SUPREME COURT OF THE UNITED STATES

No. 16–299

NATIONAL ASSOCIATION OF MANUFACTURERS, PETITIONER *v.* DEPARTMENT OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January 22, 2018]

JUSTICE SOTOMAYOR delivered the opinion of the Court.

What are the "waters of the United States"? As it turns out, defining that statutory phrase—a central component of the Clean Water Act—is a contentious and difficult task. In 2015, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) tried their hand at proffering a definition through an agency regulation dubbed the Waters of the United States Rule (WOTUS Rule or Rule).[1] The WOTUS Rule prompted several parties, including petitioner National Association of Manufacturers (NAM), to challenge the regulation in federal court. This case, however, is not about the substantive challenges to the WOTUS Rule. Rather, it is about in which federal court those challenges must be filed.

There are two principal avenues of judicial review of an

[1] We note that some of the parties and the Court of Appeals below refer to the WOTUS Rule as the "Clean Water Rule." Throughout this opinion, we have opted to use the former term in lieu of the latter.

action by the EPA. Generally, parties may file challenges to final EPA actions in federal district courts, ordinarily under the Administrative Procedure Act (APA). But the Clean Water Act (or Act) enumerates seven categories of EPA actions for which review lies directly and exclusively in the federal courts of appeals. See 86 Stat. 892, as amended, 33 U. S. C. §1369(b)(1). The Government contends that the WOTUS Rule fits within two of those enumerated categories: (1) EPA actions "in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345," 33 U. S. C. §1369(b)(1)(E), and (2) EPA actions "in issuing or denying any permit under section 1342," §1369(b)(1)(F).

We disagree. The WOTUS Rule falls outside the ambit of §1369(b)(1), and any challenges to the Rule therefore must be filed in federal district courts.

I

A

Although the jurisdictional question in this case is a discrete issue of statutory interpretation, it unfolds against the backdrop of a complex administrative scheme. The Court reviews below the aspects of that scheme that are relevant to the question at hand.

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II

As noted, §1369(b)(1) enumerates seven categories of EPA actions that must be challenged directly in the federal courts of appeals. Of those seven, only two are at issue in this case: subparagraph (E), which encompasses actions "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345," §1369(b)(1)(E), and subparagraph (F), which covers actions "issuing or denying any [NPDES] permit," §1369(b)(1)(F).[6] We address each of those statutory provisions in turn.

A

Subparagraph (E) grants courts of appeals exclusive jurisdiction to review any EPA action "in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." 33 U. S. C. §1369(b)(1)(E). The Government contends that "EPA's action in issuing the" WOTUS Rule "readily qualifies as an action promulgating or approving an 'other limitation' under section 1311," because the Rule establishes the "geographic scope of limitations promulgated under Section 1311." Brief for Federal Respondents 18–19. We disagree.

To begin, the WOTUS Rule is not an "effluent limitation"—a conclusion the Government does not meaningfully

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possible for a court to grant any effectual relief . . . to the prevailing party.'" *Chafin* v. *Chafin*, 568 U. S. 165, 172 (2013) (quoting *Knox* v. *Service Employees*, 567 U. S. 298, 307 (2012)). That remains true even if the agencies finalize and implement the November 2017 proposed rule's new effective date. That proposed rule does not purport to rescind the WOTUS Rule; it simply delays the WOTUS Rule's effective date.

[6] It is undisputed that the WOTUS Rule does not fall within the remaining five categories set forth in §1369(b)(1).

dispute. An "effluent limitation" is "any restriction . . . on quantities, rates, and concentrations" of certain pollutants "which are discharged from point sources into navigable waters." §1362(11). The WOTUS Rule imposes no such restriction. Rather, the Rule announces a regulatory definition for a statutory term and "imposes no enforceable duty" on the "private sector." See 80 Fed. Reg. 37102.

The Government instead maintains that the WOTUS Rule is an "other limitation" under subparagraph (E). Although the Act provides no express definition of that residual phrase, the text and structure of subparagraph (E) tell us what that language means. And it is not as broad as the Government insists.

