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

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

Plaintiffs,

v.

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.

Case No. 2:15-cv-02467

Judge Sargus

Magistrate Judge King

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

With the Defendant Agencies having stated that the stay of proceedings they had obtained pending a ruling of the MDL panel "has now expired" given that panel's ruling against the Agencies' transfer motion, Doc. 29-1 at 4, and believing the Court's ruling on one of the Agencies' recent motions perhaps to signal the same view, Plaintiff States of Ohio, Michigan, and Tennessee respectfully submit this motion requesting that operation of the Agencies' Rule purporting to redefine the "waters of the United States" be preliminarily enjoined pending final resolution of this case.

As explained more fully in the accompanying memorandum in support of this motion, the Sixth Circuit – having concluded that the States have a "substantial" possibility of success on the merits of their claims, regarding both the substance of the Rule and the process by which it was

promulgated – has entered a nationwide stay against the Rule while that Court determines its own jurisdiction. But should the Sixth Circuit, as the States believe highly likely, find that it lacks original jurisdiction that stay presumably will be set aside. The States therefore submit this preliminary injunction motion now to allow full briefing on a regular schedule here so that this Court may rule as appropriate when the Sixth Circuit determines that this case does not fall within the narrow category of Clean Water Act cases specified for review by Circuit petition.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF PRELIMINARY INJUNCTION

INTRODUCTION

The Clean Water Act confers federal regulatory jurisdiction over "navigable" waters, which the Act defines as "waters of the United States, including the territorial seas." 33 U.S.C. §§ 1251 *et seq.* and 1362(7). The Defendant Agencies read that term so broadly that in their new Rule laying claim to lands and waters far beyond the jurisdiction Congress provided, they find it necessary explicitly to disclaim authority over "puddles" and certain swimming pools (those "constructed in dry land"): but for Agency grace, they indicate, the Rule by its terms would extend even there. 33 C.F.R. § 328.3(b)(4)(iii),(vii); *see also* 80 Fed. Reg. 37099 (detailing that "[a] puddle is commonly considered a very small, shallow, and highly transitory pool of water that forms on pavement or uplands during or immediately after a rainstorm or similar precipitation event").

The reach the Agencies assert is breathtaking: it runs contrary both to statute and to recent and reiterated guidance from the United States Supreme Court in opinions rebuking earlier Agency overreach. The States of Ohio, Michigan, and Tennessee ("the States") respectfully ask the Court to enter a preliminary injunction precluding implementation of the new Rule pending final resolution of this matter. The only District Court to have considered the Rule's merits has granted a preliminary injunction to thirteen other plaintiff States, finding that "the States are likely to succeed on their claim because: (1) it appears likely that the EPA has violated its Congressional grant of authority in its promulgation of the Rule at issue, and (2) it appears likely the EPA failed to comply with APA requirements when promulgating the Rule." *North Dakota v. U.S. EPA*, ___ F. Supp. 3d ___, 2015 WL 5060744 (D. N.D. Aug. 27, 2015). For similar reasons, and also noting "the burden – potentially visited nationwide on governmental bodies …

as well as private parties – and the impact on the public in general, implicated by the Rule's effective redrawing of jurisdictional lines," the Sixth Circuit has stayed operation of the Rule nationwide while that Court considers whether it has original jurisdiction to consider Rule challenges. *In re: EPA, State of Ohio, et al. v. U.S. Army Corps of Engineers, et al.*, ___ F.3d ___, 2015 WL 5893814, at *3 (6th Cir. Oct. 9, 2015).

THE RULE

Defendant Agencies published the challenged Rule at 80 Fed. Reg. 37054 *et seq*. on June 29, 2015. The Rule purports to define navigable "waters of the United States" for purposes of federal regulatory jurisdiction under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, but reaches far beyond those waters to claim dominion over significant areas of Ohio, Michigan, and Tennessee that in no way constitute navigable, potentially navigable, or interstate waters – even in various instances reaching land that is typically dry. Although the Rule begins with unexceptionable coverage of waters that "may be susceptible to use in interstate or foreign commerce," as well as to "[a]ll interstate waters" and the "territorial seas," 33 C.F.R. § 328.3(a)(1)-(3), it then extends to areas that the Act leaves to the responsibility of the States. *Cf.* 33 U.S.C. § 1251(b) ("It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States … to plan the development and use … of land and water resources"); 33 U.S.C. § 1362(7) (defining "navigable waters" to mean only the "waters of the United States, including the territorial seas").

