PLAIN MEANING OR PRAGMATICS?
DIFFERING INTERPRETATIONS
OF THE CLEAN WATER ACT’S
JURISDICTIONAL PROVISIONS

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Abstract: There is significant discord among circuit courts over whether a broad
or narrow construction of the Clean Water Act’s jurisdictional provisions is ap-
propriate in determining when circuit courts should have direct jurisdiction to re-
view petitions challenging regulations. The broad interpretation of these provi-
sions emphasizes the practicality of direct circuit court review of a wider range of
regulations, whereas the narrow interpretation uses the plain language. In Friends
of the Everglades v. U.S. Environmental Protection Agency, the U.S. Court of
Appeals for the Eleventh Circuit addressed this issue as applied to petitions for
review of the “water transfer rule.” Adopting the plain language approach, the
court held it did not have jurisdiction to review the petition because the chal-
lenged regulation was not within the jurisdictional provisions. The Supreme
Court denied certiorari. This Comment notes that both approaches can benefit the
environment but argues that the long-term implications of the plain language ap-
proach could be detrimental due to judicial inefficiency and a lack of consistent
application of the law across districts.

INTRODUCTION

For centuries, fresh water in Everglades National Park flowed from Lake
Okeechobee to the Florida Bay every year during the wet season.¹ Now, pollu-
tion in Lake Okeechobee from surrounding agriculture overflows through the
Everglades along with the fresh water.²

The South Florida Water Management District (“Water District”) is a re-

gional government agency responsible for managing and protecting the water
resources of South Florida.³ Everglades restoration is currently a major initia-

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¹ Miccosukee Tribe of Indians of Fla. v. United States, 566 F.3d 1257, 1261 (11th Cir. 2009).
² Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1214 (11th Cir. 2009).
tive for the Water District,\textsuperscript{4} which cooperates with the EPA to develop strategies for improving water quality in the Everglades.\textsuperscript{5}

Friends of the Everglades is a non-profit organization that sues to enforce laws that preserve the ecosystems of the Everglades when the organization concludes that the state or federal government has failed to provide such protection.\textsuperscript{6} When such an entity challenges an agency action directly, a court must first establish whether it has jurisdiction based on provisions in the relevant statute before addressing the merits of the petition.\textsuperscript{7}

Circuit courts have developed two conflicting approaches to determining when agency actions can be challenged directly at their level.\textsuperscript{8} The U.S. Court of Appeals for the Eleventh Circuit in \textit{Friends of the Everglades v. U.S. Environmental Protection Agency} adopted an approach that emphasizes the plain meaning of the Clean Water Act’s (CWA) jurisdictional provisions, while other circuit courts focus on the pragmatic application of the purpose of these provisions.\textsuperscript{9} This Comment argues that these approaches are in sufficient conflict to have merited certiorari to the Supreme Court and that the plain meaning approach could have detrimental long-term environmental impacts despite positive short-term effects.\textsuperscript{10}

I. FACTS AND PROCEDURAL HISTORY

Lake Okeechobee is located in southern Florida, just north of the Everglades Agricultural Area, which consists of canals created by the U.S. Army Corps of Engineers to collect rainwater and runoff from nearby industrial and residential areas.\textsuperscript{11} The water held in these canals contains chemical contami-

\textsuperscript{4} Id.
\textsuperscript{11} S. Fla. Water Mgmt. Dist., 570 F.3d at 1214.
nants, suspended and dissolved solids, and low levels of dissolved oxygen.\textsuperscript{12} The Water District operates three pumping stations that pump water from the lower levels of the canals into the higher waters of Lake Okeechobee.\textsuperscript{13} Although no additional materials are added to the canal water through this process, the contaminants already in the water from the canals are not removed before the water is deposited in the lake.\textsuperscript{14}

On April 8, 2002, Friends of the Everglades and Fishermen Against the Destruction of the Environment sued the Water District in the U.S. District Court for the Southern District of Florida.\textsuperscript{15} The organizations sought to enjoin the Water District from back-pumping contaminated water into the lake without first obtaining a permit under the National Pollution Discharge Elimination System (NPDES) of the CWA.\textsuperscript{16}

