown Simpson, The Courts of Appeals Continue to Muck Up the Waters*

Many petitioners have sought direct judicial review in the courts of appeals pursuant to section 509(b)(1).²⁶⁰ Petitioners most often claim that their challenges fall under section 509(b)(1)(E), section 509(b)(1)(F), or under both sections 509(b)(1)(E) and (F).²⁶¹ However, as discussed *infra*, sections 509(b)(1)(E) and (F) apply to distinct situations: section 509(b)(1)(E) applies to petitions directly challenging EPA's promulgation of effluent limitations or other limitations,²⁶² whereas section 509(b)(1)(F) applies to petitions challenging EPA's issuance or denial of NPDES permits applying the limitations to individual dischargers.²⁶³

²⁵¹ See e.g., *id.*

²⁵² 445 U.S. 193 (1980).

²⁵³ *Id.* at 194. EPA vetoed the permits to the extent the permits exempted pulp mills from fully complying with EPA effluent limitations. *Id.* at 195.

²⁵⁴ *Crown Simpson*, 445 U.S. at 196.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ See Federal Water Pollution Control Act, 33 U.S.C. § 1342(d)(4) (1977).

²⁵⁸ See, e.g., *Am. Paper Inst. v. EPA*, 890 F.2d 869, 874 (7th Cir. 1989) ("[W]e believe that the [CWA] amendments to the FWCPA fundamentally altered the underpinnings of the *Crown Simpson* decision.").

²⁵⁹ See *infra* Part V.C.2.a.

²⁶⁰ See, e.g., Brief for the Respondent at 40, *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013) (No. 11-3412).

²⁶¹ See, e.g., Final Brief of Respondent EPA at 12, *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927 (6th Cir. 2009) (No. 06-4630).

²⁶² See *infra* Part V.C.1.

²⁶³ See *infra* Part V.C.2.

While some courts have recognized the distinction between section 509(b)(1)(E) and (F) jurisdiction,²⁶⁴ other courts have struggled in determining under which jurisdictional provision, if any, a challenge falls.²⁶⁵ The fact that parties and EPA continue to argue that the courts of appeals have both section 509(b)(1)(E) and (F) jurisdiction over challenges highlights the existing confusion regarding the meaning and application of these sections.²⁶⁶

Sections 509(b)(1)(A), (B), (C), (D), and (G) also confer jurisdiction on the courts of appeals over explicit EPA actions, and parties have sought direct judicial review in the courts of appeals pursuant to these provisions.²⁶⁷ In addition, courts

²⁶⁴ See, e.g., *Appalachian Power Co. v. Train*, 566 F.2d 451, 458 (4th Cir. 1977) (“If the regulations are alleged to be invalid as written, we think they must be reviewed expeditiously under section 509(b)(1)(E) . . . ; if the challenge is simply to the manner in which the regulations may be applied in a permit proceeding, then the proper time for review would be on appeal from the issuance or denial of a permit under section 509(b)(1)(F).”).

²⁶⁵ See, e.g., *Pub. Serv. Co. of Colo., Fort St. Vrain Station v. EPA*, 949 F.2d 1063, 1064–65 (10th Cir. 1991) (without stating which provision confers jurisdiction on the courts of appeals, improperly finding section 509(b)(1) jurisdiction over discharger’s petition challenging EPA’s denial of a hearing regarding a “facial challenge” to EPA regulation promulgating effluent limitations after EPA issued NPDES permit imposing the limitations on the discharger). At least one court has gone so far as to simply assume jurisdiction under section 509(b)(1), without noting which specific provision provides jurisdiction over the matter, and without providing any reasoning as to why jurisdiction exists. See *Ne. Ohio Reg’l Sewer Dist. v. EPA*, 411 F.3d 726, 732 (6th Cir. 2005) (exercising jurisdiction over petitions challenging EPA’s determination that state rules relating to water quality in the Great Lakes area were inconsistent with EPA guidance).

²⁶⁶ See, e.g., *Friends of the Everglades II*, 699 F.3d 1280, 1286 (11th Cir. 2012), *cert. denied*, No. 13-10, 2013 WL 3283503 (U.S. Oct. 15, 2013) (“The [EPA] argues that we have jurisdiction under section 1369(b)(1)(E) because the water-transfer rule is ‘related to’ a limitation on movements of water and establishes limitations on permit issuers. The [EPA] also argues that we have jurisdiction under section 1369(b)(1)(F) because the effect of a permanent exemption from the requirements of a permit is ‘functionally similar’ to the issuance of a permit.”).

²⁶⁷ See *Com. of Pa. Dep’t. of Env’tl. Res. v. EPA*, 618 F.2d 991, 995 (3d Cir. 1980) (rejecting section 509(b)(1)(A) jurisdiction because petitioner sought to compel EPA to perform a nondiscretionary duty); *Cerro Copper Prods. Co. v. Ruckelshaus*, 766 F.2d 1060, 1066 (7th Cir. 1985) (assuming jurisdiction over EPA regulations governing the pretreatment of wastewater discharged from industrial copper-forming facilities pursuant to sections 509(b)(1)(A), (C), and (E)); *Ark. Poultry Fed’n v. EPA*, 852 F.2d 324, 325 (8th Cir. 1988) (exercising section 509(b)(1)(C) jurisdiction over regulations defining several terms for purposes of the pretreatment standards); *Natural Res. Def. Council v. EPA*, 683 F.2d 752, 760 (3d Cir. 1982) (exercising section 509(b)(1)(C) jurisdiction over EPA action indefinitely postponing the effective date of final amendments to regulations because the amendments had been published “in final form as a ‘final rule’”); *Modine Mfg. Corp. v. Kay*, 791 F.2d 267, 271 (3d Cir. 1986) (exercising section 509(b)(1)(C) jurisdiction over EPA’s interpretation of promulgated standards and referring to the *Crown Simpson* court’s reluctance to bifurcate review); *Narragansett Elec. Co. v. EPA*, 407 F.3d 1 (1st Cir. 2006) (rejecting section 509(b)(1)(C) jurisdiction over EPA’s interpretation of an already promulgated regulation and distinguishing its holding from *Modine’s* “liberal interpretation” of section 509); see *supra* note 7; *Natural Res. Def. Council v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975) (rejecting section 509(b)(1)(C) jurisdiction over EPA’s omission of certain substances from the list of toxic pollutants because “[u]nless a substance is listed no standard or prohibition reviewable under section 509 will ever be promulgated”); *Am. Forest & Paper Ass’n v. EPA*, 154 F.3d 1155, 1158–60 (10th Cir. 1998) (exercising section 509(b)(1)(D) jurisdiction, without discussion, over petition for review of EPA’s approval of Oklahoma’s pollution discharge elimination system permit program but dismissing case for lack of Article III standing); *Cent. Hudson Gas & Elec. Corp. v. EPA*, 587 F.2d 549, 556 (2d Cir. 1978) (rejecting section 509(b)(1)(D) jurisdiction over petition challenging that the State, and not EPA, had jurisdiction over pending NPDES applications because section 509(b)(1)(D) is limited to petitions challenging the approval or disapproval of state permit programs); *Peabody Coal Co. v. EPA*, 522 F.2d 1152, 1153 (8th Cir. 1975) (exercising section 509(b)(1)(D) jurisdiction over petition seeking review of

have considered timing issues in the context of section 509.²⁶⁸ However, because much of the case law regarding section 509(b)(1) involves provisions (E) and (F), this Article focuses on courts' interpretations and applications of these provisions.

1. Section 509(b)(1)(E)

Based on the text of section 509(b)(1)(E), an EPA action must satisfy four elements to qualify for direct review in the court of appeals. 1) The action must be taken by EPA and involve 2) the approval or promulgation of 3) an effluent limitation or other limitation 4) under CWA sections 301, 302, 306, or 405.²⁶⁹ Actions that do not satisfy all of these elements do not qualify for section 509(b)(1)(E) judicial review. Each one of these elements has been litigated.

a. "Approved or promulgated"

Section 509(b)(1)(E) only applies to effluent limitations or other limitations "approved or promulgated" by EPA.²⁷⁰ Based on this requirement, courts in several circuits, including the Second, Fourth, Fifth, Seventh, and D.C. Circuits, have found that section 509(b)(1)(E) does not apply to policy statements, guidance, or

EPA's decision approving Colorado's proposal to regulate pollutant discharge, but transferring case to Tenth Circuit); *Save the Bay, Inc. v. Adm'r of the EPA*, 556 F.2d 1282, 1288, 1291 n.10 (5th Cir. 1977) (rejecting section 509(b)(1)(D) jurisdiction over petition seeking review of EPA's failure to withdraw state's NPDES authority because EPA had not made an actual determination regarding revocation of the authority and also concluding, with regard to the petition's challenge to a state-issued NPDES permit, that "the reference to a state program [in section 509(b)(1)(D)] precludes [the court] from predicated upon § 509(b)(1)(D) jurisdiction to review EPA failure to veto an individual permit issued under such a program"); *Westvaco Corp. v. EPA*, 899 F.2d 1383, 1388 (4th Cir. 1990) (rejecting section 509(b)(1)(D) jurisdiction over petition challenging EPA's disapproval of lists of "impaired waters" and associated ICSs submitted by several states for section 304(l) purposes because none of the challenged EPA actions constitute the kind of "determination" contemplated in section 509(b)(1)(D)); *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) (rejecting section 509(b)(1)(G) jurisdiction over petition challenging EPA's approval of state individual control strategies intended to address discharge of toxic pollutants into water segments in the states); *Mun. Auth. of Borough of St. Mary's v. EPA*, 945 F.2d 67, 68 (3d Cir. 1991) (rejecting section 509(b)(1)(G) jurisdiction over EPA's approval of a state-issued ICS and EPA's decision to include a particular waterway on the list of polluted navigable waters subject to the CWA's section 304(l) program); *Roll Coater Inc. v. Reilly*, 932 F.2d 668, 670-71 (7th Cir. 1991) (rejecting section 509(b)(1)(G) jurisdiction over petition seeking review of EPA's approval of a state-developed ICS because EPA's approval of a state's proposed ICS is different than EPA promulgating an ICS it developed on its own).

²⁶⁸ Federal Water Pollution Control Act, 33 U.S.C. § 1369(b)(1) (2006) (Persons seeking direct judicial review under section 509 must file their petitions "within 120 days from the date of [EPA's] determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day."); *see also* *Am. Ass'n of Meat Processors v. Costle*, 556 F.2d 875, 877 (8th Cir. 1977) (rejecting section 509(b)(1) jurisdiction over untimely filed petition); *Chevron U.S.A., Inc. v. EPA*, 908 F.2d 468, 470-71 (9th Cir. 1990) (rejecting section 509(b)(1) jurisdiction over untimely filed petition).

²⁶⁹ 33 U.S.C. § 1369(b)(1)(E) (2006).