First, the Rule claims automatic and categorical federal jurisdiction over "all tributaries," including even very minor stream beds that usually carry no water at all. *See, e.g.*, 80 Fed. Reg. 37076 (coverage of occasionally trickling but normally dry stream beds with only "intermittent" or "ephemeral" flow). The Rule recites that a "tributary" is anything that contributes any "flow"

whatsoever, "either directly or through another water," to an actual interstate or navigable water, and that "is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark," without regard to various constructed or natural breaks. 33 C.F.R. 328.3(c)(3). As the Agencies see it, "[a] tributary may contribute flow through *any number* of downstream waters, including non-jurisdictional features …," and the flow need not be continuous, but can come from typically dry channels that may sometimes have water "in response to precipitation events." 80 Fed. Reg. at 37076 (emphasis added). Indeed, such "tributaries" need not even be apparent to the naked eye, but rather may be gleaned by "many tools" such as "remote sensing sources …. [including] light detection and ranging (also known as LIDAR) data and desktop tools … such as regional regression analysis or hydrologic modeling …. [that] can sometimes be used independently to infer the presence of a bed and banks and another indicator of ordinary high water mark…." *Id.* (further discussing "other evidence, besides direct field observation"). The Rule thus covers areas that may prove somewhat less "navigable" (to get back to statutory terms) even than the excluded "puddles."

Second, the Rule then geometrically expands its reach from there by asserting an automatic and categorical regulatory claim over "[a]ll waters adjacent to" any "tributary" as thus defined, as well as to any traditional navigable or interstate water, 33 C.F.R. 328.3(a)(6), then defining "adjacent" to mean not only "bordering," or "contiguous," but also "neighboring," *id.* at (c)(1), and then defining "neighboring" to include not only "[a]ll waters within 100 feet of the ordinary high water mark" of such a water, but also "[a]ll waters" within 1,500 feet of the "ordinary high water mark of such water" and within the plain of such water that has a 1 in 100 chance of flooding within any given year (and the "entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain"),

id. at (c)(2). Thus, by defining "adjacent" to include even non-adjacent territories, the Agencies purport to extend their jurisdiction categorically to wetlands and to any other "waters" as far as 1,500 feet from even "ephemeral" creek beds and other land features now defined as "tributaries." *See* 80 Fed. Reg. 37080 (noting rather dryly that "[a]djacency is not limited to waters located laterally to a traditional navigable water, interstate water, the territorial seas, an impoundment, or a tributary").

Third, the Rule purports to extend the Agencies' regulatory jurisdiction potentially to "all waters" within the 100-year floodplain of a traditional navigable or interstate water or territorial sea, and also to "all waters located within 4,000 feet of the high tide line or ordinary high water mark" of any such water or of a "tributary" if "they are determined on a case-specific basis to have a significant nexus" to a traditional navigable or interstate water or territorial sea. 33 C.F.R. 328.3(a)(8). "Significant nexus" is defined to mean "that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity" of a primary water. 33 C.F.R. 328.3(c)(5). The Agencies thus claim case-by-case authority over waters or wetlands more than three quarters of a mile away from a "tributary" as newly and very expansively defined.

Although the States had critiqued a proposed version of the Rule that the Agencies had published at 79 Fed. Reg. 22188 *et seq.* on April 21, 2014, that earlier version differed from the final Rule in material respects and did not specify distance parameters including the 1,500 foot categorical reach and the 4,000 foot case-specific reach established in the final Rule. The States therefore were not afforded notice of or opportunity to assess and submit comment on the distance parameters now at issue.

