IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

The State of Ohio and
Attorney General Bill Schuette on Behalf
of the People of Michigan,

Plaintiffs,

Case No. 2:15-cv-02467

v.

Judge _____

United States Army Corps of Engineers;
United States Environmental Protection
Agency; The Honorable Jo-Ellen Darcy
in her official capacity as Assistant
Secretary of the Army (Civil Works); and
The Honorable Gina McCarthy in her
official capacity as Administrator, U.S. E.P.A.

Defendants.

COMPLAINT

INTRODUCTION

1. In the Clean Water Act, Congress has established federal regulatory control over

claim dominion, Defendants now have issued a new rule purporting to define the "waters of the United States" in a way that reaches far beyond the constraints established by Congress, the United States Constitution, and binding Supreme Court case law. DOD Clean Water Rule: Definition of Waters of the United States, 33 CFR Part 328; EPA Clean Water Rule: Definition of Waters of the United States, 40 CFR Parts 110 *et al.* (the "Rule").

3. The Rule propounded by Defendants does not limit their regulatory authority to "navigable waters." It does not limit their authority to navigable waters and waters or wetlands that abut and maintain a continuous surface connection with navigable waters. It does not even stop at continuously flowing streams that themselves feed directly into navigable waters. Rather, in sweeping terms, it purports to extend federal regulatory jurisdiction over broad swaths of the country, including vast areas within the States of Ohio and Michigan, that in no way constitute navigable, potentially navigable, or interstate waters – even in various instances reaching land that is typically dry.

4. Defendants trumpet that previously they "ultimately construed" the Supreme Court precedent set forth in *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*") "narrowly," while holding to a "broad interpretation" of their own powers. *U.S. EPA and U.S. Dept. of the Army, Technical Support Document* for the Clean Water Rule: Definition of Waters of the United States, at 27 (May 27, 2015), http://www2.epa.gov/cleanwaterrule/technical-support-document-clean-water-rule-definition-waters-united-states. The new Rule reflects that Defendants maintain their free-ranging approach despite *SWANCC* and *Rapanos v. United States*, 547 U.S. 715 (2006), in which the Supreme Court again declined to accept their sweeping jurisdictional claims.

5. Defendants' current interpretation of statutory jurisdiction runs afoul of the terms of the Clean Water Act and of Congress's injunction that, except as expressly provided, the law is not to be construed in a way "impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters … of such States." 33 U.S.C. § 1370(2). And their "narrow" interpretation of various Supreme Court admonitions contravenes binding case law. Defendants admit that even "compared to agency practice in light of guidance issued after *SWANCC* and *Rapanos*, the final rule is generally broader …." *Technical Support Document* at 33.

6. Thus, through their overreaching Rule, these federal agency Defendants injure the States of Ohio and Michigan as landowners, as regulators (including as regulators of State waters), as trustees of the natural resources of the States, as guardians of the interests of their residents, and as keepers of their sovereign territory.

7. The new Rule intrudes federal authority over intrastate "waters" entirely within the State of Ohio and Michigan, and right up to the doorsteps of Ohio and Michigan citizens (claiming federal authority, for example, to regulate an Ohio or Michigan property owner in fixing a depression in her yard that can fill with water in heavy rains, should the area be in a floodplain and anywhere within 1,500 feet of even a usually dry stream bed that can be deemed to connect with some other such feature that connects somehow with other similar land features that may on occasion take water to a tributary of a river or lake that actually is a navigable or interstate water).

8. Because Congress did not intend or authorize such a broad jurisdictional scheme in the Clean Water Act, and could not have done so consistent with the Constitution, and because the Rule conflicts with Supreme Court precedent, Defendants' final Rule violates the

Administrative Procedure Act. The Rule is not lawful or reasonable, and should be enjoined and vacated.

JURISDICTION AND VENUE

9. This action is authorized under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and arises from violations of the APA, the Clean Water Act, and the United States Constitution. The Court has jurisdiction under 28 U.S.C. § 1331.

10. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1).