²⁷⁰ *Am. Paper Inst.*, 882 F.2d at 288 (stating that to "promulgate" means to "issu[e] a document with legal effect.").

other documents that lack “independent legal effect” or are not “final agency actions.”²⁷¹ As Judge Easterbrook commented:

Although the EPA may establish an “other limitation” for purposes of § 509(b)(1)(E) without numerical quotas on discharges . . . it does not follow that every document concerning pollution is an “other limitation.” It must have bite—it must at least control the states or the permit holders, rather than serve as advice about how the EPA will look at things when the time comes.²⁷²

Similarly, the Fifth and Ninth Circuits have found that section 509(b)(1)(E) does not extend to petitions seeking to compel EPA to act or challenging EPA’s failure to promulgate a regulation or fulfill a nondiscretionary duty.²⁷³

Courts in the Eighth and Tenth Circuits have interpreted “promulgation” more broadly. For example, an Eighth Circuit court exercised jurisdiction over a

²⁷¹ *Id.* at 288–89 (rejecting section 509(b)(1)(E) jurisdiction over a policy statement issued by a Regional EPA office that did not appear in the Federal Register and was not published in the Code of Federal Regulations in part because policy statements without legal effect cannot render discharges “unlawful”); *see also* *Am. Paper Inst., Inc. v. EPA*, NO. 88-1395, slip op. at 23–28 (7th Cir. Aug. 1, 1989), as discussed in *Am. Paper Inst.*, 882 F.2d at 289 (rejecting section 509(b)(1)(E) jurisdiction over a policy statement that, although published in the Federal Register and the Code of Federal Regulations, “did not establish rules with independent force[.]”); *Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 130 (2d Cir. 2007), *rev’d*, 556 U.S. 208 (2009) (rejecting section 509(b)(1)(E) jurisdiction over part of petition challenging an informal definition that was not binding or applied in a permitting proceeding, and thus not a final agency action); *Nat’l Pork Producers Council v. EPA*, 635 F.3d 738, 755–56 (5th Cir. 2011) (dismissing part of petition challenging EPA letters stating that poultry growers must apply for NPDES permits for a certain type of discharge because the letters “d[id] not change any rights or obligations and only reiterate[d] what has been well-established since the enactment of the CWA” and thus did not qualify for section 509(b)(1)(E) jurisdiction); *Nat’l Mining Ass’n v. Jackson*, 880 F. Supp. 2d 119, 134 (D.D.C. 2012) (rejecting section 509(b)(1)(E) jurisdiction over EPA Final Guidance document because it was not published in the Federal Register); *Westvaco Corp. v. EPA*, 899 F.2d 1383, 1388 (4th Cir. 1990) (rejecting section 509(b)(1)(E) jurisdiction over EPA letter that involved no obligations enforceable by EPA and did not require the petitioners to do anything); *City of San Diego v. Whitman*, 242 F.3d 1097, 1101 (9th Cir. 2001) (commenting that the court of appeals would not have jurisdiction over the City’s application for renewal of a modified NPDES permit until after EPA has made a decision on the application and the City has appealed to EPA because, until then, there is no final agency action); *Lake Cumberland Trust, Inc. v. EPA*, 954 F.2d 1218, 1222–24 (6th Cir. 1992) (rejecting section 509(b)(1)(G) jurisdiction over EPA’s approval of a state-issued ICS because the “approving” of an ICS is not the same as “promulgating” an ICS); *S. Holland Metal Finishing Co. v. Browner*, 97 F.3d 932, 936–37 (7th Cir. 1996) (rejecting section 509(b)(1)(C) jurisdiction over petition seeking review of EPA’s determination that the movement of a discharger’s operations from one building to another changed the classification of the source from “existing” to “new” because the determination was an “interpretative ruling,” was made by an EPA Regional Office and not adopted by EPA, “ha[d] no independent legal or precedential effect,” and was not an “effluent standard, prohibition, or pretreatment standard[.]” because it merely provided the Regional Office’s opinion about what pretreatment standard would apply to the source).

²⁷² *Am. Paper Inst.*, 882 F.2d at 289.

²⁷³ *See Chem. Mfrs. Ass’n v. EPA*, 870 F.2d 177, 226, 260 (5th Cir. 1989) (rejecting jurisdiction over parts of petition seeking to compel EPA to decide on petitioners’ applications for variances, challenging the implementation and application of regulations rather than the promulgation of regulations, and challenging EPA’s failure to promulgate certain regulations); *see infra* note 379; *Natural Res. Def. Council v. EPA*, 542 F.3d 1235, 1242 (9th Cir. 2008) (rejecting section 509(b)(1)(E) jurisdiction over a challenge to EPA’s failure to perform a nondiscretionary action where the petition does not also challenge the substance of existing regulations).

challenge to EPA's failure to promulgate regulations. In *Maier v. EPA*,²⁷⁴ the Tenth Circuit found that section 509(b)(1)(E) applied to EPA's refusal to promulgate new standards because "a challenge to the refusal to revise a rule in the face of new information is more akin to a challenge to the existing rule than a challenge to the refusal to promulgate a new rule."²⁷⁵ Similarly, the Eighth Circuit recently found in *Iowa League of Cities v. EPA*²⁷⁶ that letters sent by EPA to a U.S. Senator were "promulgated" for purposes of section 509(b)(1)(E).²⁷⁷ In reaching this decision, the Eighth Circuit commented that section 509(b)(1)(E) should apply to actions "functionally similar" to formal promulgations.²⁷⁸

b. "Effluent limitation or other limitation"

Congress defined "effluent limitation" for purposes of the CWA to mean "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance."²⁷⁹ Congress authorized EPA to approve or promulgate effluent limitations under several different CWA sections, including sections 301(b)(1)(A)(i)²⁸⁰ and (b)(2)(A)(i)²⁸¹ and section 306.²⁸² Thus, the quintessential effluent limitation imposes technical standards on dischargers.²⁸³ EPA has promulgated scores of such effluent limitations for myriad industry categories and types of pollutants.²⁸⁴ Courts of appeals have exercised jurisdiction pursuant to section 509(b)(1)(E) based on this straightforward understanding of effluent limitation.²⁸⁵ For example, in *Iowa League of Cities v.*

²⁷⁴ 114 F.3d 1032 (10th Cir. 1997).

²⁷⁵ *Id.* at 1038.

²⁷⁶ 711 F.3d 844 (8th Cir. 2013).

²⁷⁷ *Id.* at 865.

²⁷⁸ *Id.* at 862.

²⁷⁹ 33 U.S.C. § 1362(11) (2006).

²⁸⁰ This section provides that certain existing sources must have effluent limitations that require application of the best practicable control technology (BPT) by 1977. *See id.* § 1311(b)(1)(A)(i).

²⁸¹ This section provides that certain existing sources must have effluent limitations that require application of the best available technology (BAT) economically achievable by 1989. *See id.* § 1311(b)(2)(A)(i).

²⁸² This section requires EPA to promulgate new source performance standards applicable to point sources constructed after October 1972. *See id.* § 1316.

²⁸³ *See, e.g., Am. Paper Inst. v. EPA*, 890 F.2d 869, 876 (7th Cir. 1989) ("As a rule of thumb, effluent limitations dictate in specific and technical terms the amount of each pollutant that a point source may emit.").

²⁸⁴ *See, e.g.,* 40 C.F.R. § 410.22(a) (2012) (describing BPT effluent limitations for a "pollutant or pollutant property" for wool finishing point sources in terms of pounds per 1,000 pounds of fiber); *id.* § 440.43(a) (2012) (describing BAT effluent limitation for "pollutants discharged in mine drainage from mines . . . that produce mercury ores" in terms of milligrams per liter); *id.* § 420.14(a)(2) (2012) (describing the new source performance standards for "regulated parameters" such as cyanide and naphthalene resulting from byproduct cokemaking in terms of pounds for thousand pounds of product).

²⁸⁵ *See, e.g., Am. Meat Inst. v. EPA*, 526 F.2d 442, 444, 448-52 (7th Cir. 1975) (exercising section 509(b)(1)(E) jurisdiction and noting that regulations limiting the discharge of pollutants from slaughterhouses and meatpacking plants into waterways "unquestionably fall under the statutory definition of effluent limitation"); *Cerro Copper Prods. Co. v. Ruckelshaus*, 766 F.2d 1060, 1066 (7th Cir. 1985) (exercising jurisdiction under section 509(b)(1)(A), (C), and (E) over EPA regulations

EPA, the Eighth Circuit found that an agency action is a “limitation” if it places new restrictions on industry’s “discharges or discharge-related processes” and then concluded that a rule which “directly affect[ed] the concentration of discharge from a point source” was an effluent limitation.²⁸⁶ In contrast, in *American Iron and Steel Institute v. EPA*,²⁸⁷ the Third Circuit determined that the regulations at issue were not limitations, in part because the regulations merely “prescribe[d] the policy and procedures to be followed in connection with applications for permits”²⁸⁸ and did not “prescribe specific number limitations for any pollutant, nor [did] they list the facts which must be considered in determining the control measures which individual point sources must employ.”²⁸⁹

In contrast, the CWA does not define “other limitation.”²⁹⁰ However, the Supreme Court has guided that “where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”²⁹¹ As the general term “other limitation” follows the specific term “effluent limitation,” courts in several circuits have construed other limitation to mean limitations akin to effluent limitations. For example, in *Virginia Electric & Power Company v. Costle (Virginia Electric)*, the Fourth Circuit construed “limitation” to mean “a restriction on the untrammelled discretion of the industry which was the condition prior to the passage of the [CWA].”²⁹² The Fourth Circuit then concluded that a regulation mandating what information must be considered when determining the type of cooling water intake structure that point sources can employ was an “other limitation.”²⁹³ Similarly, in *Iowa League of Cities v. EPA*, the Eighth Circuit concluded that a rule that “restrict[ed] the discretion of municipal sewer treatment plants in structuring their facilities” was an “other limitation.”²⁹⁴ The Seventh Circuit has cautioned that a broader definition of “other limitation” that included regulations not akin to “effluent limitations” would “swallow up distinctions that Congress made between effluent limitations and other

governing the pretreatment of wastewater discharge from copper-forming facilities). See also *Cincinnati Gas & Elec. Co. v. EPA*, No. 85-3822, 1986 WL 16890, at *2 (6th Cir. Apr. 25, 1986) (rejecting section 509(b)(1)(E) jurisdiction over EPA’s objection to the issuance of a NPDES permit).

²⁸⁶ *Iowa League of Cities v. EPA*, 711 F.3d 844, 866 (8th Cir. 2013).

²⁸⁷ *Am. Iron & Steel Inst. v. EPA*, 543 F.2d 521 (3d Cir. 1976).

²⁸⁸ *Id.* at 526.

²⁸⁹ *Id.* at 527. See also *Nat’l Min. Ass’n v. Jackson*, 880 F. Supp. 2d 119, 133 (D.D.C. July 31, 2012) (finding that EPA final guidance did not establish section 301 effluent limitations, and thus did fall under section 509(b)(1)(E), because the Final Guidance did not “set specific limits and mandate their inclusion in all [NPDES] permits”); *Westvaco Corp. v. EPA*, 899 F.2d 1383, 1388–89 (4th Cir. 1990) (characterizing argument that EPA’s finding that petitioner’s mills are discharging into a water body not attaining water quality standards was the “promulgation of an effluent limitation” as “patently without merit”).

²⁹⁰ 33 U.S.C. § 1362 (2006) (defining “effluent limitation” but not “other limitation”).

²⁹¹ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (applying the maxim *ejusdem generis* to find that the phrase “any other class of workers engaged in . . . commerce” should “be controlled and defined by reference to the [specific classes of workers] recited just before” the phrase).

²⁹² *Va. Elec. & Power Co. v. Costle*, 566 F.2d 446, 450 (4th Cir. 1977) (“*Virginia Electric*”).

²⁹³ *Id.* at 450. See also *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 183 (2d Cir. 2004) (stating that regulations governing cooling water intake structures were “other limitations” for purposes of section 509(b)(1)(E)); *Conoco Phillips Co. v. EPA*, 612 F.3d 822, 830 (5th Cir. 2010) (exercising jurisdiction over coolant water intake regulations because they are “other limitations”).

²⁹⁴ *Iowa League of Cities*, 711 F.3d 844, 866 (8th Cir. 2013).

types of EPA regulation.”²⁹⁵ Such a broad interpretation would also render meaningless the specificity that Congress used to identify particular regulations subject to section 509(b)(1).

Despite such cautioning, parties have still argued for a broad interpretation of “effluent limitation and other limitation,”²⁹⁶ and the D.C. Circuit has agreed in several cases. For example, in 1981, the D.C. Circuit found in *NRDC v. EPA* that it had section 509(b)(1)(E) jurisdiction over regulations permitting municipalities to apply for variances from the normal effluent limitations because “as a practical matter [the regulations] restrict the discharge of sewage by limiting the availability of a variance to a class of applicants which does not include all coastal municipalities.”²⁹⁷ But, generally speaking, variances *lower* the effluent limitations that dischargers would otherwise be required to meet.²⁹⁸ The court improperly focused on the regulation’s limitation of the availability of variances to dischargers, rather than on whether the regulation actually limited industry’s discretion with regards to discharging pollutants. Similarly, in a 1982 D.C. Circuit case, also titled *NRDC v. EPA (NRDC 1982)*, the D.C. Circuit exercised section 509(b)(1)(E) jurisdiction over consolidated permit regulations (CPRs), “a complex set of procedures for issuing and denying NPDES permits,” because some of the procedures “restrict who may take advantage of certain provisions or otherwise guide the setting of numerical limitations in permits” and the regulations “[limited] point sources and permit issuers and [restricted] the untrammelled discretion of the industry that existed before the passage of the CWA.”²⁹⁹ Procedural rules governing EPA’s issuance or denial of NPDES permits do not limit the quantities, rates, or concentrations of pollutants, nor do they otherwise restrict industry’s discretion to pollute.³⁰⁰ The D.C. Circuit, relying on this poor precedent, has recently found that section 509(b)(1)(E) applies to procedural rules governing NPDES permits.³⁰¹

In contrast, other circuits have adopted a narrow interpretation of “effluent limitation and other limitation.” The Ninth and Eleventh Circuits have found that

²⁹⁵ *Am. Paper Inst.*, 890 F.2d 869, 876–77 (7th Cir. 1989).