PROCEDURAL POSTURE

Ohio and Michigan filed this action on the day that the final Rule was published, and Tennessee soon joined. In reasonably short order, some 31 states were challenging the Rule in five different cases, and private organizations filed challenges as well. The Defendant Agencies sought to transfer this case and have it consolidated with others by the Judicial Panel on Multidistrict Litigation ("JPML"); they also requested a stay from this Court pending that determination. *See* Doc. 21. The States objected to a stay and to transfer and consolidation, arguing that the MDL process is not intended for challenges to agency rulemaking as exceeding statutory and constitutional authorization, and the States acceded to a request from the Agencies for 21 additional days in which to respond to the amended complaint. *See* Docs. 23, 26. This Court granted the Agencies' request to stay proceedings pending the JPML ruling, and ordered the parties to "promptly notify this Court once such a ruling is issued." Doc. 27. The JPML rejected the Agencies' motion on October 13, 2015, and the States filed a notice that day advising the Court of the development and asking the stay of proceedings be dissolved. Doc. 28.

The Agencies later that day moved the Court to again stay proceedings, this time pending a ruling from the United States Court of Appeals for the Sixth Circuit on the matter of that Court's original jurisdiction over protective petitions for review challenging the Rule. Doc. 29. The Agencies had referenced the Sixth Circuit proceedings in their earlier stay motion, but had not then asked for a stay on that basis. Like other challengers and because the Agencies have taken the position that challenges to this Rule could be initiated only in the Circuit courts during a 120-day petition period, the States shortly after publication of the Rule filed a protective petition for review that was by lottery consolidated with other such petitions in the Sixth Circuit; they then moved the Sixth Circuit to dismiss the petition for lack of subject matter jurisdiction

because the Clean Water Act leaves challenges of this sort to District Court jurisdiction in the first instance. *See In re EPA*, 2015 WL 5893814 at * 1 (noting motions to dismiss). The States also moved the Sixth Circuit to stay operation of the Rule while it completes its jurisdictional review.

Concluding that the States "have demonstrated a substantial possibility of success on the merits of their claims" challenging the Rule, *id.* at *2, the Sixth Circuit granted a nationwide stay against the Rule pending further order of Court. *Id.* at * 3. Sixth Circuit argument on the jurisdictional motions to dismiss is set for December 8, 2015. The Agencies have invoked that Sixth Circuit stay against the Rule in asking this Court to stay proceedings here, urging that such delay "would not harm [the States], who … have already obtained the protection provided by [the Sixth Circuit's'] stay." Doc. 29-1 at 5. The States have opposed the Agencies' newest delay request (while agreeing that the Agencies may have until 21 days after the Sixth Circuit declines jurisdiction in which to answer), but have asked that if a new stay of proceedings is granted, it be accompanied by an order continuing to stay the challenged Rule itself until preliminary injunction briefing can be concluded and proceedings are revitalized. Doc. 30.

ARGUMENT

This is the rare case in which the District Court already has the advantage of its Circuit Court's analysis in assessing whether to freeze implementation of a rule. The standard that this Court is to apply in determining whether to grant a preliminary injunction precisely parallels the standard that the Sixth Circuit used in granting the States' motion against the same Agencies for a nationwide stay of the same "waters" Rule. *Compare, e.g., Michael's Finer Meats, LLC v. Alfery*, 649 F. Supp.2d 748, 756 (S.D. Oh. 2009) ("In considering a request for preliminary injunction, the Court considers each of the following factors: [1] the likelihood that the movant

will succeed on the merits; [2] whether the movant will suffer irreparable harm without the injunction; [3] the probability that granting the injunction will cause substantial harm to others; and [4] whether the public interest will be advanced by issuing the injunction. … The foregoing are 'factors to be balanced, not prerequisites that must be met'.") (citations omitted), *with In re EPA*, 2015 WL 5893814 at * 1 (using the same four factors in granting stay against operation of this very same Rule, noting again that "[t]hese are not prerequisites that must be met, but interrelated considerations that must be balanced").

I. The States are likely to succeed on the merits.

A. The Rule far exceeds the Agencies' statutory jurisdiction under the Clean Water Act and is contrary to the Supreme Court's rulings in both *SWANCC* and *Rapanos*.

Almost fifteen years ago, the Supreme Court instructed Defendant Corps of Engineers that: "Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within [the more modest but still overreaching rule then at issue] would result in a significant impingement of the States' traditional and primary power over land and water use." *Solid Waste Agency of N. Cook Cnty. ("SWANCC") v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001). The Court explained, in clear terms, that "[r]ather 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.* (quoting 33 U.S.C. § 1251(b)). Thus, the Court concluded, "[w]e cannot agree that Congress' separate definitional use of the phrase 'waters of the United States' constitutes a basis for reading the term 'navigable waters' out of the statute. … The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172. The Court therefore refused to hold that

"nonnavigable, isolated, intrastate waters" fall under federal jurisdiction pursuant to the Act. *Id.* at 171 (and observing even then that the Corps improperly was going so far as to lay claim to "isolated ponds, some only seasonal, wholly located" within a single State).