PARTIES

11. The State of Ohio is the largest land owner within its boundaries, and holds its lands, waters, and other natural resources in trust for the people of the State. The State also regulates land and water within its borders, and recognizes the interest of its residents in both a safe and clean environment and a vibrant and growing economy that can sustain Ohio families and allow for continued and enhanced environmental protection. Ohio further exercises delegated permitting authority pursuant to the terms of the Clean Water Act. *See* 33 U.S.C. § 1342(b).

12. The State of Michigan (together with the State of Ohio, "States" or "Plaintiffs") owns and manages over 4.5 million acres of public land, the vast majority of which contain "waters" potentially affected by the proposed Rule. The State of Michigan also comprehensively regulates land and water use within its borders

with Defendant United States Army Corps of Engineers, it has promulgated the final Rule at issue in this case.

14. Defendant United States Army Corps of Engineers ("U.S. Corps") is an agency of the United States under the provisions of the Administrative Procedure Act. Along with Defendant United States Environmental Protection Agency, it has promulgated the final Rule at issue in this case.

15. Defendant Gina McCarthy is Administrator of the United States Environmental Protection Agency, and is sued purely in her official capacity. Defendant McCarthy signed the final Rule on or about May 26, 2015 and submitted it for publication.

16. Defendant Jo-Ellen Darcy is Assistant Secretary of the Army (Civil Works) and supervises the United States Army Corps of Engineers; she is sued purely in her official capacity. Defendant Darcy signed the final Rule on or about May 26, 2015 and submitted it for publication.

THE CHALLENGED RULE

17. The term "waters of the United States" marks the federal jurisdictional and regulatory scope of the Clean Water Act, which prohibits the discharge of any pollutant as defined to include materials such as dirt and sand into such waters absent a permit. 33 U.S.C. §§ 1311, 1362(6). The vast majority of States, including Ohio and Michigan, have delegated permitting authority relating to such waters from U.S. EPA through the National Pollution Discharge Elimination System ("NPDES"). *See* 33 U.S.C. § 1342(b). Michigan additionally has delegated permitting authority under the program regulating the discharge of dredged and fill material. *See* 33 U.S.C. § 1344.

18. On or about April 21, 2014, Defendants published in the Federal Register a proposed rule to redefine "waters of the United States" as that phrase relates to their regulatory jurisdiction. The comment period

an almost incomprehensible set of definitions that could be read to encompass vast swaths of the countryside.

21. On or about January 15, 2015, well after the close of the comment period, Defendants announced the release of the U.S. EPA's "Final Report" on *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, which they aver "provides much of the technical basis for this rule." Rule, *Executive Summary*, 80 Fed. Reg. 37057. Defendants had not accepted or adopted that report as final at any time during the comment period.

22. On June 29, 2015, Defendants published their final Rule in the Federal Register. 80 Fed. Reg. 37054 *et seq.* In producing the final Rule, Defendants did not heed the concerns expressed by Attorneys General DeWine and Schuette and many other commenters relating to the overly-broad scope of federal jurisdiction now claimed, and they did not tailor the definition of "waters of the United States" to comply with the definition recited by the four-Justice plurality in *Rapanos* (or with Justice Kennedy's concurrence there, or with the Supreme Court's opinion in *SWANCC*).

A. "Tributaries" (no matter how far removed from actual waters of the U.S.)

23. Instead, the final Rule issued by Defendants claims automatic and categorical federal jurisdiction, for example, over "all tributaries" to

24.

1,500 feet of the ordinary high water mark of the Great Lakes, or of the high tide line of a traditional navigable waterway or territorial sea. *See, e.g.,id*. at (c)(2).

26. Thus, through their Rule, Defendants purport to extend their jurisdiction categorically to "waters" (including various no

28. "In this rule, the Agencies interpret '100-year floodplain' to mean 'the area that will be inundated by the flood event having a one-percent chance of being equaled or exceeded in any given year." Rule, *Definition of "Waters of the United States*, Subsection G(1), 80 Fed. Reg. 37081.

THE RULE IS IN VIOLATION OF LAW

jurisdiction of the Corps extends to ponds that are *not* adjacent to open water") (emphasis in original).