The district court held in favor of the plaintiffs, but before the court entered an injunction, the EPA issued a notice of proposed rulemaking on June 7, 2006.\textsuperscript{17} The rule—exempting water transfers from the permitting requirements of the CWA\textsuperscript{18}—was finalized on June 13, 2008,\textsuperscript{19} and thus controlled the result of a subsequent appeal in the Eleventh Circuit.\textsuperscript{20} In applying the newly promulgated rule, the Eleventh Circuit found in favor of the Water District and reversed the decision of the district court.\textsuperscript{21}

Seeking to invalidate the water transfer rule in a different court,\textsuperscript{22} the Miccosukee Tribe of Indians and several conservation organizations (including Friends of the Everglades) petitioned the U.S. District Court for the Southern District of New York and U.S. District Court for the Southern District of Florida to review the rule.\textsuperscript{23} Although the petitioners maintained that the district

\begin{footnotesize}
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\item[12] Id.
\item[13] Id.
\item[14] Id.
\item[16] Id. at *2.
\item[18] National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008) (to be codified at 40 C.F.R. pt. 122). A water transfer is defined as an “activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use.” \textit{Friends of the Everglades}, 699 F.3d at 1284.
\item[20] See \textit{Friends of the Everglades}, 699 F.3d at 1285.
\item[21] Id.
\item[22] Funk, supra note 8 (explaining that “[i]f [the tribe and conservation organizations] could divest the Eleventh Circuit of jurisdiction in favor of district courts, then challenges brought in district courts in other circuits might reach a different conclusion as to the validity of the Rule”).
\item[23] \textit{Friends of the Everglades}, 699 F.3d at 1285; Corrected Initial Brief for Friends of the Everglades, Florida Wildlife Federation, Sierra Club, and Environmental Confederation of Southwest Flor-
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courts had jurisdiction, the petitioners filed protective petitions for review with both the Second Circuit and Eleventh Circuit. The Judicial Panel on Multidistrict Litigation consolidated the two circuit court suits in the Eleventh Circuit, which resulted in *Friends of the Everglades v. U.S. Environmental Protection Agency*. The Eleventh Circuit had stayed the petitions while it considered the water transfer rule in the appeal of the action to enjoin the Water District.

The EPA filed a motion for summary denial of the petitions for review, and the petitioners filed motions for dismissal and argued that the circuit court lacked subject-matter jurisdiction. The Eleventh Circuit denied all motions and required the issues to be determined on the briefings and merits of the case.

Seeking to defend the water transfer rule, the EPA advocated a practical construction of the CWA jurisdictional provision. This interpretation would allow the Eleventh Circuit to decide on the merits of the case. Because the Eleventh Circuit recently upheld the water transfer rule in *Friends of the Everglades v. South Florida Water Management District*, the court could again uphold the rule in *Friends of the Everglades v. U.S. Environmental Protection Agency* if the court determined that it had jurisdiction. In contrast, the petitioners argued for a strict interpretation of the jurisdictional provision, which would give the words of the statute their plain meaning.

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24 *Friends of the Everglades*, 699 F.3d at 1285; Brief for Petitioner, *supra* note 23, at 2–3. In filing protective petitions for review with the circuit courts, the petitioners here sought only to divest the circuit courts of original jurisdiction over direct challenges to an agency action. Funk, *supra* note 8.

25 *Friends of the Everglades*, 699 F.3d at 1285.

26 *Id.* The court upheld the water transfer rule under *Chevron* deference and reversed the district court’s decision granting an injunction. *S. Fla. Water Mgmt. Dist.*, 570 F.3d at 1228.

27 *On Petitions for Review of a Final Rule of the United States Environmental Protection Agency at 2, 4–5, Friends of the Everglades, 699 F.3d 1280 (No. 08-13562) (denying various motions).*

28 *Id.* at 4–5.

29 *See Friends of the Everglades, 699 F.3d at 1286; Brief for Respondents at 17, Friends of the Everglades, 699 F.3d 1280 (No. 08-13652) (arguing that § 1369(b)(1)(E) should be interpreted as incorporating any agency actions “related to” the approval or promulgation of effluent limitations or other limitations, and reading “other limitations” to include the water transfer rule).*

30 *See Friends of the Everglades, 699 F.3d at 1286 (discussing the EPA’s interpretation of the jurisdictional provision as including the water transfer rule, which would give the circuit court jurisdiction).*

31 570 F.3d at 1228.

