

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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NATIONAL ASSOCIATION OF )  
MANUFACTURERS, )  
                                ) Petitioner, )  
                                ) v. ) No. 16-299  
DEPARTMENT OF DEFENSE, et al. )  
                                ) Respondents. )  
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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	TIMOTHY S. BISHOP	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	ERIC E. MURPHY	
7	On behalf of Respondents Ohio, et al.,	
8	In support of the Petitioner	19
9	ORAL ARGUMENT OF:	
10	RACHEL P. KOVNER	
11	On behalf of the Respondents	30
12	REBUTTAL ARGUMENT OF:	
13	TIMOTHY S. BISHOP	
14	On behalf of the Petitioner	61
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument first this morning in Case 16-299, the  
5 National Association of Manufacturers versus  
6 Department of Defense, et al.

7 Mr. Bishop.

8 ORAL ARGUMENT OF TIMOTHY S. BISHOP

9 ON BEHALF OF THE PETITIONER

10 MR. BISHOP: Mr. Chief Justice, and  
11 may it please the Court:

12 The Clean Water Act provides for  
13 judicial review in the courts of appeals of  
14 seven categories of action by the EPA  
15 Administrator, and those are defined narrowly  
16 and precisely in Section 1369(b)(1) of the Act.

17 Had Congress meant the courts of  
18 appeals to review all national or definitional  
19 rules, it would have said so, as it did in the  
20 Clean Air Act, instead of listing a handful of  
21 particular EPA actions down to the statutory  
22 subsection.

23 Our textual approach to subsections  
24 (b)(1) and (E) -- (b)(1)(E) and (F) results in  
25 a comparatively clear jurisdictional rule that

1 would eliminate many duplicative filings and  
2 years of litigation over where to litigate.

3 JUSTICE GINSBURG: What would happen  
4 if two questions were presented? The first  
5 involves whether the water in question fits  
6 within "waters of the United States"; that's a  
7 preliminary question. And then there's a  
8 challenge to a grant -- a grant or denial of a  
9 permit.

10 If you had those two combined, where  
11 do they go?

12 MR. BISHOP: Well, I -- I think,  
13 Justice Ginsburg, that the -- the Court has  
14 never answered that question. In footnote 14  
15 of the DuPont, which involved 1304(b)  
16 guidelines, this Court suggested that when you  
17 have a challenge that includes actions covered  
18 by (E) or (F) and that are not covered by (E)  
19 or (F), that it may be possible to exercise  
20 ancillary jurisdiction over the question not --  
21 not covered. Of course, the (b)(2) preclusion  
22 should not apply in that case.

23 But, you know, in any event, the  
24 challenge here is to the waters rule by itself.

25 CHIEF JUSTICE ROBERTS: One of the

1 things, putting -- I mean, obviously, your main  
2 emphasis is, of course, on the statutory  
3 language, but one of the consequences that your  
4 opponent points out is that if you're correct  
5 and these actions are brought in the district  
6 court, each of the district courts will have to  
7 review the entire administrative record, and  
8 presumably, you could have dozens of the  
9 district courts engaged in that same activity,  
10 and then it would have to be done all over  
11 again when you get to the court of appeals.

12 MR. BISHOP: Well, I mean, I think  
13 their argument is that that is inefficient,  
14 right, but they're --

15 CHIEF JUSTICE ROBERTS: Well, you'll  
16 agree that it's inefficient, won't you?

17 MR. BISHOP: Well, their -- their rule  
18 -- I mean, their rule has its own efficiency  
19 problem, which is that it's not clear. And  
20 what you end up with under a rule that isn't  
21 clear is extremely inefficient.

22 And, you know, here we have -- this  
23 rule was promulgated in June of 2015. We  
24 have --

25 CHIEF JUSTICE ROBERTS: But what about

1 my efficiency concern?

2 MR. BISHOP: Well, I -- I think -- the  
3 point I'm trying to make there, Chief Justice,  
4 is just that there are inefficiencies on both  
5 side. This Court said in Sackett that  
6 efficiency does not conquer all. We would like  
7 to litigate these issues in the district court  
8 because we think that going through the  
9 district courts and the courts of appeals will  
10 produce more accurate decision-making, will tee  
11 the case up better for this Court to review.

12 CHIEF JUSTICE ROBERTS: But there're  
13 -- I -- I take it that means they're right,  
14 that that's -- that that's what this would  
15 entail.

16 MR BISHOP: Well, I can --

17 CHIEF JUSTICE ROBERTS: And the  
18 district court, to do the correct job, would  
19 have to look at the whole record, and as many  
20 district courts as these actions have been  
21 brought would have to do that. And then the  
22 court of appeals would do it again all over.

23 MR. BISHOP: That's true. And this  
24 has been filed in 11 district courts. I would  
25 say as a practical matter that what happens in

1 these cases, once the initial skirmishing is  
2 over, is that parties on different sides tend  
3 to get together and dismiss certain cases and  
4 then join the others.

5 JUSTICE SOTOMAYOR: I'm sorry -- why  
6 -- why --

7 MR. BISHOP: In the water transfer  
8 case, that is what happened, for example.

9 JUSTICE SOTOMAYOR: What would be the  
10 inducement for that if we were to say this  
11 needs to go to district court? Why would  
12 parties run to the courthouse? They would  
13 either wait for an enforcement proceeding or  
14 wait for a denial of a permit or just wait, and  
15 the waiting would then result in the  
16 inefficiencies that the Chief Justice just  
17 pointed to.

18 Even worse, because we would have a  
19 rule being constantly challenged and never  
20 truly finalized.

21 MR. BISHOP: Justice Sotomayor,  
22 there's -- there's no chance that anyone will  
23 wait to challenge a rule like this. There were  
24 dozens of suits in the district court and  
25 protective petitions filed within days of this



1 rule coming out. This is a rule of critical  
2 importance to --

3 JUSTICE SOTOMAYOR: Let me ask you  
4 something. Is -- I don't think there's any res  
5 judicata against the government, or is there?  
6 Would a -- would a -- or collateral estoppel,  
7 it wouldn't be res judicata, could there be  
8 collateral estoppel?

9 MR. BISHOP: I don't believe any of  
10 the conditions for estoppel for either issue,  
11 preclusion or claim preclusion, would apply  
12 here. If the government lost these cases, I  
13 assume at that point that it could -- it could  
14 back away before it litigated the rest. And --

15 JUSTICE GINSBURG: Can -- can you  
16 explain to me, I know you have a textual  
17 argument, but is there some sense in having  
18 individual permit grant or denial go to the  
19 court of appeals and a question of the  
20 definition here of "waters of the United  
21 States" that goes to the district court? One  
22 would think it would be just the other way  
23 around.

24 MR. BISHOP: Well, can -- can I say  
25 two things about that, Justice Ginsburg? The

1 first is that Congress itself put the 1342 NPDS  
2 permits into B(1), so those are reviewed in the  
3 court of appeals. It did not do that with 1344  
4 fill permits. So Congress itself had no  
5 problem whatsoever with the idea that permit --  
6 permits could be challenged in different  
7 courts, even though exactly the same WOTUS  
8 decision would be made in both of those types  
9 of permit.

10 The second -- the second thing is that  
11 this idea there is bifurcation here is, is  
12 false.

13 In fact, WOTUS decisions are litigated  
14 in the district court. They are litigated in  
15 the district court when the rule is challenged,  
16 under our approach here, but they're also  
17 litigated in the district court when a  
18 particularized decision is made.

19 Riverside Bayview, SWANCC, Rapanos,  
20 Carabel, Sackett, Hawkes, all of this Court's  
21 cases addressing this question have come up  
22 through the district courts. And these arise  
23 in enforcement proceedings, in -- out of  
24 compliance orders, or out of permits.

25 By the time that a party seeks an NPDS

1 permit, it knows very well whether or not it  
2 has "waters of the United States" on its  
3 property.

4           And if you think about your Miccosukee  
5 case or the LA River case, I think it is clear  
6 why. If you are building a huge pump as in  
7 Miccosukee or if you have a constructive part  
8 of the LA River, as in that case, you've  
9 already had to get the fill permit before you  
10 ever get to the NPDS proceeding.

11           As a practical matter nobody  
12 challenges a WOTUS determination in a 1342  
13 permit proceeding. No one is ever going to go  
14 through the incredible expense of that permit  
15 without first having determined where the  
16 agency is or through one of these more formal  
17 proceedings, like a J.D. at issue in Hawk,  
18 which was reviewed, the J.D., as you said, in  
19 Hawk is reviewed in the District -- no one is  
20 going to do that unless they know whether they  
21 have WOTUS.

22           JUSTICE KAGAN: Mr. Bishop, could I  
23 step back just for a bit? I mean, I understand  
24 that your basic argument is the list is the  
25 list and what's on the list controls.

1 MR. BISHOP: Right.

2 JUSTICE KAGAN: But if I said to you  
3 what was Congress's theory behind the list, do  
4 you think Congress had one?

5 MR. BISHOP: To be honest, I do not --  
6 I cannot explain that and I have never heard  
7 anyone explain that to me. I mean, if you look  
8 at -- if you look at the list, (b) -- (b)(1)(B)  
9 references a provision that was never enacted,  
10 that doesn't exist. (A) puts into the courts  
11 of appeals promulgation of any standard or  
12 performance under Section 1316, but (E) puts in  
13 any approval or promulgation of a limitation  
14 under 1316.

15 And I mean to me this, and this was a  
16 great surprise to me, there is an article that  
17 we cite in our brief, Mead and Fromherz, that  
18 just goes through a lot of different  
19 jurisdictional provisions that Congress comes  
20 up with and explains that a lot of them are  
21 just not very carefully thought out. But what  
22 I would say --

23 JUSTICE KAGAN: So your basic view is,  
24 look, you should just resign yourself to  
25 thinking of this as having no particular

1 rationale. Congress said what it said. Nobody  
2 can figure out what the reasons are that  
3 Congress included those things and not other  
4 things. It's all a themeless pudding and  
5 that's just what it is?

