UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

STATE OF OHIO, et al.,

Plaintiffs,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,

Defendants.

Case No. 2:15-cv-02467
Chief Judge Sargus
Magistrate Judge Jolson

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

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PRELIMINARY STATEMENT

The States of New York, Washington, California, Maryland, New Jersey, Oregon, Rhode Island and Vermont, the Commonwealth of Massachusetts, and the District of Columbia (the Amici States) respectfully submit this Amicus Curiae brief in opposition to the motion of plaintiffs (the Plaintiff States) for a preliminary injunction of the Clean Water Rule, which defines the "waters of the United States" that are subject to the Clean Water Act, *see* 33 U.S.C. § 1362(7). The Amici States support the Clean Water Rule because it protects their environmental, public health, and proprietary interests in the waters of their States and waters upstream of their States.

First, the Plaintiff States' motion should be denied because the Clean Water Rule has been suspended and as a result, the Plaintiff States cannot prove they are likely to suffer any immediate and certain irreparable harm. The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (together, the Agencies) issued a final rule in February 2018 suspending the Clean Water Rule for two years, and announcing their intention to develop a new rule to permanently replace the Clean Water Rule. 83 Fed. Reg. 5,200 (Feb. 6, 2018). The Agencies recently filed a supplemental notice in furtherance of their proposal to repeal the rule permanently. *See* 83 Fed. Reg. 32,227 (July 12, 2018). There is therefore nothing to enjoin, and the

Plaintiff States only speculate about unknown future harm. Such speculation is insufficient to support the extraordinary remedy of a preliminary injunction.

Second, the Plaintiff States 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 AMICI STATES

The Amici States are situated along the shores of the Atlantic and Pacific Oceans, the Chesapeake Bay and its tributaries, the Great Lakes, and Lake Champlain and are downstream from, or otherwise hydrologically connected with, many of the Nation's waters. As such, the Amici States are impacted by water pollution generated not only within their borders but also from sources outside their borders over which they lack jurisdiction. For example, the waters of the Great Lakes that border Amici State New York are downstream of the Great Lakes waters that border two of the three Plaintiff States, Ohio and Michigan.[1]

[1] *See* https://www.glerl.noaa.gov/education/ourlakes/background.html (last accessed July 24, 2018).

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 Amici States as well as those of all 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." *See* 33 U.S.C. §1362(7).

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 Amici 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). Without the protections afforded by the Clean Water Rule, increased out-of-state water pollution will impair the Amici States' water quality. Lower water quality threatens the Amici States' drinking water supplies, commercial and recreational fishing, and related industries. Without the Clean Water Rule, the Amici States face increased costs

in administering their own water pollution programs, and increased costs in protecting for their residents the integrity of the Amici States' waters and the related health, safety, environmental, and economic benefits those waters provide.

The Amici States also 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 floodplain waters that mitigate the damaging effects of floods, will cause harm to the Amici 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 Amici States' jurisdictions, and by helping to ensure that pollution from other states does not flow into and degrade the Amici States' waters.

PRELIMINARY INJUNCTION STANDARD

"A preliminary injunction is an extraordinary and drastic remedy," *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (internal quotation marks omitted), and should "only be awarded upon a clear showing that the plaintiff is entitled to such relief," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22,

(2008). "A district court must balance four factors when considering a motion for a preliminary injunction: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction." *Bays v City of Fairborn*, 668 F.3d 814, 818-819 (6th Cir. 2012) (citation omitted). A district court's denial of a preliminary injunction is proper where the movant fails to demonstrate irreparable injury absent such relief. *Southern Milk Sales, Inc. v. Martin,* 924 F.2d 98, 103 (6th Cir. 1991).

ARGUMENT

POINT I

THE PLAINTIFF STATES CANNOT DEMONSTRATE ANY HARM JUSTIFYING A PRELIMINARY INJUNCTION

The Plaintiff States cannot demonstrate that they face any imminent irreparable harm from the Clean Water Rule, as required to obtain a preliminary injunction, because the Clean Water Rule is not currently in effect. And because the Plaintiff States cannot demonstrate that they face any imminent harm, they also cannot establish that the risk of harm to them outweighs any harm that will result if an injunction is not granted.

On February 6, 2018, the Agencies issued a regulation, effective immediately, suspending the Clean Water Rule for two years. *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). 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 Amici 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 neither imminent nor certain.