32 *See id.*

33 Brief for Petitioner, *supra* note 23, at 29 (arguing that the water transfer rule does not specifically grant or deny “a permit” and does not constitute a “limitation” on quantities, rates, and concentrations of pollutants, or “standards of performance”).
On October 26, 2012, the Eleventh Circuit held that it did not have original jurisdiction to hear direct challenges to the agency action. The holding relied on the court’s adherence to precedent supporting the stricter interpretation of the plain language of the CWA. This decision conflicted directly with National Cotton Council of America v. U.S. Environmental Protection Agency, where the court held it had original jurisdiction over review of a similar regulation.

On June 28, 2013, the EPA petitioned the Supreme Court for a writ of certiorari to appeal the Eleventh Circuit’s decision. On October 15, 2013, the Supreme Court denied the petition on the issue of whether the circuit court had original jurisdiction under 33 U.S.C. § 1369(b)(1) over a petition for review of the water transfer rule.

II. LEGAL BACKGROUND

The Clean Water Act (CWA) of 1972 was enacted to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” In pursuit of this purpose, the CWA makes it unlawful for any person to discharge any pollutant into a navigable water of the United States without a National Pollution Discharge Elimination System (NPDES) permit. The CWA empowers the EPA to issue these permits.

To implement the permitting provisions, the EPA has broad authority to “prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters.” Using this authority, the

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34 Friends of the Everglades, 699 F.3d at 1283.
35 See id. at 1283, 1287. The court relied on Northwest Environmental Advocates v. U.S. Environmental Protection Agency, 537 F.3d 1006 (9th Cir. 2008), where the Ninth Circuit held that § 1369(b)(1)(E) did not give it jurisdiction because the challenged regulation created a permanent, categorical exemption from a permitting requirement, rather than a limitation. Friends of the Everglades, 699 F.3d at 1287. The court found that the water transfer rule similarly served the opposite function of a limitation. Id. at 1287.
36 See 553 F.3d 927, 933 (6th Cir. 2009) (finding that a permanent exemption to the NPDES permitting program could be considered as regulating permitting procedures and thus governing the issuance or denial of a permit).
38 Environmental Protection Agency v. Friends of the Everglades, supra note 37.
40 33 U.S.C. § 1311(a) (“Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.”).
41 33 U.S.C. § 1342(a)(1) (giving the EPA Administrator authority to issue permits for pollutant discharges); id. § 1251(d) (giving the EPA Administrator power to administer the Clean Water Act).
42 Id. § 1252(a); Friends of the Everglades v. U.S. Envtl. Prot. Agency, 699 F.3d 1280, 1284 (11th Cir. 2012).
EPA has promulgated regulations creating permanent exemptions to the requirement to obtain a NPDES permit.\textsuperscript{43} The “water transfer rule” is one such regulation, and it permanently exempts any discharge constituting a “water transfer” from NPDES permitting requirements.\textsuperscript{44} A water transfer is an activity that “conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use.”\textsuperscript{45} The rule specifies that the circuit courts have jurisdiction over challenges.\textsuperscript{46}

Specific provisions of the CWA grant jurisdiction to the circuit courts to review enumerated agency actions directly.\textsuperscript{47} If an agency action is not among the listed actions, however, the district courts have jurisdiction under the general federal question statute, 28 U.S.C. § 1331, in conjunction with the Administrative Procedure Act (APA).\textsuperscript{48}

In \textit{Crown Simpson Pulp Co. v. Costle}, the Supreme Court in 1980 addressed whether the jurisdictional provision of the CWA included the EPA action of vetoing state-proposed NPDES permits.\textsuperscript{49} The Supreme Court held that it did because vetoing a state NPDES permit was “functionally similar” to denying a permit, which is specifically included in the provision.\textsuperscript{50}

\textbf{A. Broad, Pragmatic Interpretations of the Jurisdictional Provision}

One year later, in \textit{Natural Resources Defense Council v. U.S. Environmental Protection Agency (“NRDC 1981”)}, the U.S. Court of Appeals for the D.C. Circuit addressed a challenge to regulations governing applications for variances from limitations on municipal sewage treatment plants.\textsuperscript{51} The D.C. Circuit found that it had jurisdiction under 33 U.S.C. § 1369(b)(1)(E) of the