6 MR. BISHOP: And I think when you have  
7 that sort of --

8 JUSTICE KAGAN: Is that -- is that the  
9 idea?

10 MR. BISHOP: Yes. I think, you know,  
11 if someone can come up with an explanation of  
12 this that makes sense, I'm very happy to hear  
13 it. I have yet to hear one.

14 JUSTICE SOTOMAYOR: So, should we make  
15 --

16 MR. BISHOP: And that's why you stick  
17 to text of it --

18 JUSTICE SOTOMAYOR: Should we make  
19 sense of it? Meaning, the government's  
20 position at least with respect to (E) is very  
21 simple. Once you define navigable waters you  
22 say where an effluent limitation applies or  
23 doesn't.

24 And so that's an effluent limitation.  
25 It's attractive, simple. Certainly no more

1 complex than your position in terms of its  
2 consequences. So --

3 MR. BISHOP: Well, I would disagree  
4 with that, Justice Sotomayor. It's -- it --  
5 what it does is it eats up the entire (b)(1)  
6 statute, where there's -- and, Justice Kagan,  
7 these are not -- these are not careful  
8 provisions, I mean, I will give you that, but  
9 they are precise, okay, they can be applied,  
10 they are precise down to the last subsection in  
11 many cases.

12 And so if you apply the statutory  
13 language, you have a clean jurisdictional rule.  
14 If you take the government's --

15 JUSTICE SOTOMAYOR: But it doesn't  
16 swallow up enforcement actions. It doesn't  
17 swallow up the Army Corps permitting. There  
18 are some very big areas that it doesn't swallow  
19 up.

20 MR. BISHOP: It would swallow up -- I  
21 think it would swallow up Sackett. I -- I  
22 disagree there. The compliance order in  
23 Sackett, which went to the district court, told  
24 the Sacketts not to discharge to identified  
25 "waters of the United States" and to restore

1 the property.

2 Now, the government says enforcement  
3 orders don't promulgate limitations within  
4 Subsection (E). But if -- if an order like  
5 that, that says this is a "waters of the United  
6 States," do not discharge to it, please restore  
7 it, if that's not a limitation under (E), how  
8 can a generalized definition of WOTUS possibly  
9 be such a limitation.

10 I think that there are other, you  
11 know, there are other more complex -- I think  
12 that's an easy one -- there are other more  
13 complex ways in which the government -- I mean,  
14 the government's reading essentially is because  
15 of the breadth of 1311(a), the government's  
16 reading is basically that anything that affects  
17 effluent limitations under the statute comes in  
18 under (E). And if you think about --

19 JUSTICE SOTOMAYOR: Could you just  
20 give me one moment, because you just mentioned  
21 the limitations.

22 Give me your interpretation of  
23 effluent limitation or other limitation. What  
24 would other -- give me concrete examples of  
25 what would be an other limitation so that the

1 two terms are not redundant?

2 MR. BISHOP: Other limitations means  
3 the non-effluent limitations in the four listed  
4 provisions. (E) --

5 JUSTICE SOTOMAYOR: Give me an  
6 example, concrete example.

7 MR. BISHOP: Let me give you four  
8 examples. Under 1311(b), and there are many  
9 more, this is just a sampling, so under  
10 1311(b), EPA is directed to promulgate  
11 treatment standards for discharges to  
12 publicly-owned treatment works.

13 Under 1312, which is the water quality  
14 standards provision, it is directed to  
15 promulgate alternative effluent control  
16 strategies needed to meet water quality  
17 standards.

18 1316 is all about new source  
19 performance standards, and there, among the  
20 various things the EPA is told that it should  
21 do, you can come up with operating methods for  
22 the source, operating methods for the source to  
23 meet these standards.

24 And then under 1345, which is the  
25 sewage sludge -- toxic sewage sludge, EPA is



1 told that it can promulgate management  
2 practices. And the way these fit together, if  
3 there's an effluent limitation, is a specific,  
4 usually numerical, limitation on the  
5 quantities, rates, or concentrations of  
6 pollutants. But you can -- you can just set  
7 those numbers, but something else that you can  
8 do is you can say, well, what comes first?  
9 Before this pollutant comes out of the pipe,  
10 what can we do to reduce the effluent in there?

11 And -- and these four provisions list  
12 very precisely things like operating --

13 JUSTICE SOTOMAYOR: So give meaning to  
14 the word "limitation."

15 MR. BISHOP: A limitation --

16 JUSTICE SOTOMAYOR: Well, because  
17 you're basically buying into the government's  
18 argument that it's anything related to --

19 MR. BISHOP: Not at all.

20 JUSTICE SOTOMAYOR: -- the effluent  
21 limitation.

22 MR. BISHOP: Absolutely not. It is  
23 the -- a limitation is an effluent limitation  
24 which is defined -- defined in 36-211, and  
25 there are limitations listed in the four

1 provisions, 1311, 1312, 1316, and 1345. Those  
2 are very precise. That is not anything that  
3 affects a -- the -- the -- an effluent  
4 limitation. It is precise, non-effluent  
5 limitation actions that Congress directed EPA  
6 to take to reduce effluents.

7           And you don't need to go beyond those  
8 four -- those four provisions qualify the  
9 reference to other limitations. And what you  
10 don't do is look at 1311(a), which is the  
11 overarching, foundational provision of the  
12 statute, where if that is what defines what  
13 goes to the court of appeals under (E), you  
14 basically have -- everything -- everything  
15 comes in.

16           Let me just give one more example. I  
17 gave the example of Sackett. But it's -- you  
18 know, 1313 is the water quality provision,  
19 TMDLs. It tells -- it drives effluent  
20 limitations. You set the water quality for a  
21 segment of water, and once you've set that, it  
22 drives the effluent limitations that can be  
23 granted for point sources there.

24           That -- it is inconceivable that that  
25 doesn't fall under the government's view of

1 things that affect effluent limitations. But  
2 the -- the government has twice persuaded  
3 courts of appeals that 1313 lies outside (E)  
4 using textual grounds.

5 What the government's position does is  
6 to make a horrible mess of this statute. And  
7 that mess can only be fixed in one way. And  
8 that's by looking at the precise language that  
9 is set out in (b)(1) and in (E) and (F).

10 And if I can reserve the rest of my  
11 time for rebuttal.

12 JUSTICE GINSBURG: May I just ask you  
13 a question about if -- if, as seems likely, the  
14 rule, the "waters of the United States"  
15 definitional rule is rescinded, is this case  
16 moot?

17 MR. BISHOP: Well, I think it's just  
18 too early to say when or if it will be  
19 rescinded, Justice Ginsburg. The comments came  
20 in on September 27th. There were thousands of  
21 them. We don't know what the timetable is. We  
22 don't know what the government will do.

23 JUSTICE GINSBURG: But they -- the  
24 notice -- as I understand it, notice and  
25 comment period has concluded.

1 MR. BISHOP: It has concluded. There  
2 were thousands of comments. At some point, the  
3 government will take action. We don't know if  
4 it will -- the agency will rescind the rule or  
5 not.

6 It is clear that -- the -- the  
7 environmental groups have said in the press  
8 that they will challenge any withdrawal  
9 immediately. And I would suggest that while  
10 that challenge, doubtless with a stay request  
11 attached, is pending, then the fate of the  
12 WOTUS rule is still up in the air.

13 If I can reserve my time.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 Counsel.

16 Mr. Murphy.

17 ORAL ARGUMENT OF ERIC E. MURPHY  
18 ON BEHALF OF RESPONDENTS OHIO, ET AL.,  
19 IN SUPPORT OF THE PETITIONER

20 MR. MURPHY: Mr. Chief Justice, and  
21 may it please the Court:

22 I'd like to begin with Justice Kagan's  
23 question about the overarching theory. I think  
24 there is a theory that explains both subsection  
25 (E) and the entire statute, and that theory is

1 Congress went through and it looked at the  
2 specific delegations of authority in -- in each  
3 of these statutes. In each of these provisions  
4 that is listed here in the seven sections,  
5 Congress directs EPA to do a specific type of  
6 activity. Subsection (A), standards of  
7 performance, that's one provision in 1316. It  
8 tells EPA promulgate these standards. And  
9 that's true for each one of these, including  
10 subsection (E).

11 And I think that gives meaning to what  
12 effluent limitation or other limitation should  
13 mean because words are known by the company  
14 they keep. Effluent limitation or other  
15 limitation, under the four listed sections, it  
16 seems to me it's talking about the types of  
17 limitations that those four sections  
18 specifically tell EPA: Go engage in  
19 rule-making. Go do these types of activities.  
20 And each one of those is a distinct type of  
21 activity.

22 JUSTICE KAGAN: In the -- in the  
23 government's brief, they ask -- they say, well,  
24 what if we had just done it the following way?  
25 We, you know, issued a rule saying don't

1 discharge -- you can't discharge more than a  
2 certain amount of a certain pollutant in these  
3 following waters.

4 And just list the waters in the rule  
5 that says how much of the pollutant you can't  
6 discharge. And they say, under your rule, that  
7 would come out differently, but it shouldn't  
8 come out differently.

9 MR. MURPHY: I -- I think it would in  
10 this sense: Nothing in subsection or, excuse  
11 me, nothing in Section 1311 directs them to do  
12 that. That would be the agencies acting under  
13 their general rule-making authority, which  
14 would be in Section 1361(a). That's the  
15 catchall. It says, the agencies, you can issue  
16 rules to implement the Act. That's exactly  
17 what the WOTUS rule is designed to accomplish.  
18 It's under that authority. Nothing in Section  
19 1311 either tells the EPA to do that type of  
20 action or the WOTUS rule here.