²⁹⁶ *See* *Decker Industry Br.* at 51 (suggesting, without noting any of the statutory limitations, that the courts of appeals have section 509(b)(1)(E) jurisdiction over actions “in which parties may seek to invalidate EPA regulations”); *Decker State Br.* at 13 (arguing that NPDES regulations are “generally subject to appellate review” under sections 509(b)(1)(E) or (F)).

²⁹⁷ *Natural Res. Def. Council v. EPA*, 656 F.2d 768, 775 (D.C. Cir. 1981).

²⁹⁸ A variance is “a time-limited designated use and criterion that is targeted to a specific pollutant(s), source(s), and/or water body or waterbody segment(s) that reflects the highest attainable condition during the specified time period.” Proposed Rule, Water Quality Standards Regulatory Clarifications, 78 Fed. Reg. 54,518, 54,531 (Sept. 4, 2013). EPA may issue variances to “temporarily downgrad[e] the [water quality standard (WQS)] as it applies to a specific discharger rather than permanently downgrading an entire water body or waterbody segment(s)” if at least one of the factors listed in 40 C.F.R. 131.10(g) is satisfied. *Id.* EPA has recently proposed changes to the federal WQSs, including changes to the rules governing variances. *See generally id.*

²⁹⁹ *See, e.g., Natural Res. Def. Council v. EPA (NRDC 1982)*, 673 F.2d 400, 402, 404–05 (D.C. Cir. 1982).

³⁰⁰ *Id.* at 402 (“EPA promulgated a set of NPDES regulations in 1979. These regulations do not set any numerical limitations on pollutant discharge. Instead, they are a complex set of procedures for issuing or denying NPDES permits”).

³⁰¹ *Id.*; *See* *National Wildlife Federation v. USEPA*, No. 11-1777 2013 WL 2637079 at *5 (D.C. Cir. June 13, 2013) (relying on *NRDC 1982* for section 509(b)(1)(E) jurisdiction over regulation governing part of the NPDES permit issuing procedure).

regulations that exempt certain types of discharges from the NPDES program, and thus “provide[] no limitation whatsoever”³⁰² and “impose no restrictions on entities,”³⁰³ are not subject to direct judicial review under section 509(b)(1)(E).³⁰⁴ For example, in *Friends of the Everglades II*, the Eleventh Circuit considered whether it had section 509(b)(1)(E) jurisdiction over “an administrative rule” exempting transfers of U.S. waters (the “Water Transfers Rule”) from the NPDES program.³⁰⁵ EPA relied on *NRDC 1982* to argue that section 509(b)(1)(E) applies to rules that place limitations on permit issuers.³⁰⁶ The Eleventh Circuit rejected such a broad reading of section 509(b)(1)(E), noting that in *NRDC 1982*, the court emphasized that the CPRs, while placing limits on permit issuers, restricted industry’s discretion.³⁰⁷ The court found that the Water Transfer Rule did not fall within the scope of section 509(b)(1)(E) because, rather than limiting industry’s discretion, the rule instead “free[d] the industry from the constraints of the permit process and allow[ed] the discharge of pollutants from water transfers.”³⁰⁸

c. Specific statutory sections

Congress was specific in listing the particular statutory sections—301, 302, 306, or 405—under which the EPA must take action in order for the action to be open to challenge section 509(b)(1)(E).³⁰⁹ Thus, at first glance, this element of section 509(b)(1)(E) jurisdiction might seem the easiest to establish or, conversely, contest. For example, the section under which the regulation was promulgated might be clear based on the subject matter of the regulation,³¹⁰ or a list of which sections the regulation is being approved or promulgated under may appear in the Federal Register notice.³¹¹ As the Second Circuit has noted:

³⁰² *Nw. Env'tl. Advocates v. EPA*, 537 F.3d 1006, 1016 (9th Cir. 2008).

³⁰³ *Friends of the Everglades II*, 699 F.3d at 1287 (noting that, in contrast to the regulations in *NRDC 1982* and *Virginia Electric*, the regulations did not restrict the discretion of industry).

³⁰⁴ See also *Env'tl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 266 F. Supp. 2d 1101, 1117–18 (N.D. Cal. Jan. 6, 2003) (finding that a provision that exempted sources of pollution from the NPDES program was not an effluent limitation or other limitation); *ONRC Action v. U.S. Bureau of Reclamation*, Civ. No. 97-3090-CL, 2012 WL 3526833, at *25 (D. Or. Jan. 17, 2012) (holding that a rule that “creates a blanket exemption” to the NPDES program was not subject to section 509(b)(1)(E)) *mandamus adopted, Report and Recommendation*, No. 1:97-CV-03090-CL, 2012 WL 3526826 (D. Or. Aug. 14, 2012) available at <http://docs.justia.com/cases/federal/district-courts/oregon/ordce/1:1997cv03090/170/287/0.pdf?1345162808> (docsjustia).

³⁰⁵ *Friends of the Everglades II*, 699 F.3d at 1283.

³⁰⁶ *Id.* at 1287.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ Federal Water Pollution Control Act, 33 U.S.C. § 1369(b)(1)(E) (2006).

³¹⁰ For example, a regulation setting effluent limitations for sewage sludge would likely be promulgated under section 405, and thus section 509(b)(1)(E) jurisdiction. See generally 40 C.F.R. § 122.44(b)(2) (2001) (requiring NPDES permits to include, when applicable, conditions that meet “[s]tandards for sewage sludge use or disposal under section 405(d) of the CWA unless those standards have been included in a permit issued under the appropriate provisions of subtitle C of the Solid Waste Disposal Act, Part C of Safe Drinking Water Act, the Marine Protection, Research, and Sanctuaries Act of 1972, or the Clean Air Act, or under State permit programs approved by the Administrator”).

³¹¹ See, e.g., *Friends of the Everglades II*, 699 F.3d at 1286–87.

[T]he complexity and specificity of section 509(b) in identifying what actions of EPA under the [CWA] would be reviewable in the courts of appeals suggest that not all actions are so reviewable. If Congress had so intended it could have simply provided that all EPA action under the statute would be subject to review in the courts of appeals, rather than specifying particular actions and leaving out others.³¹²

Courts in the Eighth, Ninth, Eleventh, and D.C. Circuits have also stayed true to the language of the statute and have rejected attempts to apply section 509(b)(1)(E) to EPA actions taken pursuant to CWA sections not listed in the provision.³¹³

In contrast, courts in the Second, Fourth, Fifth, Ninth, and D.C. Circuits have expanded the scope of section 509(b)(1)(E) beyond the sections expressly enumerated in the statute. For example, in *American Iron and Steel Institute v. EPA*,³¹⁴ the D.C. Circuit determined that it had section 509(b)(1)(E) jurisdiction over Water Quality Guidance for the Great Lakes, promulgated by EPA as mandated by CWA section 118, because the Guidance required states and tribes to “adopt requirements applicable to waters of the Great Lakes System for the purposes of sections 118, 301, 303, and 402 of the [CWA],” two of which are expressly listed in section 509(b)(1)(E).³¹⁵ The court also found that it had jurisdiction over parts of the Guidance not specified in section 509(b)(1) because those parts were ancillary to the main action.³¹⁶ Similarly, in *Virginia Electric*, the Fourth Circuit exercised section 509(b)(1)(E) jurisdiction over regulations promulgated pursuant to section 316 because section 316 indicates that “its limitations are to be adopted under s[ections] 301 and 306,” and because “the regulations issued under s[ection] 316(b) are so closely related to the effluent limitations and new source standards of performance of s[ections] 301 and 306 that [the court thought] it would be anomalous to have [] review bifurcated between courts.”³¹⁷ One court in the Ninth Circuit exercised section 509(b)(1)(E)

³¹² *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 517 (2d Cir. 1976) (rejecting section 509(b)(1)(E) jurisdiction over EPA’s partial approval of New York’s thermal water quality standards pursuant to CWA section 303).

³¹³ See e.g., *Minn. Center for Env’tl. Advocacy v. EPA*, NO. 03-1636 (8th Cir. Apr. 28, 2003) (rejecting jurisdiction over challenge to EPA’s approval of total maximum daily loads under section 303); *Longview Fibre Co.*, 980 F.2d at 1313 (rejecting 509(b)(1)(E) jurisdiction over total daily maximum loads issued pursuant to section 1313); *Ackels v. USEPA*, 7 F.3d 862, 869 (9th Cir. 1993) (rejecting section 509(b)(1)(E) jurisdiction over takings claims and challenges to CWA section 309 compliance orders); *Environmental Protection Information Center v. Pacific Lumber Co.*, 266 F.Supp.2d 1101, 1117–18 (N.D. Cal. June 6, 2003) (finding that the court of appeals did not have jurisdiction over regulations promulgated under CWA sections not listed in section 509(b)(1)(E)); *Alcoa, Inc. v. EPA*, NO. 02-13562-II (11th Cir. Oct. 16, 2002) (rejecting jurisdiction over challenge to EPA’s approval of total maximum daily loads under section 303); *Nat’l Ass’n of Home Builders v. U.S. Army Corps of Engineers*, 440 F.3d 459, 463 at n.3 (D.C. Cir. 2006) (noting that a rule implementing section 404 is properly challenged in the district court); *Friends of the Earth v. USEPA*, 333 F.3d 184, 193 (D.C. Cir. 2003) (rejecting section 509(b)(1)(E) jurisdiction over petition seeking review of EPA decision implementing total maximum daily loads under section 303).

³¹⁴ *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 986 (D.C. Cir. 1997).

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Virginia Electric*, 566 F.2d 446, 450 (4th Cir. 1977). Courts in the Second and Fifth Circuits have likewise exercised direct review pursuant to section 509(b)(1)(E) over regulations promulgated pursuant to section 316. See *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 183 (2d Cir. 2004) (finding section 509(b)(1)(E) jurisdiction without any discussion beyond citing to *Virginia Electric*); *Conoco Phillips*

jurisdiction over regulations implementing section 304(l), without providing any reasoning for why it found it had jurisdiction.³¹⁸ Finally, as discussed, the Supreme Court and courts in many circuits have exercised section 509(b)(1)(E) jurisdiction over section 304 effluent limitation guidelines because they were promulgated in conjunction with section 301 effluent limitations, even though section 509(b)(1)(E) clearly does not extend to section 304 guidelines.³¹⁹

2. Section 509(b)(1)(F)

CWA section 509(b)(1)(F) provides direct judicial review in the courts of appeals for EPA's action in "issuing or denying any permit" under section 402.³²⁰ As discussed above, unless otherwise exempt, any discharge of any pollutant from a point source into a water of the United States requires a NPDES permit.³²¹ In section 402, Congress gave EPA the authority to issue NPDES permits or to delegate such authority to states, which EPA has done in most states.³²²

Where EPA remains the permit issuer, section 509(b)(1)(F)'s meaning could hardly be clearer. If EPA approves an individual application for an NPDES permit, it has *issued* such a permit. If EPA rejects an individual application for an NPDES permit, it has *denied* such a permit.³²³ Based on this common sense approach, the courts of appeals have consistently exercised jurisdiction over petitions seeking

Co. v. EPA, 612 F.3d 822, 830 (5th Cir. 2010) (assuming section 509(b)(1)(E) jurisdiction over regulations promulgated under section 316 without any discussion or citations to case law).

³¹⁸ Natural Res. Def. Council v. EPA, 915 F.2d 1314, 1320 (9th Cir. 1990).

³¹⁹ See *supra* notes 247–59 and accompanying text. Courts after *du Pont* have continued to extend section 509(b)(1)(E) jurisdiction to section 304 effluent limitation guidelines. See, e.g., Am. Paper Inst. v. EPA, 660 F.2d 954, 956 (4th Cir. 1981) (finding that section 509(b)(1)(E) provides the court with authority "for making a pre-enforcement examination of the EPA guidelines"); Am. Petroleum Inst. v. EPA, 661 F.2d 340, 341–42 (5th Cir. 1981) (noting that petition "seeks review of EPA's Final Effluent Guidelines for the oil and gas extraction 'point source category'"); Am. Ass'n of Meat Processors v. Costle, 556 F.2d 875, 876 (8th Cir. 1977) (describing the Supreme Court's *du Pont* decision as "rul[ing] that effluent guidelines for existing sources are reviewable in the courts of appeals"); Rybachek v. EPA, 904 F.2d 1276, 1284 n.6 (9th Cir. 1990) (exercising section 509(b)(1) jurisdiction over National Effluent Limitation Guidelines and Standards); Consolidation Coal Co. v. Costle, 604 F.2d 239, 242–43, n.9 (4th Cir. 1979) (exercising jurisdiction over regulatory guidelines for effluent limitations for existing sources and commenting that EPA stated this was "the first case brought to review best practicable control technology standards in which the numerical national limitations have not been attacked"); Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 512 (2d Cir. 2005) (addressing challenges to technology-based effluent limitation guidelines promulgated by EPA, without addressing whether it had jurisdiction to consider such challenges).