Dogged persistence in pursuit of discredited claims of augmented power does not trump jurisdictional statute or Supreme Court precedent. But five years later, the Agencies were back before the Supreme Court on another overreaching claim, only to be reminded that "[i]n *SWANCC*, …. we held that 'nonnavigable, isolated, intrastate waters' … which, unlike the wetlands at issue in *Riverside Bayview* [474 U.S. 121], did not 'actually abu[t] on a navigable waterway,' … were not included as 'waters of the United States.'" *Rapanos v. United States*, 547 U.S. 715, 726 (2006) (plurality op.). In his concurring opinion, Justice Kennedy, too, was constrained to emphasize again that it is a "central requirement" of the Act that "the word 'navigable' in 'navigable waters' be given some importance." *Id.* at 778 (Kennedy, J., concurring).

Now, less than a decade on, the Agencies are reaching farther still: in the understated analysis of the Sixth Circuit in its stay order, "it is far from clear that the new Rule's distance limitations are harmonious with the instruction" provided by *Rapanos*. *In re EPA*, 2015 WL 5893814 at *2. Judge Erickson in North Dakota also agrees that "[t]he Rule at issue here suffers from the same fatal defect" as identified in *Rapanos*. *North Dakota*, 2015 WL 5060744 at *5.

Justice Kennedy emphasized in his *Rapanos* concurrence that a standard covering "tributaries" that feed into a traditional navigable water (or a tributary thereof) and possess an ordinary high-water mark as indicated by certain physical characteristics – a standard that he derided as being so broad as to cover "streams remote from any navigable-in-fact water and carrying only minor water volumes to it" – could not be adopted "as the determinative measure

of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood." 547 U.S. at 781 (Kennedy, J., concurring). "Indeed," he continued, "*in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in SWANCC*." *Id.* at 781-82 (emphasis added). As Judge Erickson found, "the breadth of the definition of a tributary set forth in the Rule allows for regulation of any area that has a trace amount of water so long as 'the physical indicators of a bed and banks and an ordinary high water mark' exist. This is precisely the concern Justice Kennedy had in *Rapanos*, and indeed the general definition of tributary is strikingly similar to the Agencies' jurisdictional claim there. *North Dakota*, 2015 WL 5060744 at *5. Justice Kennedy also underscored that the Corps cannot interpret the Act so 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." 547 U.S. at 778-79; *see also id.* at 784 ("mere hydrologic connection should not suffice in all cases").

Nor can the Rule's definition of "tributary" be squared with the *Rapanos* plurality opinion, which emphasized for example that any definition of "waters of the United States" must "exclude channels containing merely intermittent or ephemeral flow." *Id.* at 733-34 (plurality). The new Rule does exactly the opposite: it explicitly *includes* such channels, directing that "flow in the tributary may be … intermittent, or ephemeral." 80 Fed. Reg. at 37076. As the *Rapanos* plurality said of the Agencies' last land grab attempt, "in applying the ['waters of the United States'] definition to 'ephemeral streams,' 'wet meadows,' … 'directional sheet flow during storm events,' [etc.], the Corps has stretched the term 'waters of the United States' beyond parody. The plain language of the statute simply does not authorize this 'Land is Waters'

approach to federal jurisdiction." *Id.* at 734. In short: "on its only plausible interpretation, the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams, … oceans, rivers, [and] lakes.'… The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* at 739.

While this far too capacious definition of "tributary" replays previous Agency attempts at jurisdictional overreach, the new Rule's further contribution to that effort comes with its legerdemain in defining "adjacent" to mean both adjacent and non-adjacent. This sleight of hand is essential to the Agencies' territorial claims because the Supreme Court has been unequivocal in holding that the mere fact that a water is near, but not adjacent to, a water that is under Agency jurisdiction does not transform the former into "waters of the United States." Thus after noting that *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), had upheld federal jurisdiction "over wetlands that actually abutted on a navigable waterway," the Court said in *SWANCC*: "In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that **the text of the statute will not allow this**." 531 U.S. at 167, 168 (italicized emphasis in original; bold added).