21 JUSTICE KAGAN: So let me make sure I  
22 understand. On -- on -- on that rule, if the  
23 -- if somebody challenged that rule, where  
24 would it go?

25 MR. MURPHY: That would -- so I

1 assume, the -- the hypothetical was --

2 JUSTICE KAGAN: You -- you can't  
3 discharge more than X amount of Y pollutant in  
4 the following waters.

5 MR. MURPHY: Okay. So I think that  
6 that -- it was just defining waters. That  
7 would -- that would strike me closer to an  
8 effluent limitation because of the actual  
9 limitation, but I still don't think it would be  
10 under 1311. 1311 directs the EPA to set  
11 effluent --

12 JUSTICE KAGAN: Well, it's an effluent  
13 limitation, but you say it's not under 1311.

14 MR. MURPHY: Because it would be under  
15 1361.

16 JUSTICE KAGAN: So then it goes to the  
17 district court?

18 MR. MURPHY: Yes. Yes. It would go  
19 to the district court, I think. In -- but the  
20 common theme of all four of these provisions, I  
21 think, is it tells the EPA to undertake  
22 specific types of actions. 1311, the  
23 technology-based limitations for existing  
24 sources; 1312, switches to water quality-based  
25 standards; 1316, new source standards; and then

1 1345, sewage sludge. So I think that there's  
2 precise language directing EPA to engage in  
3 activity, but there is nothing in the statute  
4 that you can find that -- in any of these four  
5 that says EPA, please promulgate a definition  
6 of "waters of the United States."

7 JUSTICE ALITO: But do you think that  
8 the EPA has the power to issue the type of rule  
9 that Justice Kagan described?

10 MR. MURPHY: They very may not have  
11 the power. If the -- if the power exists,  
12 however, I do not think it would be a power  
13 under 1311. I think it would -- the power  
14 would flow from 1361, which is the general  
15 authority to implement the Act.

16 I'd also like to turn briefly to the  
17 Chief Justice's concerns with efficiency. We  
18 recognize there are efficiency concerns on the  
19 other side, but -- but as DuPont itself  
20 recognized in Footnote 26, there's a competing  
21 wisdom to having things percolate up with more  
22 review. There's a greater chance of having a  
23 correct result.

24 And I think this -- there's a national  
25 rule of -- everybody would agree it's very



1 important. Everybody would agree that it's  
2 important to get things right. And I also  
3 think that -- that there are both efficiency  
4 concerns and fairness concerns on -- on our  
5 side.

6 Efficiency concerns, this Court has  
7 repeatedly said, repeatedly said, including in  
8 Hertz and many other cases, that we should  
9 establish clear jurisdictional rules. This  
10 case is an example of why that presumption  
11 should exist. We've been litigating this  
12 jurisdictional issue for two years now.

13 This is litigation that, as Hertz  
14 indicates, is better spent on litigating the  
15 merits of the rule versus litigating where to  
16 sue. I think our rule, following the plain  
17 text, adopts the clear rule. So for all sorts  
18 of future cases, it's much more likely  
19 individuals will know where to go. Issuing and  
20 denying a permit, if it actually means issuing  
21 or denying a permit, that's a --

22 JUSTICE GINSBURG: You have -- do you  
23 have any reason -- Mr. Bishop was candid in  
24 telling us there doesn't seem to be any rhyme  
25 or reason to this allocation.

1           MR. MURPHY: Well, I do think that --  
2     the rhyme or reason I came up with is, if you  
3     look at the seven actions, each of the sections  
4     that is listed promulgate a standard of  
5     performance. Under Section 306, a toxic  
6     effluent standard; under 1317, make a  
7     determination with respect to a state permit  
8     program -- these are all specific delegations  
9     of authority to the agency to engage in the  
10    specific types of actions that are listed.

11           JUSTICE KAGAN: Do you -- do you think  
12    general -- I mean, does your interpretation  
13    depend very much on a specific understanding of  
14    the word "under"? In other words, you are  
15    reading this to say something like, under the  
16    specific authority of Section 1311, 1312. But  
17    "under" is a kind of nebulous word. It doesn't  
18    say under the specific authority here. It just  
19    says "under."

20           You might read "under" a little bit  
21    differently. You might read "under" to say  
22    something like limitations regulating actions  
23    taken under Sections 1311, 1312, et cetera.

24           So why should we read "under" your  
25    way, rather than in some other way?

1 MR. MURPHY: Yes, because I think you  
2 -- "under" is absolutely -- the Court has said  
3 it is a chameleon, but I think that when you  
4 look at it in the entire phrase, promulgate or  
5 approve an effluent limitation or under  
6 limitation under these things, I think that our  
7 position relies on the entire phrase.

8 And when you say "promulgate a  
9 limitation under," that means that you are  
10 enacting a regulation that is a restriction and  
11 it is under these provisions. I just --

12 JUSTICE KAGAN: But how about -- how  
13 about, I take the point, but how about  
14 promulgating a limitation, regulating actions  
15 taken under 1311, 1312? If you did it that  
16 way, it would come out the government's way.

17 MR. MURPHY: I'm not certain that it  
18 would, because this still would not qualify as  
19 a limitation, it seems to me. I think their  
20 approach would have to be affecting a  
21 limitation that exists within, because that's  
22 essentially what they're arguing, that by  
23 defining the "waters of the United States" they  
24 are triggering -- triggering the ban on  
25 discharges in 1311(a) and that's sufficient.

1           But the statute says "promulgate a  
2    limitation." When you hear the phrase  
3    "promulgate a limitation," the thing being  
4    promulgated itself must be the restriction.  
5    But they don't rely --

6           JUSTICE KAGAN: Yes, but, on -- on the  
7    other hand, you, yourself, treat this rule as  
8    very much limiting your activities. It is a  
9    limitation on activities. It's combined with  
10   another limitation, to -- to say you can't  
11   discharge pollutants where you want to  
12   discharge pollutants, but it is very much part  
13   and parcel of the limitation that you're  
14   objecting to.

15           MR. MURPHY: So, I think the  
16   limitation is 1311(a). That's why they have to  
17   always change the verb from promulgate to  
18   impose or -- it certainly has a practical  
19   effect of triggering a limitation, but so did  
20   the compliance order in Sackett. And that  
21   flowed out of the district court.

22           I just think the practical effect  
23   test, if you're going to adopt that, it's going  
24   to be unclear in most cases whether something  
25   has a practical effect of triggering a

1 limitation under 1311(a). So I think if we're  
2 in the Hertz world where we're thinking of  
3 what's the clearer rule, I think we provide a  
4 clear rule. It's going to be easily  
5 administrable in the range of cases.

6 Under the government's approach,  
7 because it's vague, I think it is going to lead  
8 to a lot of additional litigation over where to  
9 sue.

10 I guess the final point I would make  
11 is we don't just have efficiency concerns on  
12 our side. We have fairness concerns on our  
13 side as well because of the (b)(2) ban on  
14 raising things that could have been raised  
15 under this jurisdictional provision, and later  
16 civil or criminal enforcement proceedings.

17 Justice Powell when talking about a  
18 very similar review preclusion provision  
19 suggested that he would interpret it narrowly  
20 if he could.

21 In the Clean Air Act, it's quite  
22 broad. It's impossible to interpret it  
23 narrowly. But I think the presumption of  
24 agency action review that was at issue in  
25 Sackett would trump the government's position,

1 given the unfairness that could arise.

2 And the Court should keep in mind that  
3 every one of the Court's cases that it has  
4 considered the "waters of the United States"  
5 rule, those are cases that have arisen in  
6 enforcement proceedings or other type of  
7 district court review.

8 All of those under the government's  
9 approach could now not be allowed if the  
10 government's approach is allowed, because if  
11 circuit review exists, then the (b) (2)  
12 provision kicks in and it says that you cannot  
13 have review and later criminal or civil  
14 enforcement proceedings.

15 And I think that's unfair. I think  
16 that's -- Sackett clearly indicated that the  
17 presumption of agency action review extends to  
18 this Act and it expressly said that that  
19 presumption is a repudiation of the principle  
20 that efficiency of agency action should trump  
21 all. And so I think that fairness concern  
22 equally applies here.

23 I also think that there are due  
24 process concerns as well. Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Counsel.

2 Ms. Kovner.

3 ORAL ARGUMENT OF RACHEL P. KOVNER

4 ON BEHALF OF RESPONDENTS

5 MS. KOVNER: Mr. Chief Justice, and  
6 may it please the Court:

7 In order for a person to know what  
8 they are prohibited from doing under Section  
9 1311, they need to know both numerical  
10 constraints that apply under that provision and  
11 geographical constraints under that section.

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

17 Indeed, the challenges are here today  
18 challenging the rule precisely because they  
19 submit it's going to impose broader  
20 restrictions on their conduct under Section  
21 1311.

22 And any doubt about whether  
23 geographical limitations like this ought to be  
24 treated as limitations under Section 1311 and  
25 subject to Circuit Court review is resolved by

1 this Court's cases interpreting this very  
2 provision, which indicate that the provision  
3 should be interpreted to avoid the irrational  
4 bifurcation of similar or related decisions.

5 And none of the challengers here have  
6 explained throughout the briefing or here today  
7 why it is that Congress would want to bifurcate  
8 the geographic aspects of limitations under  
9 Section 1311 from the numerical aspects.

10 Indeed, I think as some -- some of the  
11 questioning points out, this is the equivalent  
12 of a rule that does those two things together,  
13 that simply says a person shall not in the  
14 following locations discharge pollutants  
15 without a permit.