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  \item \textsuperscript{43} \textit{Friends of the Everglades}, 699 F.3d at 1284.
  \item \textsuperscript{45} Id.
  \item \textsuperscript{46} Id.
  \item \textsuperscript{47} 33 U.S.C. § 1369(b)(1)(E)-(F) (2006). Section 1369(b)(1)(E) provides review in the circuit courts for actions “approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345.” Section 1369(b)(1)(F) applies to actions “in issuing or denying any permit under section 1342.”
  \item \textsuperscript{48} Funk, \textit{supra} note 8; see 5 U.S.C. § 704 (2012) (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”); 28 U.S.C. § 1331 (2012).
  \item \textsuperscript{49} 445 U.S. 193, 194 (1980); Reply Brief of Friends of the Everglades, Florida Wildlife Federation, Sierra Club, and Environmental Confederation of Southwest Florida at 7, \textit{Friends of the Everglades}, 699 F.3d 1280 (No. 08-13652) [hereinafter Reply Brief for Petitioners].
  \item \textsuperscript{50} \textit{Crown Simpson}, 445 U.S. at 196. The Supreme Court found jurisdiction under § 1369(b)(1)(F) because the EPA’s veto of the state-issued NPDES permit had the “precise effect” of denying a NPDES permit. \textit{Id}. Because denying a NPDES permit is specifically enumerated in § 1369(b)(1)(F), the Supreme Court found vetoing a permit to be “functionally similar.” \textit{Id}.
  \item \textsuperscript{51} 656 F.2d 768, 771 (D.C. Cir. 1981).
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CWA because the action constituted an “effluent limitation.”\(^52\) Although the regulation did not create a numerical limitation, the court interpreted “effluent limitation” broadly to include restricting availability of permits because the rule regulated the “underlying permit procedures.”\(^53\)

In 1982, the D.C. Circuit again gave § 1369(b)(1) a “practical rather than a cramped construction” in *Natural Resources Defense Council v. U.S. Environmental Protection Agency* (“NRDC 1982”).\(^54\) The Consolidated Permit Regulations (CPRs) challenged in this case were a complex set of procedures for issuing or denying NPDES permits.\(^55\) These regulations did not set any numeric limitations on pollutant discharges, but the court interpreted the “other limitation” language from § 1369(b)(1)(E) broadly.\(^56\) It characterized the CPRs as “a limitation on point sources and permit issuers” and “a restriction on the untrammeled discretion of the industry.”\(^57\)

In 2009, the U.S. Court of Appeals for the Sixth Circuit addressed a challenge to an agency action permanently exempting a category of discharge from the NPDES permitting program in *National Cotton Council of America v. U.S. Environmental Protection Agency*.\(^58\) There, EPA had created a permitting exemption for pesticides under certain circumstances.\(^59\) Applying the reasoning of *NRDC 1981*, the Sixth Circuit found that the revision constituted a “regulation of the underlying permitting procedures.”\(^60\) In applying a broader construction of the jurisdictional provision, *National Cotton* follows the pragmatic approach introduced in *Crown Simpson* and refined in *NRDC 1981* and *NRDC 1982*.\(^61\)

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\(^{52}\) *Id.* at 776.

\(^{53}\) *Id.* The D.C. Circuit found “as a practical matter [the regulations] restrict the discharge of sewage by limiting the availability of a variance to a class of applicants which does not include all coastal municipalities.” *Id.* at 775. The D.C. Circuit relied on *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 136 (1977), where the Supreme Court avoided creating a “perverse situation” in which a circuit court could review the grant or denial of individual permits but could not directly review the regulations governing those permits. *NRDC 1981*, 656 F.2d at 775.

\(^{54}\) 673 F.2d 400, 405 (D.C. Cir. 1982).

\(^{55}\) *Id.* at 402.

\(^{56}\) See *id.* at 403.

\(^{57}\) *Id.* at 405 (quoting *Va. Elec. & Power Co. v. Costle*, 566 F.2d 446, 450 (4th Cir. 1977)).

\(^{58}\) 553 F.3d 927, 929 (6th Cir. 2009); see Application of Pesticides to Waters of the United States in Compliance with FIFRA, 71 Fed. Reg. 68,483, 68,485 (Nov. 27, 2006) (to be codified at 40 C.F.R. pt. 122).