³²⁰ 33 U.S.C. § 1369(b)(1)(F) (2006).

³²¹ *Id.* §§ 1311(a), 1342(a). See also *supra* note 63 and accompanying text.

³²² 33 U.S.C. § 1342(a), (b) (2006). See also *supra* note 63 and accompanying text.

³²³ Although far less common, EPA has also issued nationwide general permits. For example, in 2009 and again in 2013, EPA issued general permits for discharges incidental to the operation of vessels. See Final National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges Incidental to the Normal Operation of a Vessel, 73 Fed. Reg. 79,473, 79,473–74 (Dec. 29, 2008); Final National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges Incidental to the Normal Operation of a Vessel, 78 Fed. Reg. 21,938, 21,938 (Apr. 12, 2013). Challenges to these vessel general permits have been brought directly in the courts of appeals pursuant to CWA section 509(b)(1)(F). See, e.g., Joint Motion to Dismiss at 1, Natural Res. Def. Council v. EPA, No. 09-1089 (D.C. Cir. Apr. 16, 2013); Petition for Review of an Action by the EPA at 1, Nw. Env'tl. Advocates v. EPA, No. 13-71565 (9th Cir. May 3, 2013).

review of EPA's actions in issuing or denying an NPDES permit.³²⁴ These cases typically challenge either EPA's decision to issue or deny an NPDES permit or the aspects of a particular permit; in all of these cases, section 509(b)(1)(F) jurisdiction attaches because EPA actually issued or denied an NPDES permit.³²⁵ In addition, most, if not all, of the courts that have considered the issue have found that EPA's issuance or denial of a modification to an existing EPA-issued NPDES permit also falls under the scope of section 509(b)(1)(F).³²⁶ Likewise, many courts have rejected section 509(b)(1)(F) jurisdiction over petitions involving situations in which an NPDES permit had not been issued or denied by EPA.³²⁷ In several cases

³²⁴ See, e.g., *Adams v. EPA*, 38 F.3d 43, 46 (1st Cir. 1994) (assuming jurisdiction over EPA's issuance of an NPDES permit); *Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 660 (exercising jurisdiction over petition challenging EPA's issuance of an NPDES permit); *City of Pittsfield, Mass. v. EPA*, 614 F.3d 7, 10 (1st Cir. 2010) (exercising section 509(b)(1)(F) jurisdiction over the City's petition for review of EPA order declining to review EPA's issuance of an NPDES permit); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1162 (9th Cir. 1999) (exercising jurisdiction over petition challenging EPA's issuance of NPDES permits); *Native Vill. of Kivalina IRA Council v. EPA*, 687 F.3d 1216, 1219 (9th Cir. 2012) (exercising jurisdiction over EPA order denying review of Village's challenge to EPA's reissuance of an NPDES permit); *Natural Res. Def. Council v. EPA*, 863 F.2d 1420, 1424 (9th Cir. 1988) (exercising jurisdiction over challenges to EPA's issuance of an NPDES general permit); *P.R. Sun Oil Co. v. EPA*, 8 F.3d 73, 76 (1st Cir. 1993) (exercising jurisdiction over petition challenging EPA's renewal of an NPDES permit); *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1045 (1st Cir. 1982) (exercising jurisdiction over petition challenging EPA's issuance of an NPDES permit); *Oklahoma v. EPA*, 908 F.2d 595, 596–97 (10th Cir. 1990), *rev'd sub nom.*, *Arkansas v. Oklahoma*, 503 U.S. 91 (1992) (exercising jurisdiction over EPA's issuance of an NPDES permit); *Webb v. Gorsuch*, 699 F.2d 157, 158 (4th Cir. 1983) (exercising jurisdiction over petition challenging validity of EPA-issued NPDES permits); *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 20 (1st Cir. 2012) (exercising jurisdiction over EPA's issuance of an NPDES permit); *Tenneco Oil Co. v. EPA*, 592 F.2d 897, 899 (5th Cir. 1979) (exercising jurisdiction over petition seeking review of EPA's issuance of a NPDES permit); *Alton Box Bd. Co. v. EPA*, 592 F.2d 395, 396 (7th Cir. 1979) (exercising section 509(b)(1)(F) jurisdiction over EPA's decision not to renew an NPDES permit); *Mich. Dept. of Env'tl. Quality v. EPA*, 318 F.3d 705, 707, 709 (6th Cir. 2003) (exercising section 509(b)(1)(F) jurisdiction over EPA's issuance of an NPDES permit for a wastewater treatment facility on an Indian reservation and rejecting jurisdiction over interlocutory procedures used by EPA to halt the issuance of proposed *state* permits); *Pac. Legal Found. v. Costle*, 586 F.2d 650, 655 (9th Cir. 1978) (exercising section 509(b)(1)(F) jurisdiction over EPA's extension of an NPDES permit). See also *Montgomery Env'tl. Coal. v. Costle*, 646 F.2d 568, 576 (D.C. Cir. 1980) (assuming section 509 jurisdiction over petition challenging EPA's approval of NPDES permits if petitioners have standing under section 509); *Sun Enters., Ltd. v. Train*, 532 F.2d 280, 287–88 (2d Cir. 1976) (affirming district court's dismissal of case challenging EPA's issuance of an NPDES permit because the courts of appeals, and not district courts, have jurisdiction over such EPA actions).

³²⁵ See, e.g., *Defenders of Wildlife*, 191 F.3d at 1162 (exercising jurisdiction over challenge to EPA's issuance of NPDES permits); *Native Vill. of Kivalina IRA Council*, 687 F.3d at 1219 (exercising jurisdiction over EPA's denial to review Village's challenge to EPA's reissuance of an NPDES permit); *Natural Res. Def. Council*, 863 F.2d at 1424 (exercising jurisdiction over challenges to EPA's issuance of an NPDES general permit).

³²⁶ *Exxon Corp. v. Train*, 554 F.2d 1310, 1315 (5th Cir. 1977) (exercising jurisdiction over EPA's denial of an application to modify an existing NPDES permit); *Tex. Mun. Power Agency v. EPA*, 836 F.2d 1482, 1484–86 (5th Cir. 1988) (exercising jurisdiction over EPA's denial of an application to modify an existing NPDES permit, but noting that judicial review of the denial of a permit modification is narrower and more deferential than review of an issuance of an NPDES permit).

³²⁷ See, e.g., *Appalachian Energy Grp. v. EPA*, 33 F.3d 319, 322 (4th Cir. 1994) (rejecting jurisdiction in part because the challenged action did not involve the issuance or denial of an NPDES permit); *City of Ames, Iowa v. Reilly*, 986 F.2d 253, 256 (1st Cir. 2010) (rejecting jurisdiction over petition challenging EPA Regional Administrator's letter sent to a state indicating objection to the State's issuance of a permit, because while the action "indicat[ed] disapproval with the City's NPDES

in which the courts of appeals found they lacked jurisdiction, the courts explicitly commented that, had EPA actually issued or denied an NPDES permit, they would be able to hear the petition.³²⁸

Despite the apparent clarity of the this section, courts have still managed to expand the scope of section 509(b)(1)(F) to cover actions that clearly do not fall within the meaning of “issuing or denying” a permit.³²⁹ Parties and courts continue to rely on the Supreme Court’s *Crown Simpson* decision to justify a broad interpretation of section 509(b)(1), despite the fact that such reliance may no longer be justified. Of perhaps greater continuing relevance, inconsistent decisions and circuit splits have ensued over the issue of whether section 509(b)(1)(F) applies to regulations underlying the NPDES program.

a. State-issued NPDES permits and the Supreme Court’s Crown Simpson decision

Even where EPA has authorized a state NPDES program, EPA still retains some level of control over state decisions. For example, states must notify EPA of all proposed NPDES permits, and EPA has the opportunity to object to the permit.³³⁰ Courts of appeals that have considered petitions challenging EPA’s silence on a proposed state-issued permit are unanimous that such silence cannot

permit as drafted, [it did] not constitute a decision by the Regional Administrator—let alone the EPA’s Administrator, to whom the Regional Administrator’s decision is appealable—to issue or deny an NPDES permit.”); *Rhode Island v. EPA*, 378 F.3d 19, 22–23 (1st Cir. 2004) (rejecting jurisdiction over interlocutory appeal of EPA’s decision not to let Rhode Island intervene in an ongoing NPDES permit proceeding because the permit had not yet been issued or denied); *Cent. Hudson Gas & Elec. Corp. v. EPA*, 587 F.2d 549, 557 (2d Cir. 1978) (rejecting section 509(b)(1)(F) jurisdiction over suit challenging EPA action regarding pending NPDES applications, as permit had not yet been issued or denied); *Shell Oil Co. v. Train*, 585 F.2d 408, 411 (9th Cir. 1978) (mentioning earlier related decision in which court rejected Shell’s petition because a decision taken by California’s Regional Water Quality Control Board was not an EPA action).

³²⁸ See, e.g., *Am. Iron & Steel Inst. v. EPA*, 543 F.2d 521, 529 (3d Cir. 1976) (rejecting section 509(b)(1)(F) jurisdiction over petition challenging EPA’s promulgation of Net-Gross Regulations because no NPDES permit had been issued or denied, but commenting that “[i]mplicit in our discussion is the fact that these regulations, their validity, and their application to any permit applicant may be reviewed by this Court in subsequent proceedings brought under [section 509(b)(1)(F)] at an appropriate time and on an appropriate record”); *Diamond Shamrock Corp. v. Costle*, 580 F.2d 670, 673 (D.C. Cir. 1978) (affirming district court’s dismissal of challenge to EPA’s Net-Gross Adjustment Regulations because the regulations were not ripe for review, but commenting that “[a]ppellants acknowledge that once the regulations are applied in a permit proceeding, judicial review will be available under section 509(b)(1)(F)”); *Champion Intern. Corp. v. EPA*, 850 F.2d 182, 190 (4th Cir. 1988) (EPA’s objections to a state-issued permit “were actions of the administrator subject to judicial review in a court of appeals under § 1369(b)(1), if those actions were allowed to proceed to their logical completion, i.e., EPA either granting or denying a permit”); *City of San Diego v. Whitman*, 242 F.3d 1097, 1101 (9th Cir. 2001) (finding that the district court lacked jurisdiction over challenge to San Diego’s unfiled application for a renewed NPDES permit, and noting that after EPA makes a decision on the application, the courts of appeals would have jurisdiction under section 509(b)(1)(F)).

³²⁹ See, e.g., *Exxon Corp.*, 554 F.2d at 1316 (properly exercising jurisdiction over EPA’s denial of an application to modify an NPDES permit, but also exercising jurisdiction over petition seeking review of EPA’s denial of a hearing related to the permit modification application).

³³⁰ 33 U.S.C. § 1342(d)(1)–(2) (2006).

form the basis of eventual review under section 509(b)(1)(F).³³¹ However, prior to the Supreme Court's 1980 decision in *Crown Simpson*, circuits were split over whether the courts of appeals had jurisdiction over EPA's objections to state-issued NPDES permits based on the CWA as it existed prior to the 1977 amendments. In 1978 the Ninth Circuit found in *State of Washington v. EPA (Scott Paper)*³³² that EPA's objections to state-issued NPDES permits did not fall within the scope of section 509(b)(1)(F) because common sense and the statutory language did not support the conclusion that EPA's denial of an NPDES permit was equivalent to EPA's objection to an NPDES permit.³³³ The Ninth Circuit noted:

The common sense of the phrase "to the issuance" does not connote "fail to object." And if the text of [section] 509 will not support such a strained construction of "action in issuing", neither will it support a construction equating "action in denying" with "objecting." Not only is the language of section 509(b)(1)(F) clear and unequivocal, but neither the text nor the legislative history of the statute lends any support to a judicial construction which would fracture the provision in halves, equating "denying" with "objecting," but not equating "issuance" with "not objecting." We decline to place so radical a gloss upon the provision. It follows that we are obliged to dismiss the two petitions.³³⁴

The Ninth Circuit's well-reasoned decision conflicted with decisions from the Sixth Court holding that the courts of appeals had direct judicial review over EPA's objections to state-issued NPDES permits,³³⁵ as well as dicta from an earlier Ninth Circuit decision.³³⁶

Two years after the *Scott Paper* decision, the Supreme Court issued its *Crown Simpson* decision, implicitly overruling the Ninth Circuit's *Scott Paper* decision.³³⁷

³³¹ See *Mianus River Pres. Comm. v. EPA (Mianus)*, 541 F.2d 899, 907 (2d Cir. 1976) (rejecting jurisdiction over EPA's silence on a state-issued NPDES permit); *Save the Bay v. Adm'r of EPA*, 556 F.2d 1282, 1291 (5th Cir. 1977) (rejecting jurisdiction over petition challenging EPA's failure to veto a state-issued NPDES permit); *Crown Simpson*, 445 U.S. 193, 197 n. 9 (1980) (commenting in dicta that "EPA's failure to object, as opposed to the affirmative veto of a state-issued permit, would not necessarily amount to 'Administrator's action' within the meaning of [section 509]"). See also *Penn. Mun. Auths. Ass'n v. Horinko*, 292 F. Supp. 2d 95, 108 (D.D.C. 2003) (rejecting jurisdiction over claims involving EPA's silence on state-issued NPDES permits).