16 JUSTICE ALITO: Is there anything in  
17 the definitional section that will not  
18 indirectly affect something that is listed in  
19 1369(b)? And if that's the case, why didn't  
20 Congress just include the definitional section  
21 in the list of covered actions?

22 MS. KOVNER: Well, I think the key  
23 here is that there are -- Section 1311, there  
24 are actually only a handful of critical terms  
25 and we're defining one of those critical terms.



1 So it is not our submission that any term that  
2 was defined throughout the statute is going to  
3 affect limitations under Section 1311.

4 But here where you're defining, in  
5 effect, discharge of a pollutant, which is  
6 defined as discharge into the "waters of the  
7 United States," you are expanding or  
8 contracting the scope of the prohibition under  
9 Section 1311.

10 And that's why it is the equivalent of  
11 a rule that says on the following waters you  
12 shall not discharge pollutants under Section  
13 1311.

14 That would certainly be a limitation  
15 that's promulgated under Section 1311 and it's  
16 exactly what's happened here.

17 JUSTICE KENNEDY: So your position is  
18 that interpreting a definitional phrase is  
19 necessarily a limitation?

20 MS. KOVNER: I think it's --

21 JUSTICE KENNEDY: And is that a  
22 correct way to characterize your argument or  
23 not -- not correct?

24 MS. KOVNER: I think I might  
25 characterize it a different way. I think we

1 have a clear rule that's derived from just what  
2 is a limitation. And we think a limitation,  
3 the dictionary definition is it's a  
4 restriction.

5 So the rule has to impose a  
6 restriction under Section 1311. That -- this  
7 rule does that. It is the equivalent of a rule  
8 saying you shall not discharge pollutants into  
9 the following locations except in compliance  
10 with the terms of Section 1311.

11 So, I mean, there has been a lot of  
12 talk of clear jurisdictional rules on the other  
13 side. I think our rule is very clear. It's  
14 just, does it impose a limitation under Section  
15 1311?

16 I took our friend, you know,  
17 Petitioner to get up and say essentially he  
18 agrees with that. You look to is it a  
19 limitation and then you look to is it a  
20 limitation that arises under one of the  
21 enumerated provisions?

22 CHIEF JUSTICE ROBERTS: It seems -- it  
23 seems more natural to regard the WOTUS rule,  
24 though, as not imposing a limitation but  
25 telling you where whatever limitations are

1 imposed, will apply.

2 It -- it is not a specific limitation.  
3 It kind of sets the -- the -- the canvass and  
4 the rules kind of tell you what -- what that  
5 means.

6 MS. KOVNER: I think they are the  
7 equivalent. They're doing exactly the same  
8 thing here. You could phrase it as it is a  
9 definition that tells you where the limitations  
10 apply or you could phrase it as just part of  
11 the limitation, is it's a limitation that  
12 applies only in certain places.

13 And if you look to this Court's cases  
14 in DuPont, and Crown Simpson, I think they tell  
15 you two things: first, you look to whether a  
16 functionally similar rule would have gone to  
17 the Courts of Appeals.

18 And if it does, and I think, you know,  
19 I think this -- a functionally similar rule  
20 would go to the Court of Appeals here if it  
21 just included the geographic scope in the rule.

22 CHIEF JUSTICE ROBERTS: Well, Crown  
23 Simpson really was a denial of a permit. I  
24 think you're trying to get too much out of  
25 that.

1           In vetoing the state's grant of a  
2 permit, it denied those permits.

3           MS. KOVNER: That's right. But I  
4 think what -- the reasoning that the Court uses  
5 is it says is this functionally similar to a  
6 rule that would go to the court of appeals?  
7 And here this is functionally similar to a rule  
8 that says the effluent limitations that were  
9 promulgating apply in the following places.  
10 You shall not discharge in the following places  
11 without a permit.

12           JUSTICE GINSBURG: What goes -- what  
13 goes to the district court under your reading?

14           MS. KOVNER: No, Your Honor. I think  
15 if the EPA promulgated a restriction that said,  
16 for instance, you shall not discharge more than  
17 a thousand parts per million of a certain  
18 pollutant into the following waters, that would  
19 be a classic effluent limitation that would go  
20 to the court of appeals.

21           And I'm not sure --

22           JUSTICE GINSBURG: I'm asking what  
23 goes to the district court?

24           MS. KOVNER: So things that go to the  
25 district court include decisions on one

1 particular type of permits, fill permits. Your  
2 Honor's opinion in NRDC lists a number of  
3 additional actions that go -- you know, things  
4 that aren't effluent limitations, but are other  
5 kinds of rules. For instance, rules for  
6 grant-making, rules for certain kinds of vessel  
7 waste. Those aren't effluent limitations. And  
8 those are the kinds of things that go to the  
9 district court.

10 JUSTICE BREYER: Well, what is the --

11 CHIEF JUSTICE ROBERTS: The most -- it  
12 seems to me the most basic question, are these  
13 "waters of the United States," if you are -- if  
14 you are a farmer somewhere and you don't think  
15 these are "waters of the United States," and  
16 you go to the district court, they're going to  
17 tell you, well, sorry, you are out of luck  
18 because you didn't challenge this within 120  
19 days of the promulgation.

20 MS. KOVNER: Well, I think -- so, I  
21 think if you were challenging whether a  
22 particular land was a water of the United  
23 States, you could go to the district court and  
24 get a jurisdictional determination applying to  
25 the particular facts of your case.

1 CHIEF JUSTICE ROBERTS: Yeah, yeah,  
2 but if you think that's -- the definition is --  
3 is what you want to challenge, not whether the  
4 definition applies to your land.

5 MS. KOVNER: It's -- it's just like,  
6 Your Honor, if that farmer wanted to challenge  
7 the -- the numerical constraints that applied,  
8 they ought to go to the court of appeals to  
9 challenge the numerical constraints.

10 Now, I do think there's the separate  
11 question that the other side raises of what if  
12 there is a enforcement action and you want to  
13 contest as a defense in an enforcement action  
14 the definition of "waters of the United  
15 States"? And I think what Harrison indicates,  
16 interpreting exactly the same sort of type of  
17 scheme in the Clean Air Act, is there may be --  
18 if there is any due process issue, if that  
19 farmer needs to have a venue to challenge the  
20 rule as a defense, that's -- that's an issue  
21 with enforcement of (b) -- (b)(2). That's an  
22 issue with the enforcement of the bar to raise  
23 in that kind of challenge.

24 CHIEF JUSTICE ROBERTS: Well, I don't  
25 know what you mean is an issue. Does that mean

1 he can challenge it, in an enforcement action?

2 MS. KOVNER: It means that if there's  
3 any due process problem, the appropriate way to  
4 address that is by a narrow interpretation of  
5 (b) (2), that permits an enforcement action.

6 CHIEF JUSTICE ROBERTS: Well, what  
7 else do you need to know to tell me whether  
8 there's a due process problem or not? He  
9 thinks the definition is not appropriate --

10 MS. KOVNER: Okay.

11 CHIEF JUSTICE ROBERTS: -- under --  
12 under the statute. That you're enforcing it  
13 against him. Does he get to challenge it or  
14 not?

15 MS. KOVNER: So --

16 CHIEF JUSTICE ROBERTS: He's not a  
17 lobbyist. He's a farmer in Kansas. And all of  
18 a sudden, you come in and you're telling him  
19 that he can't, you know, discharge whatever  
20 into the lake. And -- and he says, well, I  
21 don't think that's the right definition. And  
22 you say, well, you should have come to  
23 Washington four years ago.

24 MS. KOVNER: So the Court has reserved  
25 in Harrison, in interpreting essentially the

1 same provision, whether there is a due process  
2 issue that somebody needs to be able to bring a  
3 challenge when there's an enforcement action.

4 If there is, Your Honor, it's not a --  
5 limiting the definition of effluent limitation  
6 is not going to solve that problem because  
7 there are inevitably some limitations that are  
8 going to be covered by (b)(1). So if there is  
9 a due process limitation, the way to address  
10 that has to be to say whatever those  
11 limitations are that are covered by (b)(1) --

12 JUSTICE ALITO: Well, if you will not  
13 say whether a person in that situation would be  
14 able to challenge it in a permitting -- in a  
15 permitting proceeding, then I take your answer  
16 to be that the -- the position of the United  
17 States is that the person cannot challenge it.  
18 That's the position you would take in that  
19 situation.

20 MS. KOVNER: I'm -- I'm not sure, Your  
21 Honor. I don't think we have taken a position  
22 on that because the Court has reserved it. I  
23 think the cases the Court would look to are  
24 cases like Yakus and Adamo Wrecking, and I  
25 think it might depend on the position of --



1 JUSTICE ALITO: Well, I don't  
2 understand how you can make the argument that  
3 you're making today without knowing what the --  
4 what your answer is to that question.

5 MS. KOVNER: I think --

6 JUSTICE ALITO: But you won't answer  
7 that question.

8 MS. KOVNER: I think the reason, Your  
9 Honor, is that -- I think what the Court has  
10 expressly said about it is that to the extent  
11 there's a due process problem, the appropriate  
12 way to address that, the Court said in Note 9  
13 of Harrison, is by narrowing the definition of  
14 (b)(2), by narrowing the preclusion provision.  
15 And that's what the Court would have to do  
16 because any limitation that's promulgated under  
17 (b)(1) is going to raise --

18 JUSTICE BREYER: So it says here that  
19 there is a definition of effluent limitation.

20 MS. KOVNER: Yes.

21 JUSTICE BREYER: The definition of  
22 effluent limitation is, "a restriction  
23 established by the administrator on quantities,  
24 rates, and concentrations." Well, once you  
25 have that in mind, it's hard to agree with you.

