IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
~~**WHEELING**~~ **CLARKSBURG DIVISION**

MURRAY ENERGY CORPORATION,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; GINA McCARTHY, in her official capacity as Administrator, United States Environmental Protection Agency; UNITED STATES ARMY CORPS OF ENGINEERS; and Jo Ellen Darcy, in her official capacity Assistant Secretary of the Army,

Defendants.

Civil Action No. 1:15-cv-110 (Keeley)
Electronically filed: June 29, 2015

Plaintiff Murray Energy Corporation ("Murray") files this Complaint for Judicial Review, Declaratory Relief and Injunctive Relief against Defendants United States Environmental Protection Agency ("EPA"); Gina McCarthy, the Administrator of the EPA; the United States Army Corps of Engineers ("Corps"); and Jo Ellen Darcy, the Assistant Secretary of the Army (Civil Works) and states as follows:

Overview

1.

On June 29, 2015, the Corps and EPA jointly issued a final rule entitled "*Definition of 'Waters of the United States' Under the Clean Water Act*." *See* 80 Fed. Reg. 37,054 (June 29, 2015) (the "final rule"). With this action, the Corps and EPA redefined the definition of "waters of the United States" (sometimes called "waters of the U.S." or "WOTUS") under the Clean Water Act ("CWA"). The action by the Corps and EPA wrongly expands their jurisdictional

reach well beyond the bounds allowed by the Constitution, delegated by Congress, permitted by law or supported by science. In promulgating the final rule, the defendants have violated the United States Constitution, the Clean Water Act , 33 U.S.C. § 1251 *et seq*. ("CWA"), and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*, 701 *et seq*.

Jurisdiction and Venue

2.

This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the claims arise under the laws of the United States and under the APA, 5 U.S.C. § 702, providing for judicial review of final agency action. This Court has the authority to grant the declaratory and injunctive relief sought herein under 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and under 5 U.S.C. §§ 701-706 for violations of the APA.[1]

3.

Venue is proper in this judicial district under 28 U.S.C. §1391(e) because the Corps and EPA are agencies of the United States, and the final rule adversely affects Plaintiff Murray Energy Corporation's coal mines located in this judicial district, the Wheeling Division and elsewhere in West Virginia.

Parties

4.

Plaintiff Murray is a corporation organized and existing under the laws of the State of Ohio and with its principal place of business in St. Clairsville, Ohio. Murray owns and operates

[1] Specific provisions of the CWA grant jurisdiction to the circuit courts to review enumerated agency actions directly. See 33 U.S.C. §1369(b)(1)(E)-(F). If an agency action is not among the listed actions – as is the case here – district courts have jurisdiction under the general federal question statute, 28 U.S.C. § 1331. *See Friends of the Everglades v. United States EPA*, 699 F.3d 1280 (11th Cir. 2012) (finding no jurisdiction in circuit court to hear un-enumerated CWA claim).

five mines located in this judicial district that will be directly affected by the final rule. Murray has standing to bring this action because it must comply with the final rule or risk penalties (both civil and criminal) for non-compliance, must expend resources to comply with the final rule, and will suffer other economic loss as a result of the final rule. The relief requested herein, including vacatur of the final rule or portions thereof, would redress Murray's injuries.

5.

Defendant EPA is the federal agency charged with the administration and enforcement of the CWA, in accordance with the specific delegations of authority from Congress contained in that statute. EPA developed and promulgated the final rule and is headquartered in Washington, D.C.

6.

Defendant Gina McCarthy is named in her official capacity as the Administrator of the EPA. The Administrator signed the final rule and caused it to be published in the Federal Register.

7.

Defendant Corps is an agency of the Federal government and is charged with, among other things, protecting and serving the nation's rivers and harbors. With EPA, the Corps developed and promulgated the final rule and is headquartered in Washington, D.C.

8.

Defendant Jo Ellen Darcy is named in her official capacity as the Assistant Secretary of the Army (Civil Works). The Assistant Secretary oversees and directs the activities of the Corps, signed the final rule and caused it to be published in the Federal Register.

Statutory Background and Rulemaking Proceedings

9.

As relevant to these proceedings, the CWA prohibits the discharge of "pollutants" to "navigable waters." 33 U.S.C. §§ 1311(a), 1342(a), 1344(a), 1362(12).

10.

The term "pollutants" includes, among other things, "dredged spoil, solid waste, . . . chemical wastes. . . heat . . . rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id.* § 1362(6).

11.

The term "navigable waters" is defined in the act to mean "waters of the United States." 33 U.S.C. § 1362(7). Waters need not be truly navigable to be subject to CWA jurisdiction. Waters that are jurisdictional (***e.g.***, "navigable waters" defined as "waters of the United States") are subject to multiple regulatory requirements of the CWA: standards, discharge limitations, permits and enforcement. Non-jurisdictional waters, in contrast, do not have the federal legal obligations of those requirements.

12.