\(^{59}\) *Nat’l Cotton Council of Am.*, 553 F.3d at 931; Application of Pesticides to Waters of the United States in Compliance with FIFRA, 71 Fed. Reg. at 68,485, 68,492.

\(^{60}\) *Nat’l Cotton Council of Am.*, 553 F.3d at 933.

\(^{61}\) See *NRDC 1982*, 673 F.2d at 403; *NRDC 1981*, 656 F.2d at 775.
B. Plain Language Interpretation of the Jurisdictional Provision

In 2008, the U.S. Court of Appeals for the Ninth Circuit interpreted the plain language of the jurisdictional provision of the CWA in *Northwest Environmental Advocates v. U.S. Environmental Protection Agency*. There, the challenged regulation exempted three categories of discharges from the NPDES permitting requirements. Declining to read the jurisdictional provision broadly, the Ninth Circuit determined that categorical exemptions do not fit squarely within § 1369(b)(1)(E) or (F). The court reasoned that the regulation imposed no “limitation” on discharges because it excluded certain discharges from the requirements of the permitting program and thus removed limitations based on the plain meaning of the word. Similarly, the rule did not constitute an issuance or denial of a permit because it exempted from NPDES permitting a class of point sources not found in the CWA.

III. ANALYSIS

In *Friends of the Everglades v. U.S. Environmental Protection Agency*, the U.S. Court of Appeals for the Eleventh Circuit held that it did not have original subject-matter jurisdiction over petitions to review the EPA’s water transfer rule, and that the court could not exercise hypothetical jurisdiction. The Eleventh Circuit found that the plain meaning of § 1369(b)(1)(E) and (F)—the jurisdictional provisions of the Clean Water Act (CWA) implicated in this case—could not include the water transfer rule.

Regarding § 1369(b)(1)(E), the Eleventh Circuit held that only actions that are “effluent limitations” or “other limitations promulgated under section 1311, 1312, 1316, or 1345” of the CWA could be reviewed directly by the court.

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62 See 537 F.3d 1006, 1016, 1018 (9th Cir. 2008) (holding that judicial review would be available in this case only if the language of the CWA is given a “Pickwickian” interpretation).
63 Id. at 1011; 40 C.F.R. § 122.3(a) (2013) (excluding various discharges associated with normal operation of a vessel from the NPDES permit requirement).
64 *Nw. Envtl. Advocates*, 537 F.3d at 1016, 1018.
65 Id. at 1016. The rule therefore did not constitute the approval or promulgation of “any effluent limitation or other limitation” and could not fall within § 1369(b)(1)(E). Id.
66 Id. at 1018. The rule thus could not fall within § 1369(b)(1)(F) because it was not the issuance or denial of a permit. Id. The Ninth Circuit also reasoned from a policy perspective that the “perverse situation” present in *NRDC 1982* was not applicable because with a permanent exemption to the permitting requirement, an appeals court will never hear challenges to regulations issuing or denying individual permits. *Id.* As a result it will not be “perverse” that the court cannot directly hear petitions regarding the overall exemption regulation. *Id.*
67 *Friends of the Everglades v. U.S. Envtl. Prot. Agency*, 699 F.3d 1280, 1283 (11th Cir. 2012). The U.S. Sugar Corporation advocated for hypothetical jurisdiction, where a court decides a case on the merits as if it did have jurisdiction. *Id.* at 1286. The Eleventh Circuit rejected hypothetical jurisdiction as *ultra vires*, or beyond the powers of the court, and contradicting Supreme Court precedent. *Id.* at 1288.
68 *Id.* at 1287, 1288.
The Eleventh Circuit rejected the EPA Administrator’s argument that circuit courts also have jurisdiction over rules “related to” a limitation on movements of water. The court found that the water transfer rule is not a “limitation” because it does not impose any restrictions and instead exempts parties from the NPDES permitting program under specific circumstances.

The Eleventh Circuit similarly held that it did not have original jurisdiction under § 1369(b)(1)(F) because the water transfer rule “neither issues nor denies a permit.” The Supreme Court has interpreted this provision to include rules that have the “precise effect” of or are “functionally similar” to issuing or denying a permit. The Eleventh Circuit found that the water transfer rule is not functionally similar to issuing or denying a permit.