1     Because it looks as if, given the fact that we  
2     have (A), (C), (D), and then (E), which refer  
3     to those four sections, it would seem to do two  
4     things: (F) says if they issue -- you know,  
5     you don't -- you want them to issue a permit  
6     and they won't, to you, go ahead, you can go to  
7     the court of appeals. A little unusual since  
8     it's fact-based, but nonetheless.

9             And then the other four that I just  
10     mentioned seem to say if there are standards,  
11     which are like rules, and they're related to  
12     the specific definition I told you about or the  
13     equivalent because "standards of performance,"  
14     after all, is a different set of words than  
15     "effluent limitations." But the "other  
16     limitations" means something like that.

17             And if that isn't the correct  
18     interpretation, then what in heaven's name are  
19     (A), (C), (D), and (F) -- or what are (A), (C),  
20     and (D) doing there? Because you don't need  
21     them? Indeed, your view, which makes sense,  
22     because maybe all rules should be reviewed in a  
23     court of appeals, but that isn't what it says.

24             And -- and I am rather stuck with  
25     that. And you say, well, why did Congress do

1 it? The reason they did it is because they  
2 were worried about getting review of effluent  
3 limitations, or the equivalent, as defined up  
4 there in a court of appeals fast. And as to  
5 the rest of it, the rest of what the EPA does,  
6 they didn't care or at least they didn't care  
7 here. Or at least the hearings weren't about  
8 that. Or at least the members of Congress  
9 weren't thinking about that. That's why  
10 they're left out.

11 All right. Now, that's -- that's how  
12 I read it. And -- and what is it that you want  
13 to say that will disabuse me of that reading?

14 MS. KOVNER: Sure. So let me give you  
15 first a textual response and then a response  
16 that goes to, I think, what Congress indicated  
17 it was thinking.

18 JUSTICE BREYER: Yeah.

19 MS. KOVNER: So with respect to text,  
20 I mean, it says "effluent or other" --

21 JUSTICE BREYER: Oh, I know that.  
22 "Other" means the same --

23 MS. KOVNER: Right.

24 JUSTICE BREYER: -- roughly speaking,  
25 as effluent limitations but in respect to those

1 things that aren't strictly labeled effluent  
2 limitations.

3 MS. KOVNER: So I think -- I guess I  
4 would have two responses to that, Your Honor.  
5 The first is that's not how this Court has  
6 interpreted parallel language in the Clean Air  
7 Act. So in Harrison, Your Honor, the Court  
8 looks at a statute that's a -- same -- the same  
9 kind of list, a bunch of other enumerated  
10 actions, and then a "and any other action of  
11 the administrator" catch-all at the end. And  
12 the Court gives the catch-all its ordinary  
13 meaning. It doesn't apply the canons Your  
14 Honor's talking about, things like ejusdem  
15 generis.

16 And the second thing I would say, Your  
17 Honor, is even if you want to apply sort of an  
18 effluent-related label I think like Your Honor  
19 is suggesting, a closely related, closely  
20 connected limitations label, this is the first  
21 one in line because this is the limitation that  
22 tells you exactly where the effluent  
23 limitations apply. It's as closely connected  
24 as you can get.

25 JUSTICE SOTOMAYOR: So, Ms. Kovner --

1 MS. KOVNER: And then just to go to  
2 what Congress was -- indicated it was thinking.  
3 I think if you look to the legislative history,  
4 it thought it was sending most national rules  
5 to the courts of appeals, not the district  
6 courts --

7 JUSTICE SOTOMAYOR: Are --

8 JUSTICE BREYER: And if it is that, if  
9 it is that, if the -- Learned Hand once said  
10 you have to read these things like music. And  
11 -- the word "other limitations" certainly  
12 doesn't sound like a big catch-all; it sounds  
13 like a little catch-all.

14 So if that's true, your reading,  
15 though, why did they bother writing this other  
16 stuff? Because after all, they would be up  
17 there in the court of appeals anyway under what  
18 you see as a big catch-all.

19 MS. KOVNER: Well, I think, Your  
20 Honor, if you -- if Your Honor is inclined to  
21 give it a narrow reading, we would say just  
22 apply the principles that this Court has  
23 applied in other cases to construe how big that  
24 exception is, what its scope is. And what the  
25 Court has said is avoid the bifurcation of

1 closely related decisions.

2 And something that tells you the  
3 geographic scope of what effluent limitations  
4 are is just as closely related as you can get  
5 to -- to effluent limitations. So --

6 JUSTICE SOTOMAYOR: So, Ms. Kovner --

7 JUSTICE GINSBURG: Ms. Kovner, you  
8 mentioned the Clean Air Act. But that does  
9 have a provision that makes rules of national  
10 scope go to the court of appeals. That's  
11 what's missing here.

12 MS. KOVNER: Your Honor, we agree that  
13 this provision is narrower than the Clean Air  
14 Act provision and that there are many rules  
15 that are going to be promulgated that don't go  
16 to the courts of appeals. So we're not reading  
17 this as though it said "and any other action of  
18 the Administrator," like the Clean Air Act.  
19 What we do think it says is effluent or any  
20 other limitations under Section 1311. So if  
21 it's imposing a limitation under Section 1311,  
22 that's all we're saying is what goes to the  
23 courts of appeals.

24 JUSTICE SOTOMAYOR: So, basically, you  
25 agree with your adversary that -- that "other

1 limitation" means any limitation? Is there any  
2 -- otherwise, what limitations don't exist?

3 MS. KOVNER: We -- we -- we agree that  
4 it means just the ordinary meaning, restricted  
5 --

6 JUSTICE SOTOMAYOR: Of any limitation?

7 MS. KOVNER: Yes. But I think we  
8 would also say, Your Honor, that if you were to  
9 take Justice Breyer's approach and say it has  
10 to be an effluent-related limitation, somehow  
11 connected to effluent limitations, we still win  
12 because this is the kind of limitation you need  
13 to know in order to know where the effluent  
14 limitations apply.

15 It's as closely connected as you can  
16 get --

17 CHIEF JUSTICE ROBERTS: Ms. --  
18 Justice Kagan.

19 JUSTICE KAGAN: Let's assume for --  
20 for a moment that your view of any other  
21 limitation is right, that it's quite a broad  
22 phrase, but General Murphy, as I understood it,  
23 made -- made a point that said, well, still, I  
24 mean, there's this under these following  
25 sections.

1           And suppose he's right, that in the  
2 context of this whole provision, which starts  
3 out about "promulgating limitations," that  
4 "under" is -- is best taken to mean under the  
5 specific authority of.

6           MS. KOVNER: Yes.

7           JUSTICE KAGAN: So if -- do you have  
8 any argument that this rule was promulgated  
9 under the authority of Section 11, or was it  
10 pretty clearly promulgated under the authority  
11 of Section 1361?

12           MS. KOVNER: We think it's promulgated  
13 under both. Whenever EPA promulgates a rule on  
14 interpreting the statute, it's implying -- it's  
15 applying, in part, the general rule-making  
16 authority provision that Mr. Murphy alludes to.

17           But it's also here relying on the  
18 ambiguity that exists. It's just -- you know,  
19 that --- that a statutory term is ambiguous  
20 indicates that Congress was delegating to the  
21 agencies some authority to resolve ambiguities  
22 in the statute. Here it's relying on 1311,  
23 which contains these terms that the EPA has the  
24 authority to define under the statute.

25           JUSTICE KAGAN: Now, in your own brief



1 in responding to some other argument in a  
2 footnote, you say the CWA authorized the  
3 administrator to issue the Clean Water Rule,  
4 and then you have a citation. And it gives  
5 1361 as the authority for that.

6 And that seems, you know, pretty right  
7 to me, that you were relying on general  
8 rule-making authority, rather than relying on  
9 the provision that talked about specific  
10 effluent restrictions.

11 MS. KOVNER: Well, just to be clear,  
12 Your Honor, Section -- for everything that we  
13 do under Section 1311, every kind of limitation  
14 we promulgate or approve, we are relying on  
15 that general rule-making authority.

16 I think it's important that Section  
17 1311 itself never says the EPA shall promulgate  
18 effluent limitations. I mean, it's simply, you  
19 know, relying on our Section 1361 rule-making  
20 authority to say we're the entity that gets to  
21 define what the limitations are going to be.  
22 We're relying on our general rule-making  
23 authority to give content to definitions that  
24 the statute, you know, indicated are going to  
25 be defined terms and are going to impose

1 limitations.

2 For example, you know, other places in  
3 1361, they talk about best pollution control  
4 technology as defined by the administrator.  
5 Well, I think if we define best pollution  
6 control technology more stringently, it's  
7 pretty clearly going to be imposing an  
8 additional limitation under Section 13 --

9 JUSTICE BREYER: Why? Because if you  
10 say, if it's like effluent limitation, how --  
11 you say we need an end because this is close  
12 enough -- but it's defined as a, as I said,  
13 quantities, rates, and concentrations of  
14 constituents which are discharged.

15 Now, how is a geographical regulation,  
16 a geographical limitation or expansion, how is  
17 that related to, why, that doesn't sound like a  
18 restriction on quantities, rates, and  
19 concentrations of discharges.

20 MS. KOVNER: Sure. It's a limitation  
21 that's very closely bound up with quantities  
22 and rates because you need to know the scope of  
23 the definition of -- the scope of --

24 JUSTICE BREYER: The discharge from a  
25 point --

1 MS. KOVNER: Yes.

2 JUSTICE BREYER: -- so a geographical  
3 limitation.

4 MS. KOVNER: Yes.

5 JUSTICE BREYER: Is -- okay, I get it.

6 MS. KOVNER: So, in order to know the  
7 scope of that obligation of the limits on rates  
8 or points, you need to know where those  
9 limitations apply. And it's literally  
10 something you need to know both in order to  
11 know why you're --

12 JUSTICE BREYER: I see the point, I'll  
13 think about it.

14 JUSTICE GINSBURG: May I ask you about  
15 the mootness problem? Isn't it so that and now  
16 the government is poised to moot this case  
17 anytime it wants. It has announced that it is  
18 rescinding this rule and go back to the old  
19 rule, and it has no disincumbent, and tomorrow  
20 it could say no more new "waters of the United  
21 States" rule.