The Agencies thus endeavor to give "adjacent" a new meaning to circumvent judicial precedent, including *SWANCC*. "Adjacent," the Rule says, means not only "bordering" or "contiguous," but also "neighboring," 33 C.F.R. 328.3(c)(1), and "neighboring" categorically includes "all waters" located within the 100-year floodplain and 1,500 feet of not only core jurisdictional waters but also all "tributaries" as broadly defined. 33 C.F.R. 328.3(c)(2)(ii). But

Sixth Circuit precedent flatly precludes reading "adjacent" as used in *SWANCC* and *Rapanos* to incorporate this Rule definition. *Summit Petroleum Corp. v. U.S. EPA*, 690 F.3d 733, 744 (6th (recognizing and adopting *Rapanos* understanding that "'[h]owever ambiguous the term may be in the abstract, 'adjacent' … is not ambiguous between 'physically abutting' and merely 'nearby'."). *See also id.* at 754 (Moore, J., dissenting, but agreeing that for purposes of the Clean Water Act, "the Court in *Rapanos* clarified that its use of the word 'adjacent' in *Riverside Bayview* meant only physically abutting and, accordingly, that only those wetlands that physically abut navigable waters could be considered adjacent to such waters for CWA purposes").

The plurality in *Rapanos* insisted that coverage of waters by virtue of their adjacency to actual "waters of the United States" could only come through a "continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins," 547 U.S. at 742, while Justice Kennedy's concurrence repeatedly reflects a view even more stringent in some circumstances. He wrote: "The dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far." *Id.* at 778-79. The Rule's categorical claim of jurisdiction over all "adjacent" waters, with adjacency defined to include non-adjacent waters as far as 1,500 feet away from a "tributary," is *more* expansive than the Corps regulation Justice Kennedy rejected as "preclude[d]" by the Clean Water Act. 547 U.S. at 781.

The Supreme Court again made clear only three years ago that the waters considered in both *SWANCC* and in *Rapanos* could not somehow be considered "adjacent" to navigable waters. *Sackett v. EPA*, 132 S. Ct. 1367, 1370 (2012) (contrasting abutting waters in *Riverside*

Bayview with *SWANCC* land "which 'seasonally ponded' but which was not adjacent to open water," and with *Rapanos* "wetland not adjacent to navigable-in-fact waters"). Yet under their new Rule, the Agencies impermissibly claim "adjacency" (and therefore *per se*, categorical jurisdiction) for areas as much as five football fields away from a "tributary" or other claimed jurisdictional water. That proposition contradicts the Act as construed in both *SWANCC* and *Rapanos* and sweeps far too broadly.

And the Rule's claim of potential Agency case-by-case jurisdiction over areas up to 4,000 feet from "tributaries" and other waters, *see* 33 C.F.R. 328.3(a)(8), severs its connection from the Act still further. The Rule asserts jurisdiction based on claimed connection with a single hydrological function, for example asserting jurisdiction based on the concept of "dispersal" involving "plants and invertebrates" that "hitchhike" on waterfowl. 80 Fed. Reg. at 37063, 37072, 37094; EPA, Connectivity of Streams and Wetlands to Downstream Waters 5-5 (2015). Such an approach flies in the face of *SWANCC*'s rejection of claimed federal jurisdiction over isolated "seasonal ponded" spots that hosted bird species including some that "depend upon aquatic environments for a significant portion of their life requirements." 531 U.S. at 164. As the Agencies previously recognized, Justice Kennedy cited *SWANCC* with approval in his *Rapanos* concurrence, and "[i]t is clear … that Justice Kennedy did not intend for [his] standard to be applied in a manner that would result in assertion of jurisdiction over waters that he and the other justices determined were not jurisdictional in *SWANCC*." Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States, U.S. EPA and Army Corps (June 5, 2007) at 8, n.29, available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2007_6_5_wetlands_RapanosGuidance6507.pdf. (last viewed November 1, 2015).