The CWA's single definition of "navigable waters" applies to the entire law. 33 U.S.C. § 1362(7). In particular, it applies to federal prohibition on discharges of pollutants except in compliance with the act's requirements (*Id*. § 1311), requirements for point sources to obtain a permit prior to discharge (§§ 1342 and 1344), water quality standards and measures to attain them (§1313), oil spill liability and oil spill prevention and control measures (§ 1321), certification that federally permitted activities comply with state water quality standards (§ 1341), and enforcement (§ 1319).

13.

For nearly 30 years, the definition of "waters of the United States," found in EPA regulations at 40 C.F.R. § 122.2 (2014) and identical Corps regulations at 33 C.F.R. § 328.3 (2014), has remained virtually unchanged. *See* 48 Fed. Reg. 14,146 (Apr 1, 1983) (adopting EPA definition); 51 Fed. Reg. 41,206 (Nov. 13, 1986) (adopting identical Corps definition).

14.

Since the definition of WOTUS was first adopted, EPA and the Corps have sought to expand the definition to reach more water bodies – and even dry land – well beyond the bounds of what Congress intended. The U.S. Supreme Court has rejected the agencies' efforts to rewrite the Clean Water Act. *See, e.g., Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*") (rejecting Corps' assertion that isolated, non-navigable, intrastate ponds were waters of the U.S.).

15.

The Supreme Court has sought to provide clarity to the concept of "waters of the U.S." and identify where, along the continuum of the landscape from wet to dry land, the federal government's authority under the Act stops and begins. Two Supreme Court cases, *SWANCC*, 531 U.S. 159, and *Rapanos v. United States*, 547 U.S. 715 (2006), set the legal standard.

16.

In the years since *SWANCC* and *Rapanos*, the EPA and Corps have continued their aggressive assertion of CWA jurisdiction over areas that are clearly not within the definition of "waters of the U.S." In an attempt to expand their jurisdiction beyond what the Constitution allows, beyond what Congress intended, and beyond what science supports, the Defendants initiated a rulemaking to change the definition of waters of the United States.

The Proposed Rule Redefining Waters of the US

17.

On April 21, 2014, Defendants published a proposed rule in the Federal Register that dramatically and unlawfully alters the definition of WOTUS. *See Definition of 'Waters of the United States' Under the Clean Water Act, Proposed Rule"* 79 Fed. Reg. 22,188 (April 21, 2014) ("proposed rule").

18.

To support the proposed rule, Defendants commissioned a scientific report: U.S. Environmental Protection Agency, *Draft Report, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Washington, DC: U.S. EPA, 2013) ("Connectivity Report").

19.

As evidence of the Defendants' rush to get the proposed rule out, the Connectivity Report did not undergo a complete peer review and was still not final when the proposed rule was published in the Federal Register. In fact, the Connectivity Report was submitted to the EPA's Science Advisory Board to begin review on the same day the proposed rule was provided for interagency review. The Defendants' approach defied basic principles of administrative rulemaking and specific regulatory guidelines requiring a complete and final agency record to be made available for public review, and is particularly problematic here because the scientific and legal concepts are inextricably linked.

20.

The Connectivity Report suffers from a number of deficiencies that call into question its overall accuracy and completeness. The EPA's own Science Advisory Board published findings

suggesting that EPA's basic approach to defining connectivity, including in the context of defining tributaries, is flawed. *See SAB Review of Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Oct. 17, 2014) ("SAB Report").

21.

The proposed rule allowed the public to file comments not later than July 21, 2014. *Id*. This comment deadline was extended twice, ultimately requiring comments to be filed not later than November 14, 2014. *See* 79 Fed. Reg. 35,712 (June 24, 2014); 79 Fed. Reg. 61,590 (Oct. 14, 2014).

22.

Along with many other parties, Plaintiff filed extensive comments on the proposed rule within the deadline. *See* Exhibit A. Defendants failed to adequately address the issues raised in Plaintiff's comments as well as the comments raised by others.

23.

As noted above, the proposed rule was finalized on June 29, 2015. *See* 80 Fed. Reg. 37,054 (June 29, 2015). Exhibit B.

The Final Rule Redefining WOTUS

24.

The final rule expands the definition of waters of the United States in a number of significant and alarming ways in violation of the United States Constitution, the CWA, and the APA.

Factual Background

25.

Plaintiff Murray Energy Corporation is the largest privately-owned coal company in the United States. It owns and operates numerous mining operations located at sites across the United States from North and Central Appalachia to Southern Illinois and Southern Utah, including the mining facilities located in this judicial district.

26.

As relevant to the final rule, Murray's mine sites contain numerous geographic features such as ditches, dry creeks, and ponds that are newly subject to EPA and Corps jurisdiction as a result of the promulgation of the final rule.

27.

As a result of initial mine development, daily operations, and routine expansions, impacts to these features must occur on a frequent and recurring basis. For example, certain features must be filled by dirt, gravel, or other earthen material to allow equipment and vehicles access to a mine, and certain other features must capture and discharge stormwater runoff. Both types of activities – the placement of fill material and the discharge of pollutants such as those stormwater into a water of the U.S. – are regulated under the CWA and require a permit. *See* 33 U.S.C. §§1342, 1344. *See* Exhibit C, Affidavit of Crellin Scott.