22 MS. KOVNER: I -- I think my friend on  
23 the other side's description of the state of  
24 affairs is correct in that we've completed the  
25 notice and comment receiving phase and the

1 agency is now evaluating that -- those comments  
2 that it's received.

3 And it is possible that the agency  
4 will, after that, decide, as it's proposed to  
5 do, decide to rescind the existing rule.

6 I do think it points up, Your Honor,  
7 the sort of practical implications here. I  
8 mean, for example, the agency received about  
9 500,000 comments about the new proposed rule.  
10 It received, I think, about twice as many  
11 comments, it assembled a 350,000 page  
12 administrative record about the old rule.

13 JUSTICE SOTOMAYOR: So just  
14 realistically, is it possible this case would  
15 be mooted this term or is this process one that  
16 innately will take longer than this term?

17 MS. KOVNER: I don't know the answer  
18 to that question. When -- when it became a  
19 possibility that the rule would be rescinded,  
20 we advised the Court and suggested it might  
21 want to consider holding the case in abeyance  
22 to see what happens, but the Court elected to  
23 proceed with the case. And we don't have any  
24 sort of different information now aside from  
25 that the notice and comment has concluded.

1 CHIEF JUSTICE ROBERTS: Nothing in the  
2 pending proceedings addresses the  
3 jurisdictional issue that's before us right  
4 now, does it?

5 MS. KOVNER: The jurisdictional issue  
6 would arise again, yes, under a new -- so I  
7 think if -- I tend to agree that if the Court  
8 rescinded the rule that is at issue here, this  
9 case would become moot, but the issue would  
10 arise again in the context of the new "waters  
11 of the United States" rule.

12 And, you know, I think what you would  
13 have, to allude to the practical consequences  
14 that Your Honor discussed earlier, as this case  
15 exemplifies, you'd have people go into dozens  
16 of district courts. Those courts would be  
17 reviewing hundreds of thousands of pages of  
18 administrative records.

19 It would get to the courts of appeals.  
20 They would do that again with no deference to  
21 the initial district court decision.

22 It's really inimical to what this  
23 Court indicated in Crown Simpson and in other  
24 cases was the purpose of this provision, which  
25 is to give clarity.

1 JUSTICE GORSUCH: Well, Counsel, under  
2 Hertz, we -- we prefer a clear rule.

3 MS. KOVNER: Yes.

4 JUSTICE GORSUCH: And if that's the  
5 thumb on the scale, I thought you had a pretty  
6 interesting argument that, you know, it would  
7 go to the courts of appeals and that would be  
8 more efficient, until your interaction with the  
9 Chief Justice and Justice Alito where you --  
10 you indicated you wouldn't necessarily  
11 foreclose district court actions either.

12 So where does that leave us in terms  
13 of a clear rule?

14 MS. KOVNER: Yeah, I -- the Court has  
15 indicated clear rules are important. We think  
16 we have the clear rule here. You just look to  
17 --

18 JUSTICE GORSUCH: But you wouldn't --  
19 you wouldn't -- you wouldn't stand by that rule  
20 when pressed by -- by my colleagues.

21 MS. KOVNER: Oh, I don't think so. I  
22 think the person who's bringing a civil suit,  
23 absolutely, under (b)(1), has to go to the  
24 court of appeals.

25 The issue that this Court has reserved

1 is, well, what if you are -- what if you're the  
2 defendant in an enforcement action.

3 JUSTICE GORSUCH: Right.

4 MS. KOVNER: Harrison indicates it's a  
5 separate question and any issue that arises  
6 would be an issue in (b)(2).

7 JUSTICE GORSUCH: So if we're going to  
8 be in district court anyway, what's -- what's  
9 the efficiency gained here by your rule?

10 MS. KOVNER: Well, I think, you know,  
11 this case exemplifies when a major rule like  
12 this is promulgated, you have many, many people  
13 who want to challenge the rule.

14 Here, you had 15 people, you know, 15  
15 parties walk in, and the question is are those  
16 challenges going to be routed to a single court  
17 of appeals that can quickly resolve, you know,  
18 these challenges, or are they going to be  
19 considered in 15 different district courts or a  
20 dozen different district courts and then go up  
21 to the courts of appeals and have that 350,000  
22 page record considered anew.

23 We think it's inimical to the  
24 objective of obtaining certainty about what the  
25 scope of people's obligations are under Section

1 1311.

2 JUSTICE SOTOMAYOR: I'm sorry.

3 Perhaps you can focus in.

4 MS. KOVNER: Yes.

5 JUSTICE SOTOMAYOR: What would be the  
6 difference? Let's assume we say this goes to  
7 the court of appeals and the court of appeals  
8 says, whatever, the rule is okay.

9 MS. KOVNER: Yes.

10 JUSTICE SOTOMAYOR: Now an enforcement  
11 action comes in and someone, some farmer says I  
12 don't -- I shouldn't fit under this rule  
13 because this really can't be navigable waters.  
14 What happens then?

15 Does the Court say, well, that was  
16 litigated or should have been litigated before,  
17 so we're just not going to pay attention to  
18 this challenge?

19 MS. KOVNER: So I think then the  
20 question would be, notwithstanding whatever  
21 this Court has said about (b)(1), is there a  
22 (b)(2) due process exception?

23 That question is going to be a live  
24 question no matter what this Court decides  
25 about the scope of (b)(1), because there are



1 always going to be challenges that farmer could  
2 bring.

3 JUSTICE GORSUCH: So, in every  
4 enforcement action, we're going to be having  
5 district courts decide this question anyway  
6 eventually.

7 MS. KOVNER: No, no, I think the next  
8 question the Court will need to address, and it  
9 will need to address no matter what it decides  
10 in this case about the scope of effluent  
11 limitations is, is there a due process  
12 requirement that in an enforcement proceeding  
13 somebody will be able to challenge something  
14 that, you know, was promulgated through a rule.  
15 It's going to arise on either side's -- on  
16 either side's view of what the scope of  
17 effluent limitations are.

18 JUSTICE ALITO: Could I ask you about  
19 clause (F)? What is your textual argument  
20 relating to that?

21 MS. KOVNER: Sure. So I think it -- I  
22 think our argument derives in large part from  
23 what this Court said about (F) in Crown  
24 Simpson, which is this Court indicated the  
25 provision should be construed not simply to

1 sort of reach decisions that issue or deny a  
2 permit but also decisions that are so closely  
3 related that it would be irrational to divide  
4 them up.

5           And so then I think it goes to the  
6 point that Justice Ginsburg made and what this  
7 Court said in DuPont, which is if the  
8 individual -- if this decision, when in the  
9 context of an individual proceeding would go to  
10 the court of appeals and, you know, here, in  
11 the context of an individual permitting  
12 decision, a "waters of the United States"  
13 decision would go to the court of appeals, then  
14 it doesn't make sense for a categorical rule  
15 about that to go to the district court.

16           And courts of appeals sort of starting  
17 from Crown Simpson have adopted that approach.  
18 And so they've said sort of the basic rules  
19 that are sort of thresholds to whether you can  
20 get a permit or not go to the courts of  
21 appeals.

22           JUSTICE ALITO: So the -- so the  
23 argument would be that the definition issues or  
24 denies a permit because it has an important  
25 effect on the issuance and denial of permits?

1 MS. KOVNER: It's -- it's a threshold  
2 for a permit to be issued that it has to be a  
3 water of the United States. And if that  
4 decision is made in an individual permitting  
5 action, it will go to the court of appeals.

6 But I do think, Your Honor, looking at  
7 that decision, if you look at the sort of  
8 functionally similar or identical language the  
9 Court relied on and said if it's functionally  
10 similar then it should go to the court of  
11 appeals, it has a lot of relevance under (E)  
12 because this is the equivalent of a rule that  
13 says, you know, you cannot discharge pollutants  
14 on the following locations.

15 If that goes to the court of appeals,  
16 then a rule that just specifies the geographic  
17 piece should also go to the courts of appeals.

18 And, Your Honor, I do think it's worth  
19 highlighting that the approach that we're  
20 proposing of avoiding irrational bifurcation is  
21 an approach this Court set out about 40 years  
22 ago.

23 Since then the courts of appeals have  
24 been applying it. They have a construction of  
25 limitation that they are looking to, you know,

1 does this restrain industry?

2 And they've been applying this sort of  
3 does this bifurcate decisions that are closely  
4 related analysis. They have been doing that  
5 for 40 years. In that time, Congress has  
6 amended this provision, but they haven't  
7 expressed any disapproval of that approach.

8 And, in fact, whenever Congress has  
9 spoken about this provision, they've indicated  
10 they understand that national rules are  
11 generally going to go to the courts of appeals.

12 JUSTICE SOTOMAYOR: But we do have  
13 confusion just in this case.

14 MS. KOVNER: I think your --

15 JUSTICE SOTOMAYOR: The Circuit and  
16 District Courts would. So something about our  
17 rule is not clear.

18 MS. KOVNER: You're -- I think Your  
19 Honor is correct.

20 JUSTICE SOTOMAYOR: So tell me what we  
21 do to make it clear. How do we --

22 MS. KOVNER: Yes.

23 JUSTICE SOTOMAYOR: -- explain this to  
24 the courts below so that they have a clearer  
25 idea of what it is that's in and what's out?