Indeed, the Agencies *concede* that they "have determined that the vast majority of the nation's water features are located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea." Agencies' Economic Analysis of the EPA-Army Clean Water Rule (May 2015) at 11, available at http://www2.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf. But the Supreme Court already has told the Agencies that overbroad assertions of federal jurisdiction in this area "result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. Congress gave the Agencies no authority to lay claim to such huge swaths of State lands and waters. "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 the States … to plan the development and use … of land and water resources…'." *Id.* (citing 33 U.S.C. § 1251(b). The Court therefore "read[s] the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation." *Id.* *See also, e.g.*, *Rapanos*, 547 U.S. at 738 (plurality op.) ("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 'waters of the United States' hardly qualifies.").

Yet completely contrary to that Supreme Court instruction, the Agencies in creating their Rule simply ignored all federalism implications. 80 Fed. Reg. 37102 ("This rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."). That Agency conclusion cannot be

squared with *SWANCC*, *Rapanos*, the Act, or the Constitution. And had Congress actually granted the Agencies the sweeping authority they claim in this Rule, the "significant constitutional and federalism questions" identified in *SWANCC* would invalidate such measure.

B. The Rule violates the APA because the final Rule is not a logical outgrowth of the proposed rule and its distance demarcations lack scientific support.

The proposed version of the Rule as published on April 21, 2014 at 79 Fed. Reg. 22188 *et seq.* did not in any way identify or give notice of or provide opportunity to assess and comment on the categorical or case-by-case distance parameters (of 1,500 feet and 4,000 feet, respectively) on which the final Rule turns, and nothing in either published version of the Rule sets forth a scientific basis that marks those parameters as anything less than arbitrary and capricious. The Rule contravenes the Administrative Procedure Act for both reasons.

The Supreme Court has explained that the APA's notice-and-comment provisions under 5 U.S.C. § 553 require that a final agency rule be a "logical outgrowth" of a published proposal on which interested persons have been given the opportunity to submit data, argument, and other comment. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). The proposing agencies must have identified "the range of alternatives being considered with reasonable specificity," and enabled the public to "have anticipated that [the] requirement" at issue might be adopted. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 548-49 (D.C. Cir. 1983). Here, however, the Agencies provided the public with no specifics at all on any distance parameters under consideration.[1]

[1] The significance of that failure – and the sort of analysis to which interested parties could have contributed significantly if given any fair opportunity – is illustrated, for mere example, by the [then non-public] concerns expressed by very high-ranking Corps officials on the distance parameters included without public notice in the final Rule. "As noted in the internal memoranda … the Agencies' internal documents reflect the absence of any information about how the EPA obtained its presented results." *North Dakota*, 2015 WL 5060744 at *5.

The Sixth Circuit in granting its stay held that the Agencies "have failed to identify anything in the record that would substantiate a finding that the public had reasonably specific notice that the distance-based limitations adopted in the Rule were among the range of alternatives being considered." *In re EPA*, 2015 WL 5893814 at *3. The Agencies could not point to such notice because it was not given. 79 Fed. Reg. 22188 *et seq.* *North Dakota* reached the same conclusion: "The definition of 'neighboring' under the final rule is not likely a logical outgrowth of its definition in the proposed rule." 2015 WL 5060744 at *6. "When the Agencies published the final rule, they materially altered the Rule by substituting … geographical distances that are different in kind and degree and wholly removed from the original concepts announced in the proposed rule." *Id.*

Further still, the Agencies have provided no legally satisfactory explanation for the distance parameters that they did unveil in the final Rule. As the Sixth Circuit observed, the Agencies have not "identified specific scientific support substantiating the reasonableness of the bright-line standards they ultimately chose. Their argument that 'bright-line tests are a fact of regulatory life' and that they used 'their technical expertise to promulgate a practical rule' is undoubtedly true, but not sufficient." *In re EPA*, 2015 WL 5893814 at *3. The *North Dakota* court, too, found for purposes of preliminary injunction that: "The Rule … arbitrarily establishes the distances from a navigable water that are subject to regulation." 2015 WL 5060744 at *6 (adding, for example, that "the court has reviewed all of the information available to it and is unable to determine the scientific basis for the 4,000 feet standard. … [I]t appears that the standard is the right standard [only] because the Agencies say it is. Under these circumstances the Rule … is likely arbitrary and capricious."). Where a rule is "arbitrary, capricious, an abuse

of discretion, or otherwise not in accordance with law," it must be set aside. 5 U.S.C. § 706(2)(A).

