Civil Action No. 2:15-cv-00079 LGW-RSB

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

STATE OF GEORGIA, et al.,

Plaintiffs,

v.

SCOTT PRUITT, et al.,

Defendants.

AMICUS CURIAE BRIEF BY THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, MARYLAND, NEW JERSEY, OREGON, RHODE ISLAND, VERMONT AND WASHINGTON, THE COMMONWEALTH OF MASSACHUSETTS, AND THE DISTRICT OF COLUMBIA, IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT AND SUMMARY OF THE ARGUMENT

The States of New York, California, Connecticut, Maryland, New Jersey, Oregon, Rhode Island, Vermont and Washington, the Commonwealth of Massachusetts, and the District of Columbia (the Amici States or States) respectfully submit this Amicus Curiae brief in opposition to the plaintiff states' motion for a preliminary injunction of the Clean Water Rule, 80 Fed. Reg. 37,054 (June 29, 2015), which defines the "waters of the United States" under the Clean Water Act, *see* 33 U.S.C. § 1362(7). Plaintiffs' motion should be denied for either of two reasons. First, plaintiffs cannot prove they are likely to suffer *any* harm, let alone irreparable harm, because the Clean Water Rule has been suspended and is not currently in effect. The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (together, the agencies) have issued a final rule suspending the Clean Water Rule for two years, and have announced their intention to develop a new rule to permanently replace the Clean Water Rule. *See Definition of "Waters of the United States" – Addition of an Applicability Date to 2015 Clean Water Rule,* 83 Fed. Reg. 5,200 (Feb. 6, 2018) (Suspension Rule). There is therefore nothing to enjoin, and plaintiffs only speculate about unknown future harm. Such speculation is insufficient to support the extraordinary remedy of a preliminary injunction.

Second, plaintiffs cannot show a likelihood of success on the merits. The Clean Water Rule furthers the Clean Water Act's objective to protect the Nation's waters, complies fully with the procedural and substantive requirements of the Administrative Procedure Act, and comports with controlling precedent from this Circuit and the Supreme Court, and with the Constitution.

THE INTERESTS OF THE STATES

The Amici States are situated along the shores of the Atlantic and Pacific Oceans, the Chesapeake Bay, the Great Lakes, and Lake Champlain and are downstream from, or otherwise hydrologically connected with, many of the Nation's waters. As such, the States are recipients of water pollution generated not only within their borders but also from sources outside their borders over which they lack jurisdiction. The Clean Water Rule advances the goal of the Clean Water Act, 33 U.S.C. § 1251 *et seq.,* to secure a strong federal "floor" for water pollution control, thereby protecting the interests of the States as well as those of all other states that have waters located downstream from other states. It does this by providing a protective, clear, practical, and science-based definition of "waters of the United States."

The definition of "waters of the United States" implicates the environmental and public health interests of the Amici States and their residents, and affects the States' proprietary interests. The Clean Water

Rule protects those interests by "prevent[ing] the 'Tragedy of the Commons' that might result if jurisdictions can compete for industry and development by providing more liberal limitations than their neighboring states." *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1378 (D.C. Cir. 1977). Downstream states would be at a competitive disadvantage if they had to impose more stringent controls than upstream states to safeguard their public health and welfare. *See United States v. Ashland Oil & Trans. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974). The Clean Water Rule's protections would help ensure that out-of-state flows of pollution do not lower the States' water quality and thereby threaten the States' drinking water supplies, commercial and recreational fishing, and related industries. Without the Clean Water Rule, the States face increased costs to administer their own water pollution programs and protect for their residents the integrity of the States' waters and the related health, safety, environmental, and economic benefits those waters provide.

In addition, the Amici States own, operate, finance and manage property within their borders, including lands, roads, bridges, buildings, drinking water systems, sewage and storm water treatment or conveyance systems, and other infrastructure and improvements. Inadequate or ineffective protection of waters under the Clean Water Act, such as wetlands and other waters that mitigate the damaging effects of floods, will cause

harm to the States' properties and increase the costs of operating and managing them.

The Clean Water Rule would protect the Amici States' environmental, public health, and proprietary interests by strengthening and clarifying Clean Water Act protections of waters within the States' jurisdictions, and by helping to ensure that polluted water from other states does not flow into the States' waters.

PRELIMINARY INJUNCTION STANDARD

The issue before the Court is whether plaintiffs have demonstrated their entitlement to a preliminary injunction of the Clean Water Rule.