1 MS. KOVNER: Yes. I think the clear  
2 rule, Your Honor, is to say if a rule imposes  
3 limitations under Section 1311, then it goes to  
4 the courts of appeals.

5 And I think if -- if the Court reaches  
6 --

7 JUSTICE SOTOMAYOR: That has to do  
8 with whether it imposes a limitation on any of  
9 the words of 1311.

10 MS. KOVNER: I -- I think --

11 JUSTICE SOTOMAYOR: Because that's how  
12 you limited it before.

13 MS. KOVNER: Sure. So I think --

14 JUSTICE SOTOMAYOR: Discharge of any  
15 pollutant in navigable waters. What other  
16 words are at issue?

17 MS. KOVNER: So, for instance, courts  
18 of appeals have consistently treated rules that  
19 interpret other provisions -- other words in  
20 1311 like "pollutant" or "point source," those  
21 have also been going to the courts of appeals.

22 JUSTICE KAGAN: And -- and,  
23 Ms. Kovner, suppose that the -- the rule had  
24 restricted the class of "waters of the United  
25 States".

1 MS. KOVNER: Yes.

2 JUSTICE KAGAN: Would that still count  
3 as a limitation under your view?

4 MS. KOVNER: It would, Your Honor,  
5 because we don't think the right baseline is  
6 what was the pre-existing rule. We think you  
7 look at the rule by itself. The easiest way to  
8 see that I think is an analogy to numerical  
9 limits. So, if the rule is, initially, you can  
10 only discharge 16,000 parts per million of a  
11 chemical, and the rule is changed so now it's  
12 you can discharge 18,000, it's a more lenient  
13 limitation, but you would still say that's an  
14 effluent limitation that goes to the courts of  
15 appeals.

16 If there are no further questions.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 Counsel.

19 Two minutes, Mr. Bishop.

20 REBUTTAL ARGUMENT OF TIMOTHY S. BISHOP  
21 ON BEHALF OF THE PETITIONER

22 MR. BISHOP: So the government's just  
23 conceded that it's been pushing this functional  
24 argument, functional effects argument, for the  
25 last 40 years, which is true, and some courts

1 have accepted that and not all have by any  
2 means.

3 But the result has been that, for 40  
4 years, people have been filing duplicative  
5 actions and then litigating about where to  
6 litigate. This is the third case I've had like  
7 this. My clients have had dozens of cases  
8 where they've spent millions of dollars  
9 litigating about where to litigate. The answer  
10 to this is to look at the clear language of the  
11 statute, which is the only way to get a -- a  
12 bright-line rule here.

13 And just to -- part of that is the  
14 word "under," Justice Kagan. And I -- I think  
15 when you look at the -- although this is a  
16 chameleon, when you look at the cases, two  
17 clear meanings for "under" that come out. One  
18 is authorized by, as you mentioned. And this  
19 is not authorized by. It's a footnote that you  
20 indicated, and the government's brief concedes,  
21 is authorized by 1361(a), not by 1311.

22 Another meaning is as specified in.  
23 And that meaning is important here because  
24 where the -- because the second clause in (E)  
25 specifies limitations under these four

1 provisions. And those four provisions, as  
2 Justice Breyer noted, list both effluent  
3 limitations and other types of limitations that  
4 cut back on what comes out of the pipe but are  
5 not themselves effluent limitations.

6 That is a perfectly clear meaning of  
7 (E) that does not reach a broad geographical  
8 definition of this type. Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel. The case is submitted.

11 (Whereupon, at 11:02 a.m., the case  
12 was submitted.)

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## Official - Subject to Final Review