As the Sixth Circuit opinion suggested, the Agencies' only explanation for the arbitrary distances they selected consisted of conclusory statements that the parameters are "reasonable" and based on unspecified "experience" and a desire to have "clear lines." 80 Fed. Reg. 37085-91. Indeed, to the extent that the Agencies provided any actual information with the final Rule relating to the distance parameters chosen, they cited science that undercuts their position. "Regarding 'adjacent waters'" (to which the Rule applies its 1,500 foot-parameter), "[i]n particular, the SAB [the Agencies' Science Advisory Board] noted, 'the available science supports defining adjacency or determination of adjacency on the basis of functional relationships,' rather than 'solely on the basis of geographic proximity or distance to jurisdictional waters'." 80 Fed. Reg. 37064. And with regard to the "other waters" category, as the *North Dakota* Court observed, "the Rule must be supported by some evidence why a 4,000 foot standard is scientifically supportable." *North Dakota*, 2015 WL 5060744 at *6 (holding on preliminary injunction that distance parameter is without evidentiary support).

In sum, as the Sixth Circuit concluded, "the rulemaking process by which the distance limitations were adopted is facially suspect," and the States are likely to succeed on the merits for that reason as well as because of the Rule's legal dissonance with the Act and Supreme Court precedent. *In re EPA*, 2015 WL 5893814 at *2.

II. The States will suffer irreparable harm absent the injunction.

In seeking a further delay of these proceedings pending the Sixth Circuit's ruling on its jurisdiction, the Agencies have said that continuation of this Court's procedural stay "would not harm Plaintiffs" because of the "protection provided" by the Sixth Circuit's stay of the Rule.

Doc. 29-1 at 5. Once the Sixth Circuit concludes that it lacks original jurisdiction, however, as the States strongly submit that it does, presumably that stay will be lifted and the States will be exposed to the Rule's sovereign harms absent a preliminary injunction.

The Supreme Court in *SWANCC* found that the Corps' much less encompassing jurisdictional waters claim based on the "Migratory Bird Rule" "would result in a significant impingement of the States' traditional and primary power over land and water use." 531 U.S. at 174. The affront to the States' sovereignty is significantly greater here under this new Rule that the Agencies themselves concede asserts *per se* or potential jurisdiction over "the vast majority of the nation's water features." *See* Agencies' Economic Analysis of the EPA-Army Clean Water Rule (May 2015) *supra,* at 11. Usurpation from the States of their sovereign rights and responsibilities regarding intrastate waters that are not waters of the United States would constitute irreparable harm. *See, e.g., Kansas v. U.S.*, 249 F.3d 1213, 1228 (10th Cir. 2001) (because Interior Department's decision places Kansas's "sovereign interests and public policies at stake, we deem the harm the State stands to suffer as irreparable if deprived of those interests …." (citing *Kiowa Indian Tribe v. Hoover*, 150 F.3d 1163, 1171-72 (10th Cir. 1998) ("interference with tribe's sovereign status sufficient to establish irreparable harm")); *Ute Indian Tribe v. State of Utah*, 790 F.3d 1000, 1005 (10th Cir. 2015) (have "'repeatedly stated that … an invasion of tribal sovereignty can constitute irreparable injury'.").

The *North Dakota* opinion discussed the issue with care:

> The States … have demonstrated that they will face irreparable harm in the absence of a preliminary injunction. It is within the purview of the traditional powers of the States to maintain their 'traditional and primary power over land and water use.' Once the Rule takes effect, the States will lose their sovereignty over intrastate waters that will then be subject to the scope of the Clean Water Act. … [T]he Agencies admit to an increase in control over those traditional state-regulated waters of between 2.84 to 4.65 percent. Immediately

> upon the Rule taking effect, the Rule will irreparably diminish the States' power over their waters.