"A preliminary injunction is an extraordinary and drastic remedy." *Wreal, LLC v. Amazon.com*, 840 F.3d 1244, 1247 (11th Cir. 2016) (citation omitted). It "is the exception rather than the rule," and a preliminary injunction is "not to be granted unless the movant clearly established the 'burden of persuasion' as to each of the four prerequisites." *Four Seasons Hotels & Resorts, B.V v. Consorcio Barr, S.A.,* 320 F.3d 1205, 1210 (11th Cir. 2003) (internal quotation and citations omitted). Those four prerequisites are that: (1) the movants are likely to succeed on the merits, (2) the movants will likely suffer irreparable harm if the injunction is not issued, (3) the balance of equities tips in the movants' favor, and (4) the injunction is in the public interest. *United States v. Jenkins,* 714 F. Supp.2d 1213, 1220 (S.D. Ga. 2008)

(citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008)).

For the reasons discussed below, plaintiffs cannot establish that they are entitled to a preliminary injunction, and their motion should be denied.

ARGUMENT

POINT I

PLAINTIFFS CANNOT DEMONSTRATE ANY HARM JUSTIFYING A PRELIMINARY INJUNCTION

Plaintiffs cannot demonstrate that they face an imminent threat of any harm from the Clean Water Rule, let alone irreparable harm, as required to obtain a preliminary injunction. And because plaintiffs cannot demonstrate any actual harm from the rule, they also cannot establish any hardship to them if the rule is not enjoined, thus the balance of equities does not favor them.

On February 6, 2018, the agencies issued the Suspension Rule, a regulation which immediately stayed the implementation of the Clean Water Rule for two years. *See* 83 Fed. Reg. 5,200. The Suspension Rule adds an "applicability date" of February 6, 2020 to the Clean Water Rule, suspending it for two years and replacing it with preexisting regulations. *Id.* at 5,201, 5,208.

Although the States have challenged the legality of the Suspension Rule, *see State of New York, et al. v. Pruitt*, Case No. 1:18-cv-1030 (S.D.N.Y.,

filed Feb. 6, 2018), they have not sought a preliminary injunction, the issues in that case are still being briefed, no argument date on the merits has been set, and the Suspension Rule's rescission is not imminent.

Plaintiffs have asserted that "[t]he uncertain status of the [Suspension] Rule" because of such legal challenges "imposes irreparable . . . harm on the [plaintiffs]." *See* Dkt. No. 140 at 7. But as long as the Suspension Rule remains in effect, plaintiffs can complain of no harm from the Clean Water Rule, let alone irreparable harm.

At this point, plaintiffs' assertions of injury from the Clean Water Rule involve only future, potential harm, and as such are necessarily speculative. It is well-settled that speculative harm is insufficient for granting a preliminary injunction. As the Supreme Court has explained, "[o]ur frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction . . . A preliminary injunction will not be issued simply to prevent the possibility of some remote future injury." *Winter,* 555 U.S. at 22 (emphasis in original, internal citations and quotations omitted); *accord NE. Fla. Chapter of Ass'n of General Contractors of Am. v. City of Jacksonville,* 896 F.2d 1283, 1285 (11th Cir. 1990) ("A showing of irreparable harm is the *sine qua non* of injunctive relief" and "must be neither remote nor speculative, but actual and imminent.") (internal quotations and citations

omitted). Because plaintiffs cannot suffer any injury from the Clean Water Rule as long as the Suspension Rule remains in effect, they cannot establish that irreparable harm is "actual and imminent." *Id.*

Plaintiffs' inability to demonstrate a threat of irreparable harm also precludes them from carrying their burden of persuasion as to the third preliminary injunction factor, which requires a showing that the equities are in their favor. Besides the absence of any actual imminent harm from the Clean Water Rule, as explained here that rule once effective protects the Nation's waters and the significant interests of the Amici States. Thus on balance the hardship to the Amici States from enjoining the rule outweighs any harm to plaintiffs from denying an injunction. This further counsels against granting the extraordinary relief sought by plaintiffs. And as to the fourth factor relevant to the analysis – whether the remedy sought serves the public interest – an injunction will harm the public interest by impeding the future implementation of the Clean Water Rule, which furthers the objectives of the Clean Water Act. Accordingly, plaintiffs cannot meet their preliminary injunction burden.

POINT II

THE COURT SHOULD DENY THE MOTION FOR A PRELIMINARY INJUNCTION BECAUSE PLAINTIFFS CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS

In their original motion papers, plaintiffs failed to establish that they are likely to prevail on the merits of their challenge to the Clean Water Rule, and they cannot do so now. Contrary to their assertions, the agencies did not violate the Administrative Procedure Act (APA) in promulgating the Clean Water Rule's definition of "waters of the United States." Further, the Clean Water Rule is rationally based on a voluminous administrative record, is consistent with the Clean Water Act and case law, and does not raise any constitutional concerns.