³³² 573 F.2d 583 (9th Cir. 1978).

³³³ *Id.* at 587.

³³⁴ *Id.*

³³⁵ See *Ford Motor Co. v. EPA*, 567 F.2d 661, 668 (6th Cir. 1977) (exercising section 509(b)(1)(F) jurisdiction over EPA's veto of state NPDES permit modifications); *Republic Steel Corp. v. Costle*, 581 F.2d 1228, 1230 n. 1 (6th Cir. 1978) (exercising section 509(b)(1)(F) jurisdiction over EPA's objection to a state-issued NPDES permit); *Cleveland Elec. Illuminating Co. v. EPA*, 603 F.2d 1, 2 (6th Cir. 1979) (exercising section 509(b)(1)(F) jurisdiction over petition challenging EPA's objection to a proposed state-issued permit).

³³⁶ *Mianus*, 541 F.2d at 909 (commenting that "had the Administrator exercised his right of review [over the state-issued NPDES permit] and rejected the Water Company's permit application, that rejection would clearly be subject to review as 'Administrator's Action'").

³³⁷ The *Crown Simpson* Court did not expressly overrule *Scott Paper*. See *Crown Simpson*, 445 U.S. 193, 196 (1980). However the Court, in finding that EPA's objection to a state-issued NPDES permit fell within the scope of section 509(b)(1)(F), noted its agreement with the concurring Ninth Circuit opinion, in which the concurring judge believed *Scott Paper* was wrongly decided and that that the courts of appeal should have direct judicial review over EPA's objections to state-issued NPDES permits. *Id.*

As discussed above, the Supreme Court found that the courts of appeals had direct judicial review under section 509(b)(1)(F) over EPA's objection to a state-issued NPDES permit because, under the version of the CWA applied by the *Crown Simpson* court, EPA's objection was "functionally similar" to, or had the same "precise effect" as, EPA's denial of an NPDES permit: In both cases, no permit could be issued.³³⁸ Rather than relying on common sense and the statutory language, as the *Scott Paper* court did, the Supreme Court focused on the practical implications of its decision, seeking to avoid "a seemingly irrational bifurcated system" in which "denials of NPDES permits would be reviewable at different levels of the federal-court system depending on the fortuitous circumstance of whether the State in which the case arose was or was not authorized to issue permits."³³⁹

However, the 1977 CWA amendments "fundamentally altered the underpinnings of the *Crown Simpson* decision."³⁴⁰ As part of the amendments, Congress provided that EPA itself could issue an NPDES permit in cases where it had objected, after December 27, 1977, to a state-issued permit.³⁴¹ In *Crown Simpson*, the Supreme Court did not "consider the impact, if any, of [the 1977 CWA] amendment on the jurisdictional issue presented" because EPA's objection to the state-issued permit occurred prior to the application of the amendment.³⁴² But after the amendments, EPA's objection to a state-issued permit is no longer functionally similar to EPA's denial of a permit because if EPA objects to a state-issued permit, EPA can still issue the permit itself, whereas if EPA denies a permit, no permit can issue.³⁴³ The Fourth and Seventh Circuits, applying the amended version of the CWA, have thus found that the courts of appeals do not have section 509(b)(1)(F) jurisdiction over petitions challenging EPA's objection to state-issued permits,³⁴⁴ and the Sixth Circuit has questioned the court of appeals' jurisdiction over such an EPA action.³⁴⁵ Thus, given the change in landscape since the enactment of the 1977 CWA amendments, the language in *Scott Paper*—emphasizing common sense and statutory language rather than practical effect—should take on renewed significance in section 509(b)(1)(F) jurisdictional analysis.

Despite Congress's negation of the Supreme Court's decision in *Crown Simpson* via the 1977 CWA amendments, other courts and parties have continued to improperly rely on *Crown Simpson*. In 2003, the District Court of D.C. commented in dicta in *Pennsylvania Municipal Authorities Association v.*

³³⁸ *Crown Simpson*, 445 U.S. at 196.

³³⁹ *Id.* at 196–97.

³⁴⁰ *Am. Paper Inst. v. EPA*, 890 F.2d 869, 874 (7th Cir. 1989).

³⁴¹ 33 U.S.C. § 1342(d)(4) (2006).

³⁴² *Crown Simpson*, 445 U.S. at 194 n. 2.

³⁴³ *Am. Paper Inst.*, 890 F.2d at 874.

³⁴⁴ *See id.* at 872–75 (rejecting jurisdiction over petition challenging EPA's objection to a proposed state-issued permit); *Champion Int'l Corp. v. EPA*, 850 F.2d 182, 190 (4th Cir. 1988) (rejecting jurisdiction over case in which EPA had objected to state proposed permit and then took over the state's permitting authority after the state issued an NPDES permit despite EPA's objection, because EPA had yet to issue or deny a permit).

³⁴⁵ *See Cincinnati Gas & Elec. v. EPA*, No. 85-3822, 1986 WL 16890, at *2 (6th Cir. Apr. 25, 1986) (reserving judgment on whether EPA's objection to a state-issued permit is reviewable under section 509(b)(1)(F), but commenting that "[i]n *Crown Simpson*, the Supreme Court left open the question whether the 1977 amendment to section 402 affected the jurisdiction of the Court of Appeals to review an EPA veto of a state permit" (internal citation omitted)).

*Horinko*³⁴⁶ that “[i]t is well-settled that EPA objections to state-issued permits fall under Section 1369(b)(1)(F).”³⁴⁷ That court cited *Crown Simpson* and *District of Columbia v. Schramm*,³⁴⁸ a D.C. Circuit case decided only a few months after *Crown Simpson* in which the court cited *Crown Simpson* to support a statement made in dicta that “[f]ederal courts clearly may review [EPA] vetoes of state NPDES decisions.”³⁴⁹ The *Horinko* court improperly relied on the *Crown Simpson* decision without considering the impact of the 1977 CWA amendments on *Crown Simpson*.³⁵⁰ Perhaps more significantly, parties have sought to expand the reach of section 509(b)(1) by transposing the *Crown Simpson* “functionally similar” and “precise effect” reasoning to actions not involving the issuance or denial of state NPDES permits.³⁵¹ Several courts have also adopted such reasoning, and have thus broadened the scope of section 509(b)(1) to include EPA actions not expressly listed in the statute. For example, in *Iowa League of Cities v. EPA*, the Eighth Circuit found, by analogy to *Crown Simpson*, that “it would be more appropriate to interpret ‘promulgating’ to include agency actions that are ‘functionally similar’ to formal promulgation.”³⁵² These parties, and the courts that agree with them, perpetuate a reliance on *Crown Simpson* that has not been justified in over thirty years.

b. Underlying NPDES Regulations

The most significant circuit split regarding section 509(b)(1)(F) revolves around whether courts of appeals must directly review not just the actual issuance or denial of NPDES permits but also underlying NPDES regulations. As discussed below, several circuits have stayed true to the plain language of the statute, and rejected jurisdiction over cases in which EPA had not yet issued or denied an

³⁴⁶ 292 F. Supp. 2d 95 (D.D.C. 2003).

³⁴⁷ *Id.* at 107. *See also* *Maine v. Johnson*, 498 F.3d 37, 47 (1st Cir. 2007) (implicitly suggesting that the court of appeals might have section 509(b)(1)(F) jurisdiction over a challenge to the “grounds on which EPA could reject a state permit” if EPA actually objects to a state permit).

³⁴⁸ 631 F.2d 854 (D.C. Cir. 1980).

³⁴⁹ *Id.* at 859. The *Schramm* case was about a petition challenging EPA’s decision not to veto a state permit and did not consider the impact of the 1977 CWA amendments on the *Crown Simpson* decision. *See id.* at 859.

³⁵⁰ *Horinko*, 292 F. Supp. 2d at 107. *See also* *Georgia-Pacific Corp. v. EPA*, 671 F.2d 1235, 1239 (9th Cir. 1982) (relying on *Crown Simpson* when exercising section 509(b)(1)(F) jurisdiction over EPA’s denial of a variance to a state-issued NPDES permit).

³⁵¹ *See, e.g.*, Petitioners’ Reply Brief at 13–14, *Decker*, 133 S.Ct. 1326 (2013) (No. 11-338); Respondent EPA’s Memorandum in Opposition to Motion to Dismiss or to Transfer to the Ninth Circuit at 9, *Nat’l Cotton Council v. EPA*, 553 F.3d 927 (6th Cir. 2009) (No. 06-4630); Opening Brief for the Federal Defendant-Appellant, *Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008) (Nos. 03-74795, 06-17187, 06-17188), 2007 WL 1110058, at *11.

³⁵² *Iowa League of Cities*, 711 F.3d 844, 862 (8th Cir. 2013). *See also* *Modine Mfg. Corp. v. Kay*, 791 F.2d 267, 271 (3d Cir. 1986) (discussing *Crown Simpson* as an “appropriate analog” to the question, which the court answered in the affirmative, of whether the court of appeals has section 509(b)(1)(C) jurisdiction over petitions seeking review of EPA’s application of pretreatment standards to individual sources, when section 509(b)(1)(C) expressly covers EPA’s promulgation of pretreatment standards); *Maier v. EPA*, 114 F.3d 1032, 1037–39 (10th Cir. 1997) (citing to *Crown Simpson* to support finding that EPA’s denial to initiate rulemaking to improve existing regulations falls under section 509(b)(1)(E)).

NPDES permit. Other circuits have found that, largely for policy reasons, the courts of appeals have jurisdiction not only over EPA's action in issuing or denying NPDES permits, but also EPA's regulations governing the NPDES program. Moreover, the Ninth Circuit has issued seemingly contrary opinions, adding to the confusion.

The courts of appeals that have found they have jurisdiction over the underlying NPDES regulations trace their reasoning back to one D.C. Circuit case, *Nat'l Res. Def. Council v. EPA (NRDC 1981)*.³⁵³ In *NRDC 1981*, the D.C. Circuit considered a petition filed by NRDC challenging EPA regulations governing the availability of variances to minimum sewage treatment standards for sewage plants.³⁵⁴ While the *NRDC 1981* court found that it had jurisdiction pursuant to section 509(b)(1)(E),³⁵⁵ the court noted that it might also have jurisdiction under section 509(b)(1)(F) based on the Supreme Court's decision in *du Pont*, even though EPA had not actually issued or denied an NPDES permit:

If we hold that the regulations here are not reviewable in a court of appeals the "perverse situation" to which the Supreme Court referred in [*du Pont*], will be created: we will be able to review the grant or denial of the permit, but will be without authority to review directly the regulations on which the permit is based.³⁵⁶

In both *du Pont* and *NRDC 1981*, the Court found that the regulations at issue were regulations approving or promulgating effluent limitations subject to review under section 509(b)(1)(E).³⁵⁷ NPDES permits are typically based on regulations approving or promulgating effluent limitations, as the permits apply the effluent limitations to individual dischargers.³⁵⁸ Thus, the "perverse situation" the courts sought to avoid was the situation in which the courts of appeals would have jurisdiction to review the issuance or denial of NPDES permits (as per section 509(b)(1)(F)), but would lack jurisdiction to review the regulations approving or promulgating the effluent limitations applied in the NPDES permits. Again perpetuating a reliance on *Crown Simpson* that has not been justified in over thirty years.

Unfortunately, courts of appeals in the Fifth, Sixth, and Ninth Circuits have taken *du Pont*'s perverse situation—and the D.C. Circuit's discussion of *du Pont* in *NRDC 1981*—out of context, applying the reasoning to regulations unrelated to the approval or promulgation of effluent limitations. As discussed below, those courts have found, relying on *du Pont*, *NRDC 1981*, and courts applying *du Pont* and *NRDC 1981*, that they have jurisdiction pursuant to section 509(b)(1)(F) to review

³⁵³ 656 F.2d 768, 771 (D.C. Cir. 1981). See, e.g., *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 933 (6th Cir. 2009) (citing *NRDC 1981* as support for assertion of jurisdiction over challenge to EPA Final Rule).