2015 WL 5060744 at *7.

Although the Sixth Circuit did not base its stay decision on immediate irreparable harm to state sovereignty considerations, it expressed "greater concern" with "the burden – potentially visited nationwide on governmental bodies, state and federal, as well as private parties – and the impact on the public in general, implicated by the Rule's effective redrawing of jurisdictional lines over certain of the nation's waters." *In re EPA*, 2015 WL 5893814 at *3. "The sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being," the Court continued. *Id.*

Moreover, although as the *North Dakota* court noted the Agencies concede increases in lands claimed as under federal jurisdiction "of between 2.84 and 4.65 percent in positive jurisdictional determinations annually," 80 Fed. Reg. 37101, the record reflects that those figures in fact dramatically understate the Rule's increased claims over precisely the sorts of areas designated by *SWANCC* and *Rapanos* as most clearly beyond federal "waters" authority. In what the Agencies themselves call the "*isolated waters category*" of "ORM2 … *intrastate, non-navigable waters*" that now could "meet the new definition of adjacent waters" as *automatically* covered under the final rule, the Agencies calculate a whopping 17.1 percent increase in positive determinations of federal jurisdiction. Agencies' Economic Analysis, *supra*, at vii (emphasis added) (also saying that "34.5 percent of 'other waters' overall will change from a negative to a positive" [jurisdictional determination] under the provisions of the new rule"); *id.* at 7 (noting that the "isolated waters category is used in the Corps' ORM2 database to represent intrastate, non-navigable waters …"); *id.* at 9 ("17.1 percent of negative jurisdictional determinations for ORM2 other waters are assumed to become positive jurisdictional determinations under the final

rule because they meet the new definition of adjacent waters and are not excluded under paragraph (b) of the rule. These waters fall within the 100-year floodplain and are within 1,500 feet of a stream mapped on the USGS's National Hydrology Dataset"). But the Supreme Court fifteen years ago unequivocally rejected "the Corps' claim of jurisdiction over nonnavigable, isolated, intrastate waters." *SWANCC*, 531 U.S. at 171; *see also Rapanos*, 547 U.S. at 781-82 (Kennedy, J., concurring).

In addition to assaulting the States' authority over their sovereign lands and waters, the Rule will burden the States with additional compliance and regulatory expenditures. With increased federal jurisdictional determinations, the Agencies concede that States will confront "incremental costs" for Clean Water Act Section 401 certification program, implementation programs, and other measures. Agencies' Economic Analysis at 19, 25-29. "It is undeniable that if the States incur monetary losses as a result of an unlawful exercise of regulatory authority, no avenue exists to recoup those losses as the United States has not waived sovereign immunity from suits seeking those sorts of damages." *North Dakota*, 2015 WL 5060744 at *7.

III. The balance of harms weighs in favor of the States, and an injunction will serve the public interest and "honor[] the policy of cooperative federalism that informs the … Act."

As the Sixth Circuit found, there is no "indication that the integrity of the nation's waters will suffer imminent injury if the new scheme is not immediately implemented and enforced." *In re EPA*, 2015 WL 5893814 at *3. States have plenary authority to protect waters not under federal jurisdiction. 33 U.S.C. § 1370. And like the Sixth Circuit stay, a preliminary injunction here will "honor[ ] the policy of cooperative federalism that informs the Clean Water Act and must attend the shared responsibility for safeguarding the nation's waters." *Id.*

Holding the Agencies to the law as already explicated by the Supreme Court advances the interests protected by both the Clean Water Act and the Administrative Procedure Act while

vindicating our nation's rule of law. *Cf.* Agencies' Economic Analysis at v (Agencies are abandoning the "caution in asserting jurisdiction" that they say they had exercised after "key Supreme Court cases"). It ameliorates the problems that temporary implementation of a legally vulnerable Rule would pose to the States and the public alike pending final resolution: "a stay temporarily silences the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing." *In re EPA*, 2015 WL 5893814 at *3. And also as the *North Dakota* court found, a "far broader segment of the public would benefit from the preliminary injunction because it would ensure that federal agencies do not extend their power beyond the express delegation from Congress. A balancing of the harms and analysis of the public interest reveals that the risk of harm to the States is great and the burden on the Agencies is slight." 2015 WL 5060744 at *8.

CONCLUSION

The States respectfully request that this Court preliminarily enjoin operation of the Rule pending final resolution of this case.

Respectfully submitted,
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CERTIFICATE OF SERVICE

This will certify that the foregoing was filed electronically on November 3, 2015. This filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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