A. Plaintiffs' APA Arguments Are Not Likely to Succeed on the Merits.

Plaintiffs complain that the Clean Water Rule violated the notice and comment provisions of the APA primarily because the specific distance limitations in the rule's "waters of the United States" definition were not in the proposed rule, and thus, the plaintiffs assert, the final rule was not a "logical outgrowth" of the proposed rule. But in fact distance-based limitations were contemplated by the proposed rule. "Under the 'logical outgrowth' test . . . , the key question is whether commenters should have anticipated that EPA might issue the final rule it did." *City of Portland v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007) (internal quotations omitted).

In the preamble to the proposed rule, the agencies sought public input on how best to determine what are jurisdictional "adjacent waters," and specifically requested comments "on other reasonable options for providing clarity," including those "establishing specific geographic limits" such as "distance limitations." 79 Fed. Reg. at 22,208-09; *see* 80 Fed. Reg. at 37,088-91 (discussing public comments on distance limitations). The final rule encompassed adjacent waters within the Act's protections, defined to include waters within specified distances from other waters. 33 C.F.R. §§ 328.3(a)(6), (c)(1), (c)(2). It also included waters at longer specified distances from such other waters provided that a case-specific analysis was satisfied. *Id.* § 328(a)(8). Given that the agencies expressly requested comments on the inclusion of specific distance limitations, their decision to adopt distance limitations was reasonably anticipatable by commenters and thus a logical outgrowth of the proposed rule. Plaintiffs cannot satisfy their burden to demonstrate a likelihood of success on this APA claim.

Plaintiffs are also unlikely to succeed on their claim that the Clean Water Rule is arbitrary and capricious. The Rule is the result of reasoned agency rulemaking to determine which waters should be included within the "waters of the United States." The Clean Water Rule relies substantially on a comprehensive report prepared by EPA's Office of Research and Development, and review of that report by EPA's Science Advisory Board

(Science Report).[1] The Science Report in turn is based on a review of more than 1200 peer-reviewed publications. That report and the review by the Science Advisory Board concluded that tributary streams, and wetlands and open waters in floodplains and riparian areas, are connected to and strongly affect the chemical, physical, and biological integrity of downstream traditional navigable waters, interstate waters, or the territorial seas. 80 Fed. Reg. at 37,057.

This extensive scientific record demonstrates that the waters the Clean Water Rule protects have a significant nexus to traditionally navigable waters. Thus, the rule was adopted based on a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

For example, the Clean Water Rule requires that a jurisdictional tributary contribute flow and possess both an ordinary high water mark (OHWM) *and* a bed and bank, 33 C.F.R. §§ 328.3(a)(5), (c)(3). These requirements adequately demonstrate "volume, frequency and duration of flow," 80 Fed. Reg. at 37,115, and in fact narrow the definition of tributary under preexisting regulations which only required that a tributary have an OHWM to constitute a jurisdictional water of the United States. *See*

[1] U.S. EPA, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report),* EPA/600/R-14/475F (2015), available at https.//cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414.

Rapanos v. United States, 547 U.S. 715, 781 (2006) (Kennedy, J., concurring). And the evidence before the agencies further established that even intermittent and ephemeral tributaries "play an important role in the transport of water, sediments, organic matter, pollutants, nutrients, and organisms to downstream environments." U.S. EPA, *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States* (May 27, 2015) (Technical Support Document) at 233.[2]

Similarly, the Clean Water Rule's use of distance limitations to delineate which waters should be included within the definition of "waters of the United States" is rationally supported by the record. The Science Report specifically noted that "spatial proximity" is an important determinant of the connection between wetlands and streams and downstream waters. Science Report at ES-11; *see also* 80 Fed. Reg. 37,085-86 (discussing scientific basis for including waters located within distance limitations); Technical Support Document at 150, 172 ("[d]istance also affects connectivity between non-floodplain and riparian/floodplain wetlands and downstream waters," and the limits selected "ensure that the waters are providing similar functions to downstream waters and . . . are located comparably in the landscape such that the agencies reasonably judged them to be similarly situated."); and

[2] Available at https://www.epa.gov/sites/production/ files/2015-05/documents/technical_support_document_for_the_clean_water_rule_1.pdf.

Technical Support Document at 297-304 (describing important functions performed by waters within these lateral limits that significantly affect downstream water quality). Relying on science, the rule reasonably employs distance thresholds to protect upstream waters that function to significantly affect downstream waters, and is not arbitrary and capricious.