³⁵⁴ *NRDC 1981*, 656 F.2d at 771.

³⁵⁵ *Id.* at 776.

³⁵⁶ *Id.* at 775.

³⁵⁷ *Id.* at 776; *du Pont*, 430 U.S. 112, 136–37 (1977).

³⁵⁸ See Federal Water Pollution Control Act 33 U.S.C. § 1342(a)(1) (2006) ("[EPA] may . . . issue a permit for the discharge of any pollutant, or combination of pollutants . . . upon condition that such discharge will meet either (A) all applicable requirements under sections [301, 302, 306, 307, 308, and 403] of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the [EPA] determines are necessary to carry out" the CWA).

regulations underlying the NPDES program in situations in which EPA had not yet issued or denied an NPDES permit. The underlying regulations that have received the most attention are those governing whether the NPDES program applies to discharges from particular sources. For example, in *American Mining Congress v. EPA*,³⁵⁹ the Ninth Circuit cited only to *du Pont* and *NRDC 1981* to support its finding that it had section 509(b)(1)(F) jurisdiction over a petition challenging an EPA regulation requiring storm water discharge permits for contaminated discharges from inactive coal mines, and commented more broadly that it had jurisdiction under section 509(b)(1)(F) “to review the regulations governing the issuance of permits under section 402 . . . as well as the issuance or denial of a particular permit.”³⁶⁰ In *National Cotton Council of America v. EPA*,³⁶¹ the Sixth Circuit Court of Appeals found that it had jurisdiction over EPA’s promulgation of rules exempting certain pesticides from the NPDES program.³⁶² To reach this conclusion, the court relied primarily on *NRDC 1981*, *du Pont*, *American Mining Congress*, and one other similar Ninth Circuit case, *NRDC v. EPA*.³⁶³ But again, *NRDC 1981* and *du Pont* did not hold that section 509(b)(1)(F) applies to underlying NPDES permit regulations.³⁶⁴ By failing to carefully examine their own jurisdiction and the jurisdiction of the cases on which they relied, the *American Mining Congress* and *National Cotton Council* courts, as well as other courts holding likewise, have removed *du Pont* and *NRDC 1981* from their proper context and improperly broadened section 509(b)(1)(F) actions in which EPA has not yet issued or denied an NPDES permit.

In contrast to this chain of case law, the Ninth and Eleventh Circuits have correctly found, in situations where EPA had not issued or denied an NPDES permit, that they lack section 509(b)(1)(F) jurisdiction over regulations exempting certain discharges from the NPDES program.³⁶⁵ For example, in *Friends of the*

³⁵⁹ 965 F.2d 759 (9th Cir. 1992).

³⁶⁰ *Id.* at 763 (exercising jurisdiction over petition after only a one sentence discussion commenting that “[w]e have jurisdiction under section 509(b)(1)(F) of the CWA, which allows us to review the regulations governing the issuance of permits under section 402, as well as the issuance or denial of a particular permit”).

³⁶¹ 553 F.3d 927 (6th Cir. 2009).

³⁶² *Id.* at 933.

³⁶³ *See id.* (citing to *du Pont* and *NRDC 1981* to justify finding of jurisdiction over portions of EPA regulations issuing NPDES permit application requirements for certain storm water discharges, including exemptions from permitting requirements for certain discharges). Other cases in the Ninth Circuit, as well as one Fifth Circuit case, have also found that the courts of appeals have jurisdiction under section 509(b)(1)(F) to review underlying NPDES permit regulations. *See e.g.*, *Nat’l Pork Producers Council v. EPA*, 635 F.3d 738, 747 (5th Cir. 2011) (exercising jurisdiction over rules governing the NPDES program’s applicability to concentrated animal feeding operations, under section 509(b)(1)(E) or (F), even though the court had not yet issued any permits); *NRDC v. EPA*, 526 F.3d 591, 601 (9th Cir. 2008) (assuming jurisdiction over rule exempting certain activities from the NPDES program in one sentence that simply cites to *NRDC v. EPA*, 966 F.2d 1292 (9th Cir. 1992)).

³⁶⁴ *See NEDC v. EPA*, 656 F.2d 768, 775-76 (D.C. Cir. 1981) (finding that regulations were effluent limitations subject to section 509(b)(1)(E)), *du Pont*, 430 U.S. 112, 136 (1977) (finding jurisdiction over effluent limitations promulgated pursuant to section 301).

³⁶⁵ *Appalachian Power Co. v. Train*, 566 F.2d 451, 458 (4th Cir. 1977) (retaining jurisdiction over case for any future objections on the merits of EPA-promulgated regulations, and commenting that “[i]f the regulations are alleged to be invalid as written, we think they must be reviewed expeditiously under s 509(b)(1)(E); if the challenge is simply to the manner in which the regulations may be applied in a

Everglades II the Eleventh Circuit rejected EPA's argument that it had section 509(b)(1)(F) jurisdiction over the Water Transfers Rule, an EPA regulation that exempted transfers of U.S. waters from the NPDES program.³⁶⁶ The court commented that exercising jurisdiction would be "contrary to the statutory text."³⁶⁷ The court also distinguished its decision from that in *Crown Simpson*, finding that a permanent exemption from the NPDES program is not "functionally similar" to the denial of an NPDES permit because "[t]he exemption is a general rule, as opposed to a decision about the activities of a specific entity, and a permanent exemption from the permit program frees the discharging entities from further monitoring, compliance, or renewal procedures."³⁶⁸

In *Northwest Environmental Advocates v. EPA (NWEA)*, the Ninth Circuit found that it lacked section 509(b)(1)(F) jurisdiction over EPA regulations exempting vessel discharges from the NPDES program.³⁶⁹ The court agreed with the district court in *Environmental Protection Information Center v. Pacific Lumber Co.*,³⁷⁰ which considered a similar regulatory exemption and noted that:

Because plaintiff challenges a decision that in effect excludes sources from the NPDES program, the circuit courts will never have to confront the issuance or denial of a permit for these sources. The Ninth Circuit, by virtue of the regulation, will never have to consider on direct review an action involving the denial of an NPDES permit for pollutant discharges within the exemption provided by the regulation. Thus, a district court taking jurisdiction over a challenge to [a regulation] does not create the same awkwardness for a circuit court as that described in [*NRDC 1981*].³⁷¹

The court also rejected the argument that it had jurisdiction because EPA's exemption of certain categories of discharges from the NPDES program was "functionally similar" to the denial of an NPDES permit, noting that the *Crown Simpson* court's understanding of "functional similarity" was narrow, only extending to the situation at issue in *Crown Simpson*.³⁷²

As noted above, prior to *NWEA*—for example, in *American Mining Congress*—the Ninth Circuit had ruled that the courts of appeals did have direct

permit proceeding, then the proper time for review would be on appeal from the issuance or denial of a permit under s 509(b)(1)(F)”) (internal citations omitted) (internal footnote omitted).

³⁶⁶ *Friends of the Everglades II*, 699 F.3d 1280, 1287–88 (11th Cir. 2012).

³⁶⁷ *Id.* at 1288.

³⁶⁸ *Id.*

³⁶⁹ NW. Env'tl. Advocates v. EPA, 537 F.3d 1006, 1016–18 (9th Cir. 2008) (*NWEA*).

³⁷⁰ 266 F. Supp. 2d 1101 (N.D.Cal. 2003).

³⁷¹ *NWEA*, 537 F.3d at 1019 (quoting Env'tl. Prot. Infor. Ctr. v. Pac. Lumber Co., 266 F. Supp. 2d 1101, 1108–09 (N.D.Cal. 2003)).

³⁷² *Id.* at 1016 (discussing EPA's "functional similarity" argument based on the Supreme Court's ruling in *Crown Simpson*). Parties in other cases have also tried to apply the *Crown Simpson* court's "functional similarity" reasoning to actions not involving EPA's objection to state-issued permits. See e.g., *Friends of the Everglades II*, 699 F.3d at 1286, 1288 (mentioning and then rejecting EPA's argument that a permanent exemption from the NPDES program is "functionally similar" to the issuance of an NPDES permit). In some instances, courts have improperly agreed with these parties, and have extended the *Crown Simpson* reasoning to actions not envisioned by the Supreme Court. See, e.g., *Iowa League of Cities*, 711 F.3d 844, 862 (8th Cir. 2013) (“[W]e are persuaded that it would be more appropriate to interpret “promulgating” to include agency actions that are “functionally similar” to a formal promulgation.”).

judicial review over underlying NPDES regulations.³⁷³ However, the *NWEA* court distinguished its decision from these earlier Ninth Circuit decisions because either the earlier case was based on a regulation subjecting certain discharges to the NPDES program, rather than exempting them from the NPDES program,³⁷⁴ or because the exemptions in the earlier cases were “based in part on exemptions specified in the text of the CWA.”³⁷⁵ The *NWEA* court failed to make any distinction between its holding and the Ninth Circuit’s previous holding in *Environmental Defense Center, Inc. v. EPA*,³⁷⁶ in which the court found it had jurisdiction over regulations subjecting discharges from small sewer systems and construction sites to the NPDES program because section 509(b)(1) “assign[ed] review of EPA effluent *and permitting regulations* to the Federal Courts of Appeals.”³⁷⁷ Thus, the Ninth Circuit is split both with other circuits, and within itself, on the issue of whether the courts of appeals have jurisdiction to review underlying NPDES regulations pursuant to section 509(b)(1)(F), in the absence of the actual issuance or denial of an NPDES permit. And this is just one example of how, after thirty years, federal courts continue to add to the confusion regarding which EPA actions must be challenged directly in the courts of appeals.

VI. THE NEED FOR A NARROW INTERPRETATION OF SECTION 509(B)

A. *Confusion in the Courts Could Be Avoided by a Plain Text Interpretation of Section 509(b)*

The most obvious question left unanswered by the Court’s *Decker* decision is whether the EPA rules at issue in that case—had NEDC actually been seeking to invalidate them—should have been challenged in the courts of appeals under section 509(b)(1). As noted above, the Court did not address whether section 509(b)(1) should be read to cover only the precise EPA actions listed, or whether it should be read in a more “functional” way.³⁷⁸ The Court hinted its view of the narrowness of the provision when it stated that section 509 “extends only to certain suits challenging some agency actions.”³⁷⁹ But the Court did not indicate whether the Silvicultural Rule or the Phase I Stormwater Rule were among the “some agency actions” to which it was referring.³⁸⁰ As discussed at length above, the confusion in the case law has centered around particular categories of EPA actions, with the most litigation surrounding the scope of coverage under section 509(b)(1)(E) (pertaining to effluent limitations or other limitations) and 509(b)(1)(F) (pertaining to issuing or denying NPDES permits).³⁸¹ These were the two sections under which the *Decker* petitioners argued the EPA rules were

³⁷³ *Am. Mining Congress v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992).

³⁷⁴ *See NWEA*, 537 F.3d at 1016–17 (distinguishing *NWEA* from *American Mining Congress*).

³⁷⁵ *Id.* at 1017–18 (distinguishing *NWEA* from *NRDC v. EPA*, 966 F.2d 1292 (9th Cir. 1992) and *NRDC v. EPA*, 526 F.3d 591 (9th Cir. 2008)).

³⁷⁶ 344 F.3d 832 (9th Cir. 2003).

³⁷⁷ *Id.* at 843 (internal citation omitted) (emphasis added).

³⁷⁸ *See Decker*, 133 S. Ct. 1326, 1334–35 (2013).

³⁷⁹ *Id.* at 1334.

