

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF GEORGIA,
STATE OF WEST VIRGINIA,
STATE OF ALABAMA,
STATE OF FLORIDA,
STATE OF INDIANA,
STATE OF KANSAS,
COMMONWEALTH OF KENTUCKY,
NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL
RESOURCES,
STATE OF SOUTH CAROLINA,
STATE OF UTAH, and
STATE OF WISCONSIN



Petitioners,

PETITION FOR REVIEW

v.

Case No. _____

REGINA A. MCCARTHY,
in her official capacity as
Administrator of the United States
Environmental Protection Agency;

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY;

JO-ELLEN DARCY,
in her official capacity as
Assistant Secretary of the Army (Civil Works);

UNITED STATES ARMY CORPS OF
ENGINEERS

Respondent.

The States of Georgia, West Virginia, Alabama, Florida, Indiana, Kansas, South Carolina, Utah, Wisconsin, the Commonwealth of Kentucky, and the North Carolina Department of Environment and Natural Resources (collectively “the States”), respectfully petition this Court as a protective matter, pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure and the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (“CWA”), for review of the final rule entitled “Clean Water Rule: Definition of Waters of the United States.” 80 Fed. Reg. 37,053 (June 29, 2015) (the “Rule”). To the extent this Court determines that it has jurisdiction, the States request that this Court hold unlawful, vacate, enjoin, and set aside the Rule, and provide such additional relief as may be appropriate.

The States file this Petition only out of an abundance of caution, and believe the Petition should be dismissed immediately for lack of jurisdiction. In the Rule, EPA and the Corps suggest that a challenge to the Rule may fall within the court of appeals’ jurisdiction under 33 U.S.C. § 1369(b)(1). *See* 80 Fed. Reg. at 37,104. The States believe this is clearly incorrect as a matter of law and that jurisdiction to review the Rule lies with district courts under 28 U.S.C. § 1331. *See Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012).^{*} Nevertheless, the States file this Petition as a protective matter, consistent with established practice. *See*

^{*} Accordingly, the States filed a complaint in the United States District Court for the Southern District of Georgia on June 30, 2015, seeking vacatur of the Rule. Dkt. 1, *Georgia v. McCarthy*, No. 2:15-cv-00079 (S.D. Ga. June 30, 2015). The States do not waive any claims or rights to proceed in that pending action.

Inv. Co. Inst. v. Bd. of Governors of Fed. Reserve, 551 F.2d 1270, 1280 (D.C. Cir 1997) (“If any doubt as to the proper forum exists, careful counsel should file suit in both the court of appeals and the district court or, since there would be no time bar to a proper action in the district court, bring suit only in the court of appeals.”).

DATED: July 20, 2015

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I will cause to be served a true copy of the Petition for Review via U.S. mail on the 20th day of July, 2015, upon the following:

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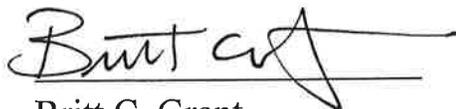
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Jo-Ellen Darcy, Assistant Secretary of the Army
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Dated: July 20, 2015

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