28.

In particular, at the Harvey Run II Refuse Impoundment, located near Fairview in Marion County, West Virginia (referred to as "Harvey Run II"), there are numerous additional streams and ditches that will be regulated under the CWA for the first time because of the final rule.

These features include approximately 15,000 linear feet of ditches that are now jurisdictional under the rule.

29.

In addition, at the Nolan Run Saddle Dike Extension, located in Harrison County, West Virginia (referred to as "Nolan Run"), the final rule will subject to CWA jurisdiction additional ditches and features, including an open-water pond totaling 1.88 acres that will be deemed *per se* jurisdictional under the final rule based on its adjacency to a tributary.

30.

Lastly, with regard to the proposed American Mountaineer Mine and Refuse Area, located near Wallace in Harrison County, West Virginia (referred to as "AMEI"), the final rule will subject to CWA regulation many features previously deemed non-jurisdictional by the Corps including, among others, an isolated wetland totaling 0.03 acre, and numerous diversion ditches totaling approximately 5,620 linear feet, that are proposed for excavation.

31.

The expansion of jurisdiction over previously unregulated features is particularly problematic for Murray because these features pervade its eastern and western coalfields. Thus, such features are frequently encountered during routine activities such as construction and maintenance of access and haul roads or roadside ditches.

32.

Complying with the final rule for these features will cost Murray substantial sums of money to apply for, obtain, and comply with permit conditions, in lost productivity resulting from an inability to utilize a mine site in an efficient manner, and in a general devaluation of its mine holdings.

COUNT I

THE FINAL RULE VIOLATES THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION.

33.

Plaintiff incorporates by reference the allegations contained in the preceding paragraphs of this Complaint.

34.

The Defendants' authority to regulate may not exceed the powers enumerated to Congress by the Constitution and delegated to the EPA and the Corps by the CWA.

35.

The final rule impermissibly extends the definition of WOTUS to reach features that are neither channels of interstate commerce; instrumentalities of interstate commerce; or substantially related to interstate commerce, in violation of Congress' enumerated powers under the Commerce Clause. U.S. Const. art. I, sec. 8, cl. 3.

COUNT II

THE FINAL RULE VIOLATES THE SEPARATION OF POWERS BETWEEN THE STATES AND THE FEDERAL GOVERNMENT IN THE U.S. CONSTITUTION.

36.

Plaintiff incorporates by reference the allegations contained in the preceding paragraphs of the Complaint.

37.

The final rule is a significant impingement on the States' traditional and primary power over land and water use, and thus runs afoul of the principles of federalism which undergird the Constitution.

COUNT III

THE FINAL RULE VIOLATES THE CLEAN WATER ACT.

38.

Plaintiff incorporates by reference the allegations contained in the preceding paragraphs of this Complaint.

39.

Congress limited the reach of the CWA to "navigable waters." 33 U.S.C. §§ 1311(a), 1344(a), 1362(12). In promulgating a rule or regulation, the Corps and the EPA may not expand the reach of the CWA beyond what Congress intended.

40.

With the adoption of the final rule, the Defendants have unlawfully expanded the definition of waters of the United States beyond the limits imposed by Congress, as most recently interpreted by the Supreme Court in *SWANCC* and *Rapanos*.

COUNT IV

THE FINAL RULE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT BY FAILING TO PROVIDE ADEQUATE ADVANCE PUBLIC NOTICE AND OPPORTUNITY TO COMMENT.

41.

Plaintiff incorporates by reference the allegations contained in the preceding paragraphs of this Complaint.

42.

The final rule made fundamental changes to the proposed rule, such that the public had no proper notice and opportunity to comment. Those sections of the final rule were not a logical outgrowth of the proposed rule.

43.

The final rule was premised on reports and analysis that were incomplete and inadequate and not made final with sufficient time for the public to comment.

44.

Accordingly, Defendants' actions violated the Administrative Procedure Act.

COUNT V

THE FINAL RULE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT BY BEING ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, AND NOT IN ACCORDANCE WITH LAW.

45.

Plaintiff incorporates by reference the allegations contained in the preceding paragraphs of this Complaint.

46.

In promulgating the final rule, the Defendants acted in a manner that was arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law by expanding the definition of WOTUS beyond what is allowed by *SWANCC* and *Rapanos* and supported by science.

Prayer for Relief

Murray Energy Corporation prays for judgment from this Court as follows:

(A) Declare that the Defendants violated the U.S. Constitution, the Clean Water Act, and the Administrative Procedure Act when they adopted the final rule and that the final rule is, therefore, invalid and of no regulatory effect;

(B) Vacate the final rule;

(C) Enjoin and restrain the Corps and EPA from enforcing, applying, or implementing the final rule;

(D) Award Murray Energy Corporation its attorney's fees and costs of court as may be permitted by law; and

(E) Grant such other relief as the Court deems just and proper.

Dated: June 29, 2015

Respectfully submitted,

MURRAY ENERGY CORPORATION

By: /s/ Jason E. Manning
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