For starters, Congress' use of the phrase "effluent limitation or other limitation" in subparagraph (E) suggests that an "other limitation" must be similar in kind to an "effluent limitation": that is, a limitation related to the discharge of pollutants. An "other limitation," for instance, could be a non-numerical operational practice or an equipment specification that, like an "effluent limitation," restricts the discharge of pollutants, even though such a limitation would not fall within the precise statutory definition of "effluent limitation." That subparagraph (E) cross-references §§1311, 1312, 1316, and 1345 reinforces this natural reading. The unifying feature among those cross-referenced sections is that they impose restrictions on the discharge of certain pollutants. See, *e.g.,* 33 U. S. C. §1311 (imposing general prohibition on "the discharge of any pollutant by any person"); §1312 (governing "water quality related effluent limitations"); §1316 (governing national performance standards for new sources of discharges); §1345 (restricting discharges and use of sewage sludge). In fact, some of those sections give us concrete examples of the type of "other limitation" Congress had in mind. Section 1311(b)(1)(C) allows the EPA to issue "any more stringent limitation[s]" if technology-

based effluent limitations cannot "meet water quality standards, treatment standards, or schedules of compliance." And §1345(d)(3) provides that, if "it is not feasible to prescribe or enforce a numerical limitation" on pollutants in sewage sludge, the EPA may "promulgate a design, equipment, management practice, or operational standard." All of this demonstrates that an "other limitation," at a minimum, must also be some type of restriction on the discharge of pollutants. Because the WOTUS Rule does no such thing, it does not fit within the "other limitation" language of subparagraph (E).

The Government tries to escape this conclusion by arguing that subparagraph (E) expressly covers "*any* effluent limitation or other limitation," §1369(b)(1)(E) (emphasis added), and that the use of the word "any" makes clear that Congress intended subparagraph (E) to sweep broadly and encompass all EPA actions imposing limitations of any sort under the cross-referenced sections. True, use of the word "any" will sometimes indicate that Congress intended particular statutory text to sweep broadly. See, *e.g.*, *Ali* v. *Federal Bureau of Prisons*, 552 U. S. 214, 220 (2008) ("Congress' use of 'any' to modify 'other law enforcement officer' is most naturally read to mean law enforcement officers of whatever kind"). But whether it does so necessarily depends on the statutory context, and the word "any" in this context does not bear the heavy weight the Government puts upon it. Contrary to the Government's assertion, the word "any" cannot expand the phrase "other limitation" beyond those limitations that, like effluent limitations, restrict the discharge of pollutants. In urging otherwise, the Government reads the words "effluent limitation and other" completely out of the statute and insists that what Congress really meant to say is "any limitation" under the cross-referenced sections. Of course, those are not the words that Congress wrote, and this Court is not free to "rewrite the statute" to the Gov-

ernment's liking. *Puerto Rico* v. *Franklin Cal. Tax-Free Trust*, 579 U. S. ___, ___ (2016) (slip op., at 14) ("[O]ur constitutional structure does not permit this Court to rewrite the statute that Congress has enacted" (internal quotation marks omitted)).

Even if the Court accepted the Government's reading of "effluent limitation or other limitation," however, the Rule still does not fall within subparagraph (E) because it is not a limitation promulgated or approved "under section 1311."[7] §1369(b)(1)(E). This Court has acknowledged that the word "under" is a "chameleon" that "must draw its meaning from its context." *Kucana* v. *Holder*, 558 U. S. 233, 245 (2010) (internal quotation marks omitted). With respect to subparagraph (E), the statutory context makes clear that the prepositional phrase—"under section 1311"—is most naturally read to mean that the effluent limitation or other limitation must be approved or promulgated "pursuant to" or "by reason of the authority of" §1311. See *St. Louis Fuel and Supply Co., Inc.* v. *FERC*, 890 F. 2d 446, 450 (CADC 1989) (R. B. Ginsburg, J.) ("'under' means 'subject [or pursuant] to' or 'by reason of the authority of'"); cf. Black's Law Dictionary 1368 (5th ed. 1979) (defining "under" as "according to"). Here, the EPA did not promulgate or approve the WOTUS Rule under §1311. As noted above, §1311 generally bans the discharge of pollutants into navigable waters absent a permit. Nowhere does that provision direct or authorize the EPA to *define* a statutory phrase appearing elsewhere in the Act. In fact, the phrase "waters of the United States" does not appear in §1311 at all. Rather, the WOTUS Rule was promulgated or approved under §1361(a), which

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[7] Because no party argues that the WOTUS Rule is an EPA action approving or promulgating an effluent limitation or other limitation under §1312, §1316, or §1345, the Court confines its analysis to §1311.

grants the EPA general rulemaking authority "to prescribe such regulations as are necessary to carry out [its] functions under" the Act. Proving the point, the Government's own brief cites §1361(a) as the statutory provision that "authorized the [EPA] to issue the [WOTUS] Rule." Brief for Federal Respondents 17, n. 3.[8]

The Government nonetheless insists that the language "under section 1311" poses no barrier to its reading of subparagraph (E) because the "[WOTUS] Rule's legal and practical effect is to make effluent and other limitations under Section 1311 applicable to the waters that the Rule covers." *Id.*, at 28. But the Government's "practical-effects" test is not grounded in the statutory text. Subparagraph (E) encompasses EPA actions that "approv[e] or promulgat[e] any effluent limitation or other limitation under section 1311," not EPA actions that have the "legal or practical effect" of making such limitations applicable to certain waters. Tellingly, the Government offers no textual basis to read its "practical-effects" test into subparagraph (E).