³⁸⁰ *Id.*

³⁸¹ *See supra* Part V.C.

covered, and the Supreme Court's silence on the reach of section 509(b)(1)(E) and 509(b)(1)(F) means that, for the time being at least, the confusion surrounding these subsections may continue.³⁸²

And this is not the only confusion that remains. More broadly speaking, and also relevant to the situation in *Decker*, there is a direct circuit split as to whether an exemption from an NPDES requirement must be reviewed in the first instance by a court of appeals within 120 days of promulgation.³⁸³ Again the Ninth Circuit³⁸⁴ and Eleventh Circuit³⁸⁵ have said no, the Sixth Circuit³⁸⁶ has said yes, and the Supreme Court has punted.³⁸⁷ Moving outside the context of exemptions, it is far from clear what many courts would say regarding the reviewability of an NPDES regulation that *is not* an exemption. Courts have found rules governing the NPDES program reviewable in the courts of appeals under section 509(b)(1)(E) because the rules are "limitations."³⁸⁸ Similarly, courts may rely on section 509(b)(1)(F) for jurisdiction over NPDES regulations in an attempt to avoid *du Pont's* "perverse situation" of having the issuance or denial of NPDES permits reviewed by courts of appeals but the underlying regulations guiding such issuance or denial reviewed by district courts (section 509(b)(1)(F)).³⁸⁹

But of course, the importance of understanding section 509(b)(1)'s reach extends beyond NPDES regulations, exemptions or otherwise, because EPA makes many decisions outside the NPDES program. Just as one example, EPA makes many significant decisions under CWA's water quality standards program.³⁹⁰ Some litigants have argued, including the *Decker* petitioners, that section 509(b)(1) applies to *all EPA CWA rules*,³⁹¹ which would presumably mean section 509(b)(1) covers these EPA water quality standards decisions even though section 303 of the statute³⁹² is cited nowhere in section 509(b)(1).³⁹³

Additionally, EPA makes innumerable decisions in the form of guidance documents, responses to administrative petitions, and the like, that do not take the form of regulations.³⁹⁴ Given the narrow and precise list of EPA actions carved out in the statute, it is hard to find room for the argument that these kinds of EPA

³⁸² *Decker*, 133 S. Ct. at 1334.

³⁸³ *Friends of the Everglades II*, 699 F.3d 1280, 1287–88 (11th Cir. 2012); *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 932–33 (6th Cir. 2009); *NWEA*, 537 F.3d 1006, 1016, 1018 (9th Cir. 2008).

³⁸⁴ *NWEA*, 537 F.3d at 1016, 1018. *But see* *Env'tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 843 (9th Cir. 2003).

³⁸⁵ *Friends of the Everglades II*, 699 F.3d at 1287–88.

³⁸⁶ *Nat'l Cotton Council of Am.*, 553 F.3d at 932–33.

³⁸⁷ *Decker*, 133 S. Ct. at 1334.

³⁸⁸ *See supra* Part V.C.1.b.

³⁸⁹ *See supra* Part V.C.2.b.

³⁹⁰ *See generally, e.g.*, Water Quality Standards Regulatory Clarifications, 78 Fed. Reg. 54,518, 54,521 (proposed Sept. 4, 2013) (to be codified at 40 C.F.R. Pt. 131) (illustrating decisions EPA made regarding the Federal Water Quality Standards); Final Aquatic Life Ambient Water Quality Criteria for Ammonia—Freshwater 2013, 78 Fed. Reg. 52,192 (Aug. 22, 2013) (releasing final national recommended water quality criteria for ammonia, as required by CWA section 304(a), and to be used by states pursuant to section 303(c)).

³⁹¹ *See supra* note 25 and accompanying text.

³⁹² *See* Federal Water Pollution Control Board, 33 U.S.C. § 1313 (2006) (pertaining to the development and implementation of water quality standards).

³⁹³ *See id.* § 1365.

³⁹⁴ EPA, *Policy & Guidance*, <http://www2.epa.gov/laws-regulations/policy-guidance> (last visited Nov. 23, 2013) (illustrating EPA's understanding of the role of guidance documents).

decisions should be covered. But, the Eighth Circuit has decided that section 509(b)(1) covers EPA letters to a Senator.³⁹⁵ EPA itself has argued that its denial of an administrative petition is covered by 509(b)(1),³⁹⁶ and it has suggested that an amicus brief is an action challengeable under section 509(b)(1).³⁹⁷ One can also imagine scenarios under which an EPA failure to act could be deemed reviewable under section 509(b)(1).³⁹⁸ Thus, outstanding questions regarding finality and notice, and the discretionary nature of particular actions, remain.

Of fundamental importance to the scope of section 509(b), and to the resolution of the above-mentioned questions, is whether EPA actions that are “functionally similar” to actions listed in section 509(b)(1) are directly reviewable in the courts of appeals. As noted above, courts and parties have relied on this reasoning, based on the Supreme Court’s *Crown Simpson* decision, when arguing—and finding—that actions not expressly listed in the statute are subject to direct judicial review pursuant to section 509.³⁹⁹ Thus, there is a risk, already realized in some cases, that parties and courts will use this language as a springboard to rationalizing the expansion of section 509(b)(1) to include EPA actions clearly not contemplated for direct judicial review in the courts of appeals. In part due to the absence of legislative history regarding Congress’s intent for including the particular EPA actions in section 509, courts have been unable to agree on the most basic questions: Did Congress mean what it said when it precisely listed the actions in section 509(b)(1), or did it intend for section 509(b)(1) to apply to EPA actions related to,⁴⁰⁰ or that have the “precise effect” of, actions expressly listed in the statute?

As this Article has demonstrated, a plain text reading has to be the better answer. As several courts of appeals have noted, Congress would not have listed the actions in section 509(b)(1) so precisely if it did not intend that only the specific listed actions, and no others, would be directly reviewable in the courts of appeals under section 509(b)(1).⁴⁰¹ A narrow interpretation of section 509(b)(1) would likely resolve many of the unanswered questions regarding CWA judicial review.

³⁹⁵ *Iowa League of Cities*, 711 F.3d 844, 863 (8th Cir. 2013).

³⁹⁶ Opening Brief for the Federal Defendant-Appellant at 13, *NWEA v. EPA*, 537 F.3d 1006 (2008) (Nos. 03-74795, 06-17187, 06-17188).

³⁹⁷ See *supra* note 142 and accompanying text (discussing EPA’s position in *Brown*).

³⁹⁸ See, e.g., *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1021 (8th Cir. 2010) (dismissing CAA enforcement claims as a collateral attack on EPA’s failure to object to a CAA Title V permit; concluding that EPA’s “inaction” falls within the scope of CAA section 307(b)’s judicial review provision).

³⁹⁹ See *Crown Simpson*, 445 U.S. 193, 196–97 (1979).

⁴⁰⁰ *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 655 (2007) (exercising section 509(b)(1)(D) jurisdiction to review both EPA’s decision to transfer permitting authority to Arizona and EPA’s Endangered Species Act consultation process and Biological Opinion that informed the transfer decision because the biological opinion was “virtually determinative” of the transfer decision); *Defenders of Wildlife v. EPA*, 420 F.3d 946, 955–56 (9th Cir. 2005), *rev’d on other grounds*, 551 U.S. 644 (2007); see *supra* notes 314–16 and accompanying text (discussing ancillary jurisdiction in *American Iron and Steel Institute*).

⁴⁰¹ See, e.g., *supra* note 313 and accompanying text; *P.H. Glatfelter Co. v. EPA*, 921 F.2d 516, 518 (4th Cir. 1990) (rejecting section 509(b)(1)(G) jurisdiction over petition seeking review of EPA’s listing decision and conditional approval of a state-developed ICS in a draft NPDES permit, commenting that “the fact that Congress provided for review of EPA’s promulgation of an ICS under section 509(b)(1)(G) but made no provision for review of other EPA decisions under section 304(l) suggests that Congress intended such intermediate steps not be immediately reviewable.”).

For example, EPA actions “functionally similar” to actions listed in section 509(b)(1) would likely not be reviewable in the courts of appeals, nor would regulations underlying the NPDES program, including regulations exempting certain discharges from the permitting requirements.⁴⁰² In the absence of guidance from the Supreme Court to the contrary, the lower courts should stay true to the statute’s text and conclude that the statute means what it says.⁴⁰³

B. A Narrow Interpretation of Section 509(b) Avoids Significant Practical and Constitutional Concerns

A narrow interpretation of section 509(b)(1), holding that Congress meant what it said, when it said only the EPA actions listed in section 509(b)(1) were subject to direct judicial review, would avoid significant practical and constitutional concerns implicated by an expansive reading of that section. The implications of an expansive reading of section 509(b)(1) are troubling, as amply illustrated by *Decker* itself, as well as other recent decisions by the courts of appeals.⁴⁰⁴

If the *Decker* petitioners were correct, NEDC was required to challenge either the Silvicultural Rule when the rule was promulgated in 1980, or EPA’s Phase I Storm Water Rule when it was promulgated in 1990.⁴⁰⁵ Yet, it is inconceivable how NEDC could have been on notice of EPA’s interpretation of these rules. Despite much of the parties’ and amici’s briefing referring to EPA’s long held views,⁴⁰⁶ EPA acknowledged that it announced its interpretation of the Silvicultural Rule “for the first time” in the *Decker* litigation.⁴⁰⁷ Thus in 1980, NEDC would have been required to invent the facts surrounding the current controversy or assume an interpretation of the rule that was not apparent from the text of the rule itself.

Consider the regulatory history of the Silvicultural Rule. The phrase “natural runoff” crept into the text of the Silvicultural Rule without comment or explanation. The term “runoff” first appeared in a comment to EPA’s 1978

⁴⁰² See *Crown Simpson*, 445 U.S. at 194.

⁴⁰³ See *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 354 (1976) (Rehnquist, J., dissenting) (“The Court of Appeals not unreasonably believed that [the statute] means what it says.”).

⁴⁰⁴ See *supra* note 276 and accompanying text (discussing *Iowa League of Cities*, 711 F.3d 844, 865 (8th Cir. 2013)).

⁴⁰⁵ *Georgia-Pacific West* Petition, *supra* note 12, at 29.

⁴⁰⁶ See *id.* (arguing “it has been clear since those regulations were promulgated in 1990 that channeled forest road runoff is not a stormwater discharge associated with industrial activity”); Reply Brief for Petition for Certiorari at 6, *Georgia-Pacific W., Inc.*, 133 S. Ct. 23 (No. 11-347) (“EPA has repeatedly stated for more than 35 years that forest road precipitation runoff does not become a point source when it is channeled”); *Georgia-Pacific West* Brief for Petitioners *supra* note 7 at 54, (“For 35 years, the meaning of the Silvicultural Rule has been clear: precipitation runoff from forest roads, whether or not collected in ditches, is nonpoint source and not subject to permitting. And since its adoption in 1990, EPA’s Phase I rule has made clear that collected runoff is not a point source discharge ‘associated with industrial activity.’ EPA has reiterated these interpretations time and again, and has enforced each consistently from the outset.”).

⁴⁰⁷ The United States in its 2010 Amicus Brief to the Ninth Circuit argued that section 509(b)(1) expressly permitted NEDC’s challenge—this was before the United States switched its position on this matter—because “the pertinent EPA interpretation [was] offered well after the regulation [was] promulgated.” Brief for the United States as Amicus Curiae Supporting Petitioners, Responding to the Court’s Questions of October 21, 2010, at 10, *Brown*, 640 F.3d 1063 (2011) (No. 07-35266).

proposed revision to the 1976 Silvicultural Regulations.⁴⁰⁸ The finalized 1980 Silvicultural Rule also included “runoff” in its comment section.⁴⁰⁹ Without public comment or EPA elaboration, the term “natural runoff” was adopted into the text of the 1980 regulation.⁴¹⁰ And this rule amendment followed closely on the heels of the D.C. Circuit’s seminal decision in *Natural Resources Defense Council, Inc. v. Costle*,⁴¹¹ which held that EPA did not have the authority to exempt classes of discharges from the CWA.⁴¹² This context makes it even more implausible that NEDC or any other interested party should have read the Silvicultural Rule amendment as an exemption from the NPDES program. And given that EPA included no comment or explanation regarding what “natural runoff” means, it is difficult to imagine precisely what NEDC would have been challenging at that time.

Yet this did not stop the petitioners in *Decker*, and many of their amici, from arguing that indeed NEDC was required to have challenged one or both of the underlying rules at issue in the case within 120 days of the rule(s)’ promulgation.⁴¹³ As noted above, the United States’ position was somewhat more tempered,⁴¹⁴ but it made suggestions that were perhaps equally unworkable as a practical matter. The United States suggested that NEDC should have directly challenged EPA’s interpretation of the Silvicultural Rule announced for the first time in an amicus brief in the Ninth Circuit.⁴¹⁵ Once a federal agency announces its interpretation of a rule in an amicus brief, the United States suggested, this might present new circumstances arising after 120 days, making the rule again challengeable under section 509(b)(1).⁴¹⁶ This suggestion—even if viable under the statute, which is doubtful⁴¹⁷—raises many questions regarding procedural complexities for which

⁴⁰⁸ National Pollutant Discharge Elimination System Revision of Existing Regulations, 43 Fed. Reg. 37,078, 37,101 (Aug. 21, 1978) (codified at 40 CFR pts. 6, 122–125).