The Plaintiff States have asserted that they are "at risk of imminent and irreparable harm from the 2015 Rule because the 'applicability date' respite is only temporary and is itself being challenged in four lawsuits." States Supplemental (Replacement) Memorandum in Support of Preliminary Injunction (Pl. Mem.) (Dkt. No. 64) at 2. But the Suspension Rule on its own terms applies for the next 18 months. Thus, as long as the Suspension Rule remains in effect, the Plaintiff States can complain of no imminent and irreparable harm from the Clean Water Rule.

At this point, the Plaintiff States' 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 Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991) ("the harm alleged must be both certain and immediate, rather than speculative or theoretical" (citation omitted)). Because the Plaintiff States 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 "certain and immediate, rather than speculative." *Griepentrog*, 945 F.2d at 154.

Plaintiff States urge this Court to follow the Sixth Circuit's analysis in granting a stay of the Clean Water Rule (Pl. Mem. at 29), but not only has that ruling been vacated, as the Plaintiff States acknowledge, Pl. Mem. at 1, the Rule's current suspension renders that analysis inapplicable. Notably, the Sixth Circuit relied heavily on the "pervasive nationwide impact" of the Clean Water Rule's implementation. *See Ohio v. U.S. Army Corps of Eng'rs*, 803 F.3d 804, 806 (6th Cir. 2015). The Sixth Circuit was particularly concerned with the potential compliance burdens the Clean Water Rule might impose on

governmental bodies and private parties. *Id.* at 808. Here, in contrast, the Clean Water Rule is suspended for two years and is not being implemented in any state, including the Plaintiff States. As long as the Clean Water Rule remains subject to the suspension, no court-issued injunction is needed to prevent the Agencies from implementing the Rule, and the Sixth Circuit's analysis is therefore inapplicable. Thus, the Plaintiff States cannot demonstrate that they will suffer irreparable injury absent an injunction, and their inability to satisfy the second factor requires this Court to deny their motion.

The Plaintiff States' inability to demonstrate irreparable harm also precludes them from satisfying the third factor, which requires the Court to balance the harm to plaintiffs against any harm to third parties. The Clean Water 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 the Plaintiff States from denying an injunction. And as to the fourth factor of 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 and its goal to protect public health and the environment that sustains life.

POINT II

THE PLAINTIFF STATES CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS

The Plaintiff States argue that the Court should follow the Sixth Circuit's ruling in *Ohio*, 803 F.3d at 807, which held that there was a "substantial possibility" that the Clean Water Rule challenges then pending before it would succeed on the merits. Pl. Mem. at 1. But as noted above, that ruling has been vacated and thus has no precedential value. And because the Plaintiff States have shown no immediate and certain irreparable harm, the Court does not need to reach the question of likelihood of success on the merits before the merits have been fully briefed. *See Southern Milk Sales, Inc.*, 924 F.2d at 103 (a court can properly deny a motion for preliminary injunction when the movant fails to demonstrate imminent and certain harm absent the injunction). Moreover, the Plaintiff States' likelihood of success is far from clear on their claims that the Clean Water Rule (1) exceeds the Agencies' jurisdiction, (2) has federalism implications, and (3) violates the Administrative Procedure Act.

First, the Plaintiff States cannot demonstrate a strong likelihood of success on their claim that the Clean Water Rule exceeds the Agencies' jurisdiction under the Clean Water Act. *See* Pl. Mem. at 15-23. The objective of the Clean Water Act 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); *see* 33 U.S.C. §§ 1344(h)(1), 1370. The 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." *Id.* § 1367(7).

The Clean Water Rule's definition of the "waters of the United States" is consistent with the Act's objective. The Plaintiff States argue (Pl. Mem. at 18) that the Rule cannot "be squared with" Justice Kennedy's concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006), but the Agencies *adopted* Justice Kennedy's "significant nexus" standard in crafting the Clean Water Rule. 80 Fed. Reg. 37,054, 37,056-57 (June 29, 2015). Under that standard, wetlands and other waters are covered by the Act if they have a "significant nexus" to navigable waters, meaning that "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the

chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable,'" *id*. at 780.[2]

Using the "significant nexus" standard and a robust scientific record, the Agencies carefully developed the Clean Water Rule to cover only those waters that either had a significant nexus to traditionally navigable waters or constituted traditionally navigable waters themselves. The Rule relies substantially on a comprehensive report prepared by EPA's Office of Research and Development (Science Report), which was then reviewed by EPA's Science Advisory Board.[3] The Science Report was itself based on more than 1200 peer-reviewed publications. The Science Report and 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.