Although the Eleventh Circuit’s holding was consistent with one interpretation of relevant case law, implementing bodies and the public would benefit from a Supreme Court decision clarifying the correct approach for circuit courts. The Eleventh Circuit properly analyzed the principles set out in Northwest Environmental Advocates v. U.S. Environmental Protection Agency and assessed the water transfer rule to determine that the court does not have jurisdiction under CWA § 1369(b)(1)(E) or (F). The rule at issue in that case provided that three types of discharges did not require NPDES permits. Similarly, the water transfer rule creates a permanent exemption from the NPDES permitting program. Because the rules at issue are largely functionally equivalent, the Eleventh Circuit appropriately applied the reasoning from Northwest Environmental Advocates v. U.S. Environmental Protection Agency.

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70 Friends of the Everglades, 699 F.3d at 1286.
71 Id.
72 Id. at 1287; see 33 U.S.C. § 1369(b)(1)(F).
74 Friends of the Everglades, 699 F.3d at 1288. In holding that § 1369(b)(1)(F) should not be read to include “regulations relating to permitting itself,” the Eleventh Circuit disagreed with the Sixth Circuit's decision in National Cotton Council v. U.S. Environmental Protection Agency, 553 F.3d 927 (6th Cir. 2009). See Friends of the Everglades, 699 F.3d at 1288. The Eleventh Circuit relied on the reasoning of Northwest Environmental Advocates v. U.S. Environmental Protection Agency, 537 F.3d 1006 (9th Cir. 2008), and applied the plain meaning of the statutory text. Friends of the Everglades, 699 F.3d at 1288.
75 See On Petitions for Review of a Final Rule of the United States Environmental Protection Agency, supra note 27, at 4; Funk, supra note 8.
76 See Friends of the Everglades, 699 F.3d at 1287, 1288; Nw. Envtl. Advocates, 537 F.3d at 1006, 1015.
77 Nw. Envtl. Advocates, 537 F.3d at 1011.
79 See id.; Friends of the Everglades, 699 F.3d at 1287–88 (finding that the water transfer rule categorically exempts water transfers from NPDES permitting); Nw. Envtl. Advocates, 537 F.3d at 1011 (finding that the ballast water rule categorically exempts three types of discharges from NPDES permitting).
west Advocates to Friends of the Everglades and found it did not have jurisdiction under § 1369(b)(1)(E) or (F).80

This holding was consistent with a strict but reasonable interpretation of the Supreme Court’s decision in Crown Simpson Pulp Co. v. Costle.81 There, the act of vetoing a state NPDES permit was “functionally similar” to a denial of a NPDES permit and thus subject to CWA § 1369(b)(1)(F).82 In contrast, the Eleventh Circuit found that the water transfer rule was not “functionally similar” to an issuance or denial of a NPDES permit because it had the effect of categorically excluding certain discharges from the permitting program.83 Based on the specific language of the statute and the facts of Crown Simpson, this was a reasonable construction of the jurisdictional provision.84

A broader interpretation of Crown Simpson arguably could have been reasonable, however, and could have enabled direct circuit court jurisdiction in Friends of the Everglades.85 Such an interpretation of the jurisdictional provision authorizes direct review of any EPA action that regulates underlying permitting procedures,86 including the water transfer rule.87 This reading is consistent with the policy language in both Crown Simpson and Natural Resources Defense Council v. U.S. Environmental Protection Agency (“NRDC 1982”).88

Furthermore, the Eleventh Circuit in Friends of the Everglades stated this was a jurisdictional issue of first impression in the Eleventh Circuit and that