Beyond disregarding the statutory text, the Government's construction also renders other statutory language superfluous. Take, for instance, subparagraph (E)'s cross-references to §§1312 and 1316. See §1369(b)(1)(E) (covering EPA action "in approving or promulgating any effluent limitation or other limitation under section 1311, *1312*,

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[8]It is true that the agencies cited §1311 among the provisions under which they purported to have issued the Rule. See 80 Fed. Reg. 37055. They also cited other provisions, including §§1314, 1321, 1341, 1342, and 1344. *Ibid.* As noted, however, §1311 grants the EPA no authority to clarify the regulatory definition of "waters of the United States." Furthermore, the agencies' passing invocation of §1311 does not control our interpretive inquiry. See *Adamo Wrecking Co.* v. *United States*, 434 U. S. 275, 283 (1978) (Congress "did not empower the Administrator . . . to make a regulation an 'emission standard' by his mere designation").

1316, or 1345" (emphasis added)). Section 1311(a) authorizes discharges that comply with those two cross-referenced sections. See §1311(a) (prohibiting discharge of pollutants "[e]xcept as in compliance with . . . sections 1312, 1316 . . . "). Thus, EPA actions under §§1312 and 1316 also would have a "legal and practical effect" on the scope of §1311's general prohibition of discharges, as the Government contends is the case with the WOTUS Rule. If, on the Government's reading, EPA actions under §§1312 and 1316 would count as actions "under section 1311" sufficient to trigger subparagraph (E), Congress would not have needed to cross-reference §§1312 and 1316 again in subparagraph (E). That Congress did so undercuts the Government's proposed "practical-effects" test.

Similarly, the Government's "practical-effects" test ignores Congress' decision to grant appellate courts exclusive jurisdiction only over seven enumerated types of EPA actions set forth in §1369(b)(1). Section 1313, which governs the EPA's approval and promulgation of state water-quality standards, is a prime example. Approving or promulgating state water-quality standards under §1313 also has the "legal and practical effect" of requiring that effluent limitations be tailored to meet those standards. Under the Government's reading, subparagraph (E) would encompass EPA actions taken under §1313, even though such actions are nowhere listed in §1369(b)(1). Courts are required to give effect to Congress' express inclusions and exclusions, not disregard them. See *Russello* v. *United States*, 464 U. S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks and brackets omitted)).

Accordingly, subparagraph (E) does not confer original and exclusive jurisdiction on courts of appeals to review

paragraphs (E) and (F) do not grant courts of appeals exclusive jurisdiction to review the WOTUS Rule.

B

In a final effort to bolster its preferred reading of the Act, the Government invokes the presumption favoring court-of-appeals review of administrative action. According to the Government, when a direct-review provision like §1369(b)(1) exists, this Court "will not presume that Congress intended to depart from the sound policy of placing initial . . . review in the courts of appeals" "[a]bsent a firm indication that Congress intended to locate initial APA review of agency action in the district courts." *Florida Power & Light Co.* v. *Lorion*, 470 U. S. 729, 745 (1985). But the Government's reliance on *Florida Power* is misplaced. Unlike the "ambiguous" judicial review provisions at issue in *Florida Power*, *id.*, at 737, the scope of subparagraphs (E) and (F) is set forth clearly in the statute. As the Court recognized in *Florida Power*, jurisdiction is "governed by the intent of Congress and not by any views we may have about sound policy." *Id.*, at 746. Here, Congress' intent is clear from the statutory text.[9]

IV

For the foregoing reasons, we reverse the judgment of the Court of Appeals and remand the case with instructions to dismiss the petitions for review for lack of jurisdiction.

It is so ordered.

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[9] Although the parties paint dueling portraits of the legislative history, the murky waters of the Congressional Record do not provide helpful guidance in illuminating Congress' intent in this case. Even for "[t]hose of us who make use of legislative history," "ambiguous legislative history" cannot trump "clear statutory language." *Milner* v. *Department of Navy*, 562 U. S. 562, 572 (2011). Just so here.