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[2] 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, and courts have uniformly held that compliance with it is sufficient for a water to be covered under the Act. *See* Agencies' Br. at 49 (Jan. 13, 2017) in *In re Dep't of Defense & EPA Clean Water Rule,* No. 15-3751 (and consolidated cases) (6th Cir.) (Dkt. No. 149-1) ("The [Clean Water] Rule's use of the significant nexus standard is consistent with every circuit decision . . . .").

[3] U.S. EPA, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report),* https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414 (last accessed July 24, 2018).

Reg. at 37,057. Because the Agencies relied on an extensive scientific record demonstrating that the waters that the Clean Water Rule protects have a significant nexus to traditionally navigable waters, the Rule was based on a "rational connection between the facts found and the choice made." *See Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962).

In short, 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, the Plaintiff States are unlikely to prevail on their claim that the Clean Water Rule is contrary to the Clean Water Act.

Second, the Plaintiff States are also unlikely to prevail on the merits of their argument that the Clean Water Rule has "federalism implications." *See* Pl. Mem. at 22. 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 in the judgment). The Clean Water Rule, as discussed, is based on the significant nexus standard. *See* 80 Fed. Reg. at 37,056.[4] And the fact that Amici States—

[4] Justice Kennedy further explained regarding federalism under the Clean Water Act that the Act's policy of respecting "States' responsibilities and rights [under 42 U.S.C.] § 1251(b)" encompasses respect for State water pollution policies that rely on the Act to "protect[] downstream States from out-of-state

each of which also seeks to promote and protect states' rights—oppose the request for a preliminary injunction undermines the Plaintiff States' reliance on federalism as a basis to grant the injunction.

The Supreme Court has made clear 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]

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pollution that they themselves cannot regulate." *Rapanos,* 547 U.S. at 777 (internal quotation and citation omitted).

commerce.'" *Rapanos*, 547 U.S. at 783 (Kennedy, J., concurring in the judgment) (quoting *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525-26 (1941)); *see also 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, the Rule supports our federal system by helping to maintain a level playing field while advancing the water quality and economies of all states.

In the end, however, the Plaintiff States' contentions about which waters the Rule protects amount only to 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, the Plaintiff States cannot demonstrate a likelihood of success on their federalism claim.

Third, the Plaintiff States also cannot demonstrate a strong likelihood of success on their claim that the Agencies violated the Administrative Procedure

Act (APA) when they promulgated the Clean Water Rule. *See* Pl. Mem. at 23-26. The Plaintiff States argue that the Clean Water Rule violated the APA's notice and comment provisions because the specific distance limitations in the Rule's "waters of the United States" definition were not in the proposed rule, and thus, the Plaintiff States assert, the final rule was not a "logical outgrowth" of the proposed rule. Pl. Mem. at 23-24. But in fact distance-based limitations were plainly 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. 22,188, 22,208-09 (April 21, 2014); *see also* 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), (2). It also included waters at longer specified distances from such other waters provided that they satisfy a case-by-case review. *Id.* § 328(a)(8). Given the Agencies' express request for

comment on the inclusion of specific distance limitations, the Plaintiff States should have anticipated that the Agencies would adopt distance limitations.

The Plaintiff States are also unlikely to succeed on their claim that the distance limitations are not supported by the record. *See* Pl. Mem. at 24-26. 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); U.S. EPA, *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States* (May 27, 2015)[5] (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."); Technical Support Document at 297-304 (describing important functions performed by waters within these lateral limits that significantly affect downstream water quality). Relying on the Agencies' notice that they would specifically be considering, and

[5] Available at https://archive.epa.gov/epa/cleanwaterrule/technical-support-document-clean-water-rule-definition-waters-united-states.html(last accessed July 24, 2018).

therefore were soliciting comment on, specific geographic and distance limits and an uncontroverted scientific record, the Rule reasonably employs distance thresholds to protect upstream waters that significantly affect downstream waters, and is not arbitrary and capricious.

CONCLUSION

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

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Respectfully submitted,

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