⁴⁰⁹ National Pollutant Discharge Elimination System; Revision of Regulations, 44 Fed. Reg. 32,854, 32,914 (June 7, 1979) (codified at 40 C.F.R. pts. 6, 115, 121–125, 402, 403).

⁴¹⁰ Consolidated Permit Regulations: RCRA Hazardous Waste; SDWA Underground Injection Control; CWA National Pollutant Discharge Elimination System; CWA Section 404 Dredge or Fill Programs; and CAA Prevention of Significant Deterioration, 45 Fed. Reg. 33,290, 33,447 (May 19, 1980).

⁴¹¹ 568 F.2d 1369 (D.C. Cir. 1977).

⁴¹² *Id.* at 1377.

⁴¹³ See, e.g., *Georgia-Pacific West* Brief for Petitioners, *supra* note 7, at 56, (“Here, any challenge to the Silvicultural Rule was manifestly ripe within 120 days after its 1976 promulgation or 1980 revision. Any challenge to EPA’s Phase I stormwater regulation was ripe within 120 days of its promulgation in 1990.”).

⁴¹⁴ Brief for the United States as Amicus Curiae Supporting Petitioners *supra* note 12, at 22–23 n.8 (NOS. 11-338 and 11-347) (arguing that the Court had jurisdiction because the Ninth Circuit did not invalidate the underlying rules).

⁴¹⁵ *Id.* (noting that EPA’s clarification in a filing might “provide a new opportunity for review of the rule itself” under Section 1369(b)(1)’s exception for grounds arising after the 120-day limitations period).

⁴¹⁶ *Id.*

⁴¹⁷ It seems questionable, at best, that an agency position in an amicus brief could constitute an “action” within the meaning of section 509(b)(1). Indeed, as explained below, EPA itself has vehemently argued that for an agency action to be challengeable under section 509(b)(1), it must be a final agency action under *Bennett v. Spear*, 520 U.S. 154 (1997). See Respondent EPA’s Motion to Dismiss Petition for Review for Lack of Subject-Matter Jurisdiction at 8–10, *Iowa League of Cities*, 711 F.3d 844 (2011) (No. 11-3412). That is it must be a consummation of the agency’s decision making process and legal consequences must flow from the decision. *Id.*

the United States offered no answers. In the government's view, presumably NEDC should have read the agency's amicus brief and decided to challenge it, and to do so, should have presumably sought a stay of the original enforcement case while it separately directly challenged the agency amicus brief in the court of appeals.⁴¹⁸ But then it remains unclear as to how both of the cases should proceed, in front of which court or panel, and in what sequence.⁴¹⁹

Moreover, the United States' suggestion in *Decker* was troubling, given that NEDC would not have been the only entity interested in EPA's new interpretation of its rule.⁴²⁰ Yet this approach would effectively hold the general public responsible for knowing what EPA states in every amicus brief it files or else be barred under 509(b) from bringing a later challenge.⁴²¹ The recent Eighth Circuit decision brings this concern regarding adequate notice into light as well.⁴²² In that case the Iowa League of Cities challenged two letters sent by EPA to Senator Charles Grassley in response to Senator Grassley's inquiries on behalf of the League regarding EPA's interpretation of particular requirements for municipal wastewater treatment facilities.⁴²³ EPA's two letters were sent to Senator Grassley; they were not published in the Federal Register or in the Code of Federal Regulations.⁴²⁴

Beyond these procedural complexities and the notice issues, the expansive reading of section 509(b) advanced by the petitioners in *Decker* and the plaintiffs in *Iowa League of Cities* raises questions of ripeness. An expansive reading of section 509 invites challenges to every EPA CWA action even if it is not ripe, lest interested parties risk being forever precluded from seeking review. As the United States itself argued to the court of appeals in *Decker*, parties would be required immediately to "challenge [any] potential regulatory interpretations that are textually plausible" and that they believe would violate the statute.⁴²⁵ As one court explained, "the more [courts] pull within section 509(b)(1), the more arguments will be knocked out by inadvertence later on—and the more reason [law] firms will

⁴¹⁸ See *Decker* Brief of Respondent, *supra* note 12, at 22.

⁴¹⁹ *Id.* ("A party unhappy with an agency's amicus filing would presumably have to seek a stay in the original case and file a brand new case in the court of appeals. Then the two courts (or perhaps the two panels of the same court) would either proceed simultaneously or would have to decide who goes first. Multiple questions would then arise. Should the court in the enforcement action first decide whether the agency's proposed interpretation is correct and otherwise entitled to deference? Or should the court in the Section 1369(b) case first decide whether the agency's interpretation, if correct, would violate the statute? Meanwhile, what happens with respect to discovery and motion practice in the enforcement action, and how would appeals be handled? None of these quandaries have easy answers.").

⁴²⁰ See Brief for Amici Curiae Law Professors on Section 1369(b) Jurisdiction in Support of Respondent *supra* note 28, at 32 (arguing that the United States' suggestion in *Decker* would "hold the general public responsible for knowing what EPA states in every amicus brief it files or else be barred under Section 1369(b)").

⁴²¹ See *Decker* Brief of Respondent, *supra* note 12, at 22.

⁴²² *Iowa League of Cities*, 711 F.3d 844, 865 (8th Cir. 2013).

⁴²³ *Id.* at 854.

⁴²⁴ See Respondent EPA's Motion to Dismiss Petition for Review for Lack of Subject-Matter Jurisdiction, *supra* note 417, at 8.

⁴²⁵ Brief for the United States as Amicus Curiae Supporting Petitioners, Responding to the Court's Questions of October 21, 2010, *supra* note 142, at 10 (9th Cir. 1992).

have to petition for review of everything in sight.”⁴²⁶ This would open the floodgates to “hypothetical” lawsuits.

It is well settled that a prospective claim regarding the hypothetical application of a rule to a scenario unimagined by an agency is not ripe for adjudication.⁴²⁷ The basic premise behind the ripeness doctrine is to “prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.”⁴²⁸ The Supreme Court has categorically held that a party cannot challenge an anticipated agency interpretation.⁴²⁹ In *Ohio Forestry Ass’n, Inc. v. Sierra Club*,⁴³⁰ the Court found that respondents’ claim, challenging a speculative application of a general forestry plan, was not ripe for review.⁴³¹ Conjuring up future applications of regulations does “not create adverse effects, . . . command anyone to do anything or to refrain from doing anything, . . . [or] grant, withhold, or modify any formal legal license . . .”⁴³² In short, an imagined application of agency regulations does not create any “legal rights or obligations.”⁴³³ The logic is simple. Courts are loathe to consider claims that are not ripe because it would require a court to “predict” and anticipate consequences of a regulation that are not present and “may change over time.”⁴³⁴ It is doubtful that the Supreme Court, had it fully addressed the logical end of the petitioners’ arguments in *Decker*, would have embraced an approach that effectively calls for ripeness problems.

If section 509(b)(1) is read to apply to all EPA CWA rules, query what well-counseled regulated entity or conservation organization would allow *any* EPA rule to remain unchallenged in the courts of appeals. The world of judicial review of EPA’s actions under the CWA is already messy.⁴³⁵ The confusion in the courts has already led to many litigants filing in both the district court and the court of appeals to protect their claims, then often seeking to stay one litigation and proceed with the other.⁴³⁶ Any interpretation of section 509(b)(1) that goes beyond the plain text, inviting more suits, will only exacerbate this problem.

⁴²⁶ *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (1992) (quoting *Am. Paper Inst. v. EPA*, 882 F.2d 287, 289 (7th Cir. 1989)).

⁴²⁷ *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726 (1998). *See also* *Ammex v. Cox*, 351 F.3d 697, 708 (6th Cir. 2003); *San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1048–49 (10th Cir. 2011).

⁴²⁸ *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967).

⁴²⁹ *Ohio Forestry Ass’n*, 523 U.S. 726 (1998).

⁴³⁰ *Id.*

⁴³¹ *Id.* at 728.

⁴³² *Id.* at 733.

⁴³³ *Id.*

⁴³⁴ *Id.* at 736.

⁴³⁵ *See supra* Part V.A.

⁴³⁶ *See, e.g., NRDC 1982*, 673 F.2d 400, 402 (D.C. Cir. 1982) (explaining that due to uncertainty, both NRDC and industry petitioners also filed in district courts); *NWEA*, 537 F.3d 1006, 1014 (9th Cir. 2008) (recounting the plaintiffs filing both in the district court and also directly with the circuit court as a protective measure); *Nat’l Cotton Council of Am. v. EPA*, 553 F.3d 927, 932 (6th Cir. 2009) (summarizing petitioner’s approach of also filing in district court to preserve review); *ONRC Action v. U.S. Bureau of Reclamation*, No. 97–3090–CL, 2012 WL 3526833, at *24–28 (D. Or. Jan. 17, 2012) (explaining ONRC argument that the challenge may be in district court and Bureau responds by arguing the court is divested of jurisdiction).

Finally, and on the opposite side of the spectrum, an expansive interpretation of section 509(b)(1) could give EPA too much protection from litigation. This is because, as illustrated by *Decker*, EPA could develop ambiguous rules, provide no contemporaneous interpretation, and then develop post hoc interpretations of regulations beyond the 120-day review period, enjoying immunity from suit even if such interpretations are *ultra vires*.⁴³⁷ This cannot be the result Congress intended. Forbidding review of an agency action that has yet to occur would allow “[t]he government . . . to avoid all challenges to its actions, even if *ultra vires*, simply because the agency took the action long before anyone discovered the true state of affairs.”⁴³⁸ An expansive view of section 509(b)(1) would permit the agency to adopt interpretations of its regulations, after promulgation, that are immune to challenge even if they are *ultra vires*.

VII. CONCLUSION

As Justice Scalia aptly stated in his strong dissent in *Decker*: “Enough is enough.”⁴³⁹ Though Justice Scalia was referring to blind adherence to the *Auer* deference doctrine,⁴⁴⁰ the sentiment applies with equal force to the confusion surrounding CWA section 509 jurisdiction.⁴⁴¹ More than thirty years after Congress’s initial enactment of CWA section 509(b)(1), parties are still arguing, and courts are still grappling with, the question of whether Congress meant what it said, when it said that only regulations approved or promulgated, permits issued or denied, or determinations made pursuant to specific CWA sections would be reviewable in the courts of appeals.⁴⁴² As we saw in *Decker*, parties are even taking this confusion as an open invitation to cast section 505 enforcement suits as impermissible and time-barred challenges to EPA rules.⁴⁴³ The Supreme Court rejected this latter invitation, at least in part, by telling us that a party’s reliance on the CWA to interpret a rule in an enforcement action does not necessarily turn the case into an improper collateral attack on that rule.⁴⁴⁴ But future litigation is likely inevitable as parties try to walk the blurry line, unresolved by *Decker*, between interpreting and invalidating agency rules. At least under the CWA, however, a narrow interpretation of section 509, confirming that the statute only applies to the EPA actions listed therein, would reduce the need for courts to grapple with this

⁴³⁷ Brief for Law Professors as Amici Curiae on Section 1369(b) Jurisdiction Supporting Respondent, *supra* note 28, at 30–31.

⁴³⁸ *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991).

⁴³⁹ *Decker*, 133 S. Ct. 1326, 1339 (2013).

⁴⁴⁰ *See id.* (Scalia, J. concurring in part and dissenting in part) (“The Court . . . gives effect to a reading of EPA’s regulations that is not the most natural one, simply because EPA says that it believes the unnatural reading is right. It does this, moreover, even though the agency has vividly illustrated that it can write a rule saying precisely what it means—by doing *just that* while these cases were being briefed. Enough is enough. For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean, under the harmless-sounding banner of “defer[ring] to an agency’s interpretation of its own regulations.”) (internal citations omitted); *Auer v. Robbins*, 519 U.S. 452 (1997); *see also* Dan Mensher essay page 849.

⁴⁴¹ The sentiment may also apply to other aspects of the Court’s decision. *See* Paul Kampmeier’s introductory essay page 757.

⁴⁴² *See supra* Part VI.A.

⁴⁴³ *Decker* Brief for Petitioners, *supra* note 7, at 33–34.

⁴⁴⁴ *Decker*, 133 S. Ct. at 1334.

blurry line. A plain text interpretation of section 509(b)(1) would also answer many of the specific questions the lower courts are wrestling with to this day, and it would alleviate the practical and constitutional implications of the petitioners' argument in *Decker* and other cases.⁴⁴⁵ Because, to date, the Supreme Court has declined to date to straighten out this mess, it is incumbent upon the lower courts and practitioners to say "enough is enough."

⁴⁴⁵ See *supra* Part VI.A.