34. Moreover, Defendants' three jurisdiction-claiming mechanisms identified in paragraphs 23 through 28 above also conflict with the lines drawn by both the plurality opinion and Justice Kennedy's concurring opinion in *Rapanos*. In fact, the Rule appears informed far more by the *dissent* in *Rapanos* than by the four-Justice plurality or Justice Kennedy's concurrence: indeed, Defendants' *Technical Support Document* (at pages 37-40) in its introductory discussion of "Supreme Court Decisions" devotes five paragraphs and two and one-half pages to a fulsome discussion of the *Rapanos* dissent, while giving just one short-shrift paragraph each (and a total of one page) to the plurality and the Kennedy concurrence.

35. Justice Kennedy's *Rapanos* concurrence, for example, was highly skeptical of the view that even "wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small)" could be deemed jurisdictional as a matter of course. 547 U.S. at 776-77 (Kennedy, J., concurring).

36. Justice Kennedy also insisted on "the requirement that the word 'navigable' in 'navigable waters' be given some importance." *Id.* at 778. Indeed, he found that "the deference owed to the Corps' interpretation of the statute does not extend so far" as to "permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." Defendants concede that "with this statement, Justice Kennedy is expressing concern about the categorical regulation of *wetlands* adjacent to remote and insubstantial ditches and drains." *Technical Support Document* at 76 (emphasis in original, and using "adjacent" in its dictionary sense of "lie alongside"). Although Defendants thus acknowledge that even a wetland that flows into traditional navigable waters

46. The Supreme Court underscored in *SWANCC* that it will "read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation." 531 U.S. at 174.

47. The Court noted its "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. [citation omitted.] This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 172-73.

48. "Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States … to plan the development and use of land and water resources'." *Id.* at 174 (also noting that "[p]ermitting respondents to claim [their asserted] federal jurisdiction … would result in a significant impingement of the States' traditional and primary power over land and water use.").

49. The *Rapanos* plurality echoed the same point. "Regulation of land use … is a quintessential state and local power…. The extensive federal jurisdiction urged by the Government would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land…. We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority…. The phrase 'the waters of the United States' hardly qualifies…. Even if [it] were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity." 547 U.S. at 738.

50. The jurisdiction now claimed by Defendants under the Rule is inconsistent with the Clean Water Act, and for Congress to have authorized such federal reach would have exceeded the powers granted under the Commerce Clause and violated the Constitution's structural federalism protections and the Tenth Amendment.

COUNT ONE – VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT THROUGH VIOLATION OF THE CLEAN WATER ACT AND THE U.S. CONSTITUTION

51. Plaintiffs restate and reallege each of the statements and allegations set forth in paragraphs 1-50 above.

52. The Congress of the United States has authorized this Court in such matters to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706.

53. Congress further has waived sovereign immunity as to claims brought under the Administrative Procedure Act.

54. Pursuant to the Administrative Procedure Act, the Court shall "hold unlawful and set aside agency action" that is: "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" "contrary to constitutional right, power, privilege, or immunity;" or "in excess of statutory jurisdiction, authority, or limitati

56. The Rule also was promulgated in violation of the notice and comment procedures required by the Administrative Procedure Act. *See* 5 U.S.C. §§ 553(b)-(c); 706(2).

57. The States have no adequate administrative remedy available to them; alternatively, any further effort to obtain administrative relief would be futile.

58. The States are injured by the Rule in their capacities as landowners, regulators, and trustees, and have no adequate remedy at law apart from this claim and action.

COUNT TWO – VIOLATION OF THE STRUCTURAL FEDERALISM PROVISIONS OF THE UNITED STATES CONSTITUTION INCLUDING THE TENTH AMENDMENT

59. Plaintiffs restate and reallege each of thOF THE UNITED STATES CONSTI

vacate and set aside the Rule and preliminarily and permanently stay and enjoin Defendants from seeking to claim jurisdiction thereunder;

return the matter to the Defendants to permit the Agencies to propose a new rule that is consistent with the terms of the Clean Water Act and the Constitution of the United States, and that clearly and appropriately defines the scope and limits of federal jurisdiction regarding "navigable waters" of the United States; and

provide all further relief that equity demands or counsels.

Respectfully submitted,

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