<b>1</b>	<p><b>above-entitled</b> <sup>[1]</sup> 1:13  <b>absolutely</b> <sup>[3]</sup> 16:22 26:2 53:23  <b>accepted</b> <sup>[1]</sup> 62:1  <b>accomplish</b> <sup>[1]</sup> 21:17  <b>accurate</b> <sup>[1]</sup> 6:10  <b>act</b> <sup>[12]</sup> 3:12,16,20 21:16 23:15 28:21 29:18 37:17 43:7 45:8,14,18  <b>acting</b> <sup>[1]</sup> 21:12  <b>action</b> <sup>[17]</sup> 3:14 19:3 21:20 28:24 29:17,20 37:12,13 38:1,5 39:3 43:10 45:17 54:2 55:11 56:4 58:5  <b>actions</b> <sup>[16]</sup> 3:21 4:17 5:5 6:20 13:16 17:5 22:22 25:3,10,22 26:14 31:21 36:3 43:10 53:11 62:5  <b>activities</b> <sup>[3]</sup> 20:19 27:8,9  <b>activity</b> <sup>[4]</sup> 5:9 20:6,21 23:3  <b>actual</b> <sup>[1]</sup> 22:8  <b>actually</b> <sup>[2]</sup> 24:20 31:24  <b>adamo</b> <sup>[1]</sup> 39:24  <b>additional</b> <sup>[3]</sup> 28:8 36:3 49:8  <b>address</b> <sup>[5]</sup> 38:4 39:9 40:12 56:8,9  <b>addresses</b> <sup>[1]</sup> 52:2  <b>addressing</b> <sup>[1]</sup> 9:21  <b>administrable</b> <sup>[1]</sup> 28:5  <b>administrative</b> <sup>[3]</sup> 5:7 51:12 52:18  <b>administrator</b> <sup>[6]</sup> 3:15 40:23 43:11 45:18 48:3 49:4  <b>adopt</b> <sup>[1]</sup> 27:23  <b>adopted</b> <sup>[1]</sup> 57:17  <b>adopts</b> <sup>[1]</sup> 24:17  <b>adversary</b> <sup>[1]</sup> 45:25  <b>advised</b> <sup>[1]</sup> 51:20  <b>affairs</b> <sup>[1]</sup> 50:24  <b>affect</b> <sup>[3]</sup> 18:1 31:18 32:3  <b>affecting</b> <sup>[1]</sup> 26:20  <b>affects</b> <sup>[2]</sup> 14:16 17:3  <b>agencies</b> <sup>[3]</sup> 21:12,15 47:21  <b>agency</b> <sup>[9]</sup> 10:16 19:4 25:9 28:24 29:17,20 51:1,3,8  <b>ago</b> <sup>[2]</sup> 38:23 58:22  <b>agree</b> <sup>[8]</sup> 5:16 23:25 24:1 40:25 45:12,25 46:3 52:7  <b>agrees</b> <sup>[1]</sup> 33:18  <b>ahead</b> <sup>[1]</sup> 41:6  <b>air</b> <sup>[8]</sup> 3:20 19:12 28:21 37:17 43:6 45:8,13,18  <b>al</b> <sup>[5]</sup> 1:7,21 2:7 3:6 19:18  <b>alito</b> <sup>[8]</sup> 23:7 31:16 39:12 40:1,6 53:9 56:18 57:22  <b>allocation</b> <sup>[1]</sup> 24:25  <b>allowed</b> <sup>[2]</sup> 29:9,10  <b>allude</b> <sup>[1]</sup> 52:13  <b>alludes</b> <sup>[1]</sup> 47:16  <b>already</b> <sup>[1]</sup> 10:9  <b>alternative</b> <sup>[1]</sup> 15:15  <b>although</b> <sup>[1]</sup> 62:15  <b>ambiguities</b> <sup>[1]</sup> 47:21  <b>ambiguity</b> <sup>[1]</sup> 47:18  <b>ambiguous</b> <sup>[1]</sup> 47:19  <b>amended</b> <sup>[1]</sup> 59:6  <b>among</b> <sup>[1]</sup> 15:19  <b>amount</b> <sup>[2]</sup> 21:2 22:3</p>	<p><b>analogy</b> <sup>[1]</sup> 61:8  <b>analysis</b> <sup>[1]</sup> 59:4  <b>ancillary</b> <sup>[1]</sup> 4:20  <b>anew</b> <sup>[1]</sup> 54:22  <b>announced</b> <sup>[1]</sup> 50:17  <b>another</b> <sup>[2]</sup> 27:10 62:22  <b>answer</b> <sup>[5]</sup> 39:15 40:4,6 51:17 62:9  <b>answered</b> <sup>[1]</sup> 4:14  <b>anytime</b> <sup>[1]</sup> 50:17  <b>anyway</b> <sup>[3]</sup> 44:17 54:8 56:5  <b>appeals</b> <sup>[44]</sup> 3:13,18 5:11 6:9,22 8:19 9:3 11:11 17:13 18:3 34:17,20 35:6,20 37:8 41:7,23 42:4 44:5,17 45:10,16,23 52:19 53:7,24 54:17,21 55:7,7 57:10,13,16,21 58:5,11,15,17,23 59:11 60:4,18,21 61:15  <b>appearances</b> <sup>[1]</sup> 1:17  <b>applied</b> <sup>[3]</sup> 13:9 37:7 44:23  <b>applies</b> <sup>[4]</sup> 12:22 29:22 34:12 37:4  <b>apply</b> <sup>[13]</sup> 4:22 8:11 13:12 30:10 34:1,10 35:9 43:13,17,23 44:22 46:14 50:9  <b>applying</b> <sup>[4]</sup> 36:24 47:15 58:24 59:2  <b>approach</b> <sup>[11]</sup> 3:23 9:16 26:20 28:6 29:9,10 46:9 57:17 58:19,21 59:7  <b>appropriate</b> <sup>[3]</sup> 38:3,9 40:11  <b>approval</b> <sup>[1]</sup> 11:13  <b>approve</b> <sup>[2]</sup> 26:5 48:14  <b>areas</b> <sup>[1]</sup> 13:18  <b>aren't</b> <sup>[3]</sup> 36:4,7 43:1  <b>arguing</b> <sup>[1]</sup> 26:22  <b>argument</b> <sup>[24]</sup> 1:14 2:2,5,9,12 3:4,8 5:13 8:17 10:24 16:18 19:17 30:3 32:22 40:2 47:8 48:1 53:6 56:19,22 57:23 61:20,24,24  <b>arise</b> <sup>[5]</sup> 9:22 29:1 52:6,10 56:15  <b>arisen</b> <sup>[1]</sup> 29:5  <b>arises</b> <sup>[2]</sup> 33:20 54:5  <b>army</b> <sup>[1]</sup> 13:17  <b>around</b> <sup>[1]</sup> 8:23  <b>article</b> <sup>[1]</sup> 11:16  <b>aside</b> <sup>[1]</sup> 51:24  <b>aspects</b> <sup>[2]</sup> 31:8,9  <b>assembled</b> <sup>[1]</sup> 51:11  <b>assistant</b> <sup>[1]</sup> 1:23  <b>association</b> <sup>[2]</sup> 1:3 3:5  <b>assume</b> <sup>[4]</sup> 8:13 22:1 46:19 55:6  <b>attached</b> <sup>[1]</sup> 19:11  <b>attention</b> <sup>[1]</sup> 55:17  <b>attractive</b> <sup>[1]</sup> 12:25  <b>authority</b> <sup>[18]</sup> 20:2 21:13,18 23:15 25:9,16,18 47:5,9,10,16,21,24 48:5,8,15,20,23  <b>authorized</b> <sup>[4]</sup> 48:2 62:18,19,21  <b>avoid</b> <sup>[2]</sup> 31:3 44:25  <b>avoiding</b> <sup>[1]</sup> 58:20  <b>away</b> <sup>[1]</sup> 8:14</p>	<p>17 53:23 55:21,25  <b>b(1)(b)</b> <sup>[1]</sup> 11:8  <b>b(1)(e)</b> <sup>[1]</sup> 3:24  <b>b(2)</b> <sup>[8]</sup> 4:21 28:13 29:11 37:21 38:5 40:14 54:6 55:22  <b>back</b> <sup>[4]</sup> 8:14 10:23 50:18 63:4  <b>ban</b> <sup>[2]</sup> 26:24 28:13  <b>bar</b> <sup>[1]</sup> 37:22  <b>baseline</b> <sup>[1]</sup> 61:5  <b>basic</b> <sup>[4]</sup> 10:24 11:23 36:12 57:18  <b>basically</b> <sup>[4]</sup> 14:16 16:17 17:14 45:24  <b>bayview</b> <sup>[1]</sup> 9:19  <b>became</b> <sup>[1]</sup> 51:18  <b>become</b> <sup>[1]</sup> 52:9  <b>begin</b> <sup>[1]</sup> 19:22  <b>behalf</b> <sup>[11]</sup> 1:18,21,24 2:4,7,11,14 3:9 19:18 30:4 61:21  <b>behind</b> <sup>[1]</sup> 11:3  <b>believe</b> <sup>[1]</sup> 8:9  <b>below</b> <sup>[1]</sup> 59:24  <b>best</b> <sup>[3]</sup> 47:4 49:3,5  <b>better</b> <sup>[2]</sup> 6:11 24:14  <b>beyond</b> <sup>[1]</sup> 17:7  <b>bifurcate</b> <sup>[2]</sup> 31:7 59:3  <b>bifurcation</b> <sup>[4]</sup> 9:11 31:4 44:25 58:20  <b>big</b> <sup>[4]</sup> 13:18 44:12,18,23  <b>bishop</b> <sup>[35]</sup> 1:18 2:3,13 3:7,8,10 4:12 5:12,17 6:2,16,23 7:7,21 8:9,24 10:22 11:1,5 12:6,10,16 13:3,20 15:2,7 16:15,19,22 18:17 19:1 24:23 61:19,20,22  <b>bit</b> <sup>[2]</sup> 10:23 25:20  <b>both</b> <sup>[8]</sup> 6:4 9:8 19:24 24:3 30:9 47:13 50:10 63:2  <b>bother</b> <sup>[1]</sup> 44:15  <b>bound</b> <sup>[1]</sup> 49:21  <b>breadth</b> <sup>[1]</sup> 14:15  <b>breyer</b> <sup>[13]</sup> 36:10 40:18,21 42:18,21,24 44:8 49:9,24 50:2,5,12 63:2  <b>breyer's</b> <sup>[1]</sup> 46:9  <b>brief</b> <sup>[4]</sup> 11:17 20:23 47:25 62:20  <b>briefing</b> <sup>[1]</sup> 31:6  <b>briefly</b> <sup>[1]</sup> 23:16  <b>bright-line</b> <sup>[1]</sup> 62:12  <b>bring</b> <sup>[2]</sup> 39:2 56:2  <b>bringing</b> <sup>[1]</sup> 53:22  <b>broad</b> <sup>[4]</sup> 28:22 30:12 46:21 63:7  <b>broader</b> <sup>[2]</sup> 30:13,19  <b>brought</b> <sup>[2]</sup> 5:5 6:21  <b>building</b> <sup>[1]</sup> 10:6  <b>bunch</b> <sup>[1]</sup> 43:9  <b>buying</b> <sup>[1]</sup> 16:17</p>
<b>2</b>		<b>C</b>	
<p>2015 <sup>[1]</sup> 5:23  2017 <sup>[1]</sup> 1:11  26 <sup>[1]</sup> 23:20  27th <sup>[1]</sup> 18:20</p>		<p><b>came</b> <sup>[3]</sup> 1:13 18:19 25:2  <b>candid</b> <sup>[1]</sup> 24:23  <b>cannot</b> <sup>[4]</sup> 11:6 29:12 39:17 58:13  <b>canons</b> <sup>[1]</sup> 43:13  <b>canvass</b> <sup>[1]</sup> 34:3  <b>carabel</b> <sup>[1]</sup> 9:20  <b>care</b> <sup>[2]</sup> 42:6,6  <b>careful</b> <sup>[1]</sup> 13:7</p>	
<b>3</b>			
<p>3 <sup>[1]</sup> 2:4  30 <sup>[1]</sup> 2:11  306 <sup>[1]</sup> 25:5  350,000 <sup>[2]</sup> 51:11 54:21  36-211 <sup>[1]</sup> 16:24</p>			
<b>4</b>			
<p>40 <sup>[4]</sup> 58:21 59:5 61:25 62:3</p>			
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<p>500,000 <sup>[1]</sup> 51:9</p>			
<b>6</b>			
<p>61 <sup>[1]</sup> 2:14</p>			
<b>9</b>			
<p>9 <sup>[1]</sup> 40:12</p>			
<b>A</b>			
<p>a.m <sup>[3]</sup> 1:15 3:2 63:11  <b>abeyance</b> <sup>[1]</sup> 51:21  <b>able</b> <sup>[3]</sup> 39:2,14 56:13</p>			
	<b>B</b>		
	<p><b>b(1)</b> <sup>[1]</sup> 9:2  <b>b(1)</b> <sup>[9]</sup> 3:24 13:5 18:9 39:8,11 40:</p>		











## Official - Subject to Final Review

**waters** <sup>[28]</sup> 4:6,24 8:20 10:2 12:21  
 13:25 14:5 18:14 21:3,4 22:4,6 23:  
 6 26:23 29:4 30:12 32:6,11 35:18  
 36:13,15 37:14 50:20 52:10 55:13  
 57:12 60:15,24  
**way** <sup>[15]</sup> 8:22 16:2 18:7 20:24 25:  
 25,25 26:16,16 32:22,25 38:3 39:  
 9 40:12 61:7 62:11  
**ways** <sup>[1]</sup> 14:13  
**wednesday** <sup>[1]</sup> 1:11  
**whatever** <sup>[5]</sup> 33:25 38:19 39:10  
 55:8,20  
**whatsoever** <sup>[1]</sup> 9:5  
**whenever** <sup>[2]</sup> 47:13 59:8  
**whereupon** <sup>[1]</sup> 63:11  
**whether** <sup>[13]</sup> 4:5 10:1,20 27:24 30:  
 22 34:15 36:21 37:3 38:7 39:1,13  
 57:19 60:8  
**who's** <sup>[1]</sup> 53:22  
**whole** <sup>[2]</sup> 6:19 47:2  
**will** <sup>[22]</sup> 5:6 6:9,10 7:22 13:8 18:18,  
 22 19:3,4,4,8 24:19 31:17 34:1 39:  
 12 42:13 51:4,16 56:8,9,13 58:5  
**win** <sup>[1]</sup> 46:11  
**wisdom** <sup>[1]</sup> 23:21  
**withdrawal** <sup>[1]</sup> 19:8  
**within** <sup>[5]</sup> 4:6 7:25 14:3 26:21 36:  
 18  
**without** <sup>[4]</sup> 10:15 31:15 35:11 40:  
 3  
**word** <sup>[5]</sup> 16:14 25:14,17 44:11 62:  
 14  
**words** <sup>[6]</sup> 20:13 25:14 41:14 60:9,  
 16,19  
**works** <sup>[1]</sup> 15:12  
**world** <sup>[1]</sup> 28:2  
**worried** <sup>[1]</sup> 42:2  
**worse** <sup>[1]</sup> 7:18  
**worth** <sup>[1]</sup> 58:18  
**wotus** <sup>[9]</sup> 9:7,13 10:12,21 14:8 19:  
 12 21:17,20 33:23  
**wrecking** <sup>[1]</sup> 39:24  
**writing** <sup>[1]</sup> 44:15  


---

**Y**

---

**yakus** <sup>[1]</sup> 39:24  
**years** <sup>[7]</sup> 4:2 24:12 38:23 58:21 59:  
 5 61:25 62:4  
**yourself** <sup>[2]</sup> 11:24 27:7