80 See Friends of the Everglades, 699 F.3d at 1286–88; Nw. Envtl. Advocates, 537 F.3d at 1015–16, 1018 (finding that because the specificity and precision of the statute require a narrow interpretation, the regulation at issue could not be considered an effluent limitation or other limitation, and did not involve the issuance or denial of a permit or a functionally similar action).
81 See Friends of the Everglades, 699 F.3d at 1288; Crown Simpson, 445 U.S. at 196.
83 Friends of the Everglades, 699 F.3d at 1288.
84 See id.; Crown Simpson, 445 U.S. at 196 (finding the action of vetoing a state-issued permit functionally similar to issuing or denying a permit, because the veto functioned the same as a denial if the NPDES permitting program had been overseen by the federal EPA, not the state).
88 See Crown Simpson, 445 U.S. at 196 (reasoning that “vesting jurisdiction in the courts of appeals under § 509(b)(1)(F) would best comport with the congressional goal of ensuring prompt resolution of challenges to EPA’s actions . . . ”); Natural Res. Def. Council v. U.S. Envtl. Prot. Agency, 673 F.2d 400, 405 n.15 (D.C. Cir. 1982) (“National uniformity, an important goal in dealing with broad regulations, is best served by initial review in a court of appeals . . . [T]he great advantage the district courts have over the courts of appeals—their ability to use extensive factfinding mechanisms—is not relevant here. There is not even an arguable need to engage in technical factfinding when judicial review is concentrated on an agency record and policy determinations.”).
circuit have differed in approaches.\textsuperscript{89} Even after the Eleventh Circuit’s decision in \textit{Friends of the Everglades}, it remains unclear how other circuits will interpret the precedent in the future, and a Supreme Court decision would have added clarity and predictability to this issue.\textsuperscript{90} Because the case law is ambiguous,\textsuperscript{91} and courts have the option of interpreting § 1369(b)(1)(E) and (F) broadly or narrowly, courts should decide based on efficiency, consistency and certainty to protect the environment in the long run.\textsuperscript{92}

Although the denial of certiorari gives environmental groups a second chance to argue against the water transfer rule,\textsuperscript{93} the long-term consequences of a precedent against circuit court jurisdiction could be harmful for the environment.\textsuperscript{94} The immediate effect of this case is to divest the Eleventh Circuit of jurisdiction over direct petitions challenging the water transfer rule, which renders the court’s prior decision to uphold the rule ineffective.\textsuperscript{95} Consequently, Friends of the Everglades will likely seek a favorable decision at the district court level.\textsuperscript{96} A decision for Friends of the Everglades in district court could strike down the water transfer rule as an arbitrary and capricious regulation, which would require a permit for back-pumping polluted water into Lake Okeechobee.\textsuperscript{97}

Despite this positive environmental effect, the more pragmatic approach to the provision is more effective at creating positive outcomes in the long-term.\textsuperscript{98} Section 1369(b)(1)(E) of the CWA should be interpreted to provide jurisdiction in this case because the water transfer rule regulates underlying permitting procedures.\textsuperscript{99} The rule exempts a certain category of discharge, just as

\textsuperscript{90} See \textit{Funk}, \textit{supra} note 8; see also \textit{Shell Oil Co. v. Train}, 415 F. Supp. 70, 75 (D.C. Cal. 1976) (quoting \textit{Am. Iron & Steel Inst. v. Envtl. Prot. Agency}, 526 F.2d 1027, 1074 (1975) (Adams, J., concurring) (finding that “courts have agreed only that the statute is ambiguous, and have disagreed in ‘deciphering the legislative intent from reading scraps and bits of a convoluted legislative history’”)).
\textsuperscript{92} See \textit{NRDC 1982}, 673 F.2d at 405 n.15; \textit{Funk}, \textit{supra} note 8; \textit{Manchik}, \textit{supra} note 10, at 555.
\textsuperscript{93} See \textit{Funk}, \textit{supra} note 8.
\textsuperscript{95} See \textit{Funk}, \textit{supra} note 8.
\textsuperscript{96} See \textit{id.}
\textsuperscript{97} See \textit{id.}; \textit{National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, supra} note 18, at 33,697.
\textsuperscript{98} See \textit{infra} notes 101–115 and accompanying text.
\textsuperscript{99} See \textit{Nat’l Cotton Council}, 553 F.3d at 933.
the revision to the regulation in *National Cotton Council* categorically exempts discharges of pesticides.\(^{100}\)

The pragmatic approach would improve efficient decision-making and increase regulatory certainty.\(^{101}\) Efficiency would improve because multiple petitions could be consolidated in one circuit court,\(^{102}\) and circuit courts are more competent at reviewing an administrative record than district courts.\(^{103}\) Improved regulatory certainty could follow from the increased efficiency because of the expedited review process and the greater uniformity in outcomes.\(^{104}\)

At the district court level, a variety of courts receive petitions challenging one agency action, which each district court must review independently.\(^{105}\) Because petitions may be reviewed by the circuit court on appeal from the district court,\(^{106}\) starting the petition process with the circuit court could save time and resources.\(^{107}\) When an agency action immediately harms the environment, the delay of a final decision on the challenged action could lengthen the period of harm or postpone any measures by environmental organizations to counteract the effects.\(^{108}\)