B. Plaintiffs Cannot Demonstrate a Likelihood of Success on Their Clean Water Act Claims.

Contrary to plaintiffs' claims, the Clean Water Rule is consistent with the Clean Water Act. The Act's *sole* objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The statute serves this purpose by establishing minimum pollution controls that apply nationwide, creating a uniform "national floor" of protective measures against water pollution. *Arkansas v. Oklahoma,* 503 U.S. 91, 110 (1992); 33 U.S.C. §§ 1344(h)(1), 1370. The Clean Water Act's permitting programs aim to control pollution at its source, rather than allowing pollutants to enter the water and then attempting to control them at some downstream location. 33 U.S.C. § 1342(a)(1) (establishing system for issuance of point source permits). These programs, and the Act's protections, apply to the "waters of the United States."

The Clean Water Rule's definition of the "waters of the United States" is consistent with the Act's objective and case law. In adopting the Clean Water Rule, the agencies were guided by the "significant nexus" standard for

protected waters outlined in Justice Kennedy's concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006), and relied on a strong scientific record establishing the nexus between covered waters and traditionally navigable waters. No single test for covered waters garnered a majority in *Rapanos,* but five Justices (Justice Kennedy and the four dissenters) agreed with the principle underlying the "significant nexus" standard. The Eleventh Circuit, employing different reasoning, has adopted Justice Kennedy's "significant nexus" standard. *See United States v. Robinson*, 505 F.3d 1208, 1221-22 (11th Cir. 2007) (reasoning that the "significant nexus" test is the narrowest position of the Justices concurring in the judgment).

Plaintiffs are simply wrong to assert that the Clean Water Rule is inconsistent with the "significant nexus" standard. As noted, the robust scientific report and review concluded that tributaries, adjacent waters, and open waters in floodplains and riparian areas are connected to and affect downstream traditional navigable waters. In defining covered waters to include waters with a scientifically-demonstrated nexus to traditional navigable waters, the Clean Water Rule adheres to the Act's purpose and Supreme Court precedent, and is rational in its scope. Accordingly, plaintiffs are unlikely to prevail on their claim that the Clean Water Rule is contrary to the Clean Water Act.

C. Plaintiffs Cannot Establish a Likelihood of Success on Their Constitutional Claims.

Finally, plaintiffs' constitutional claims are without merit. Justice Kennedy made clear that compliance with the significant nexus standard "will raise no serious constitutional or federalism difficulty" and "prevents problematic applications of the statute" that could raise such concerns. *Rapanos*, 547 U.S. at 782-83 (Kennedy, J., concurring). And the Clean Water Rule, as discussed, is based on the significant nexus standard. *See* 80 Fed. Reg. at 37,056.

Moreover, controlling Tenth Amendment jurisprudence forecloses plaintiffs' state sovereignty claim. The Supreme Court has held that federal laws like the Clean Water Act that prescribe minimum federal standards through a valid exercise of the commerce power do not violate the Tenth Amendment. "The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause." *Hodel v. Va. Surface Min. & Reclamation Assn.*, 452 U.S. 264, 291 (1981) (upholding the constitutionality of the Surface Mining Control and Reclamation Act of 1977). And it is clear that the Clean Water Rule satisfies the Commerce Clause.

The polluting activities controlled by the Clean Water Act, such as point source discharges of waste, are economic in nature and subject to

regulation under the Commerce Clause. *See, e.g., Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 340 n. 3 (1992) (solid waste is an "article of commerce"). The Clean Water Rule, by protecting both traditional navigable waters and the waters that significantly affect them, provides "'appropriate and needful control of activities and agencies which, though intrastate, affect that [interstate] commerce.'" *Rapanos*, 547 U.S. at 783 (Kennedy, J., concurring) (quoting *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525-26 (1941)); *see United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 133 (1985) (noting Congress' intent under the Clean Water Act to "exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term"). Indeed, in this way the rule supports our federal system by helping to maintain a level playing field while advancing the water quality and economies of all states.

Plaintiffs' complaints about which waters the Clean Water Rule protects really are disagreements with the science demonstrating the significant functions those waters perform and their connectivity to downstream waters. The scope of the Clean Water Rule does not render it unconstitutional because "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in

more than one State." *Hodel,* 452 U.S. at 282. Accordingly, plaintiffs cannot demonstrate a likelihood of success on their constitutional claims.

CONCLUSION

For the foregoing reasons, the motion for a preliminary injunction should be denied.

DATED: May 29, 2018

Respectfully submitted,

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