The contrasting aptitudes of the district and circuit courts also affect the efficiency of the decisions.\(^{109}\) Whereas district courts are more competent to hear cases requiring fact-finding, circuit courts are more adept at reviewing a record.\(^{110}\) The administrative record produced by the agency involves the factual development that would occur at the district court level, and the judicial review of the rule relies on that previously established record.\(^{111}\) Because circuit courts regularly review cases based on the lower court’s established record, they have more experience and expertise with this kind of review.\(^{112}\)

\(^{100}\) See id. at 931; National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, supra note 18, at 33,697.

\(^{101}\) See Manchik, supra note 10, at 555; Schorr, supra note 94, at 772–74, 793–94.

\(^{102}\) See 28 U.S.C. § 2112(a)(3) (“The judicial panel on multidistrict litigation shall, by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed . . . and shall issue an order consolidating the petitions for review in that court of appeals.”); *Friends of the Everglades*, 699 F.3d at 1283 (where the Judicial Panel on Multi-district Litigation consolidated two petitions in the Eleventh Circuit).

\(^{103}\) See NRDC 1982, 673 F.2d at 405 n.15; Schorr, supra note 94, at 772–74.

\(^{104}\) See NRDC 1982, 673 F.2d at 405 n.15; Schorr, supra note 94, at 793–94.

\(^{105}\) See NRDC 1982, 673 F.2d at 405 n.15.


\(^{107}\) See Manchik, supra note 10, at 555–56; Schorr, supra note 94, at 795; *Crown Simpson*, 445 U.S. at 197 (reasoning that “the additional level of judicial review . . . would likely cause delays in resolving disputes under the Act”).


\(^{109}\) See NRDC 1982, 673 F.2d at 405 n.15; Schorr, supra note 94, at 772–74.

\(^{110}\) See NRDC 1982, 673 F.2d at 405 n.15; Schorr, supra note 94, at 772–74.

\(^{111}\) See NRDC 1982, 673 F.2d at 405 n.15; Schorr, supra note 94, at 773.

\(^{112}\) See NRDC 1982, 673 F.2d at 405 n.15; Schorr, supra note 94, at 773.
Furthermore, diverging decisions by district courts would produce inconsistency that could hinder the effectiveness of the CWA. With inconsistent court decisions, regulators and the regulated community could be unsure of whether a particular action is lawful. The uncertainty created by these differences could result in less enforcement of environmental regulations, as neither agencies nor the regulated community would know whether a regulation is enforceable until it is challenged in that particular district court. Limiting the forums for judicial review to the circuit courts could produce greater uniformity of decisions because there would be fewer total forums, and petitions originally filed with several circuit courts could be consolidated in one court.

CONCLUSION

In Friends of the Everglades v. U.S. Environmental Protection Agency, the Eleventh Circuit held that it did not have subject matter jurisdiction to hear direct petitions challenging the EPA’s promulgation of the water transfer rule. Circuit courts have given the jurisdictional provision either a pragmatic or a plain meaning interpretation in determining which agency actions could be reviewed directly at the circuit court level. The Eleventh Circuit chose the plain meaning approach in holding that it did not have jurisdiction. Given the two distinct analyses applied by the circuit courts, a Supreme Court holding would have provided clarity for future interpretations of the jurisdictional provisions of the Clean Water Act. Although both approaches could benefit the environment, a strictly plain meaning approach could present systemic environmental challenges for the future. The pragmatic approach, in contrast, could improve efficiency, consistency, and regulatory certainty.


113 See NRDC 1982, 673 F.2d at 405 n.15; Manchik, supra note 10, at 560; Schorr, supra note 94, at 793 (explaining that “[w]hen more than one tribunal has jurisdiction to review similar claims, there is a risk that the results will be inconsistent and will lead to substantive inequality and uncertainty”).

114 See NRDC 1982, 673 F.2d at 405 n.15; Manchik, supra note 10, at 560; Schorr, supra note 94, at 793.

115 See Manchik, supra note 10, at 560; Schorr, supra note 94, at 793.

116 NRDC 1982, 673 F.2d at 405 n.15; Schorr, supra note 94, at 793–94.