UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SOUTHEAST STORMWATER ASSOCIATION, INC., *et al.*,

Plaintiffs,

v. Case No. 4:15-CV-579-MEW-CAS

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Defendants.
_____/

REPLY IN SUPPORT OF SUMMARY JUDGMENT[1]

[1] This filing refers to the Plaintiffs collectively as "Municipal Interests," the Defendants collectively as "Agencies," the environmental groups who have intervened as "Intervenors," the U.S. Environmental Protection Agency as "EPA," the U.S. Army Corps of Engineers as "Corps," the Administrative Procedure Act as "APA," the Clean Water Act as "CWA," the waters of the United States as "WOTUS," the municipal separate storm sewer system as "MS4," and the "Clean Water Rule: Definition of 'Waters of the United States'," 80 Fed. Reg. 37,053 (Jun. 29, 2015), as the "Rule." References to the Parties' filings begin with ECF and include a pincite to the PDF page number generated through this Court's filing system on top of the page—*not* the page number on the bottom of each page.

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ARGUMENT

I. Neither the Agencies nor the Intervenors respond to the Municipal Interests' primary argument concerning MS4s.

The Municipal Interests' primary argument is this: MS4s are point sources and cannot simultaneously be WOTUS. 33 U.S.C. § 1342(p). The CWA's text and structure makes point sources (which may discharge only after obtaining permits) distinct from WOTUS (waters that the permitted discharges flow into). *Rapanos v. United States*, 547 U.S. 715, 735 (2006) (plurality); 33 U.S.C. § 1362(12)(A), (14). The CWA underscores the point specifically for MS4s by requiring permits only for "discharge[s] from municipal storm sewers," not *into* MS4s. *Id.* § 1342(p)(3)(B). But the Rule fails to exclude MS4s from its definition of WOTUS. This violates the CWA's plain text because it simultaneously treats stormwater conveyances as both point sources and WOTUS, and ultimately regulates discharges *into* and *from* MS4s. Regulating discharges *into* and *from* MS4s defies not only the CWA's text but also common sense. Suddenly conveyances intended to move and treat stormwater are themselves the object of treatment, diverting municipal resources from actually "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters" like the Lower St. Johns River. *Id.* § 1251(a); *see also* JEA Comments.[2]

[2] EPA-HQ-OW-2011-0880-10747.

Neither the Agencies nor the Intervenors address the Municipal Interests' primary argument rooted in the CWA's text. The Agencies side-step all substantive arguments noting that these issues are "being reconsidered." ECF 73 at 3. The Intervenors say that the case "boils down to two questions: (1) is the Rule based on sound science, and (2) did the [A]gencies follow the correct procedures?" ECF 72 at 4. Not true. Statutory and constitutional constraints still matter. The Municipal Interests' primary argument is rooted in one such statutory constraint: the prohibition on simultaneously treating MS4s—point sources—as WOTUS.

At best, the Intervenors make the unremarkable point that ditches can sometimes be point sources and sometimes be WOTUS, *id.* at 21–23, but then attempt to leave this Court with the impression that point sources can simultaneously be WOTUS. *See id.* The Intervenors reference as support an exclusion of certain ditches in section 404(f)(1)(C) of the CWA (33 U.S.C. § 1344(f)(1)(C)), rely on a 1975 EPA General Counsel's opinion, cite the Rule's Technical Support Document, and note that the Erie Canal is a ditch. ECF 72 at 21–22. But they overlook four important points.

First, the Municipal Interests are *not* concerned with ditches. The Municipal Interests are concerned with ditches and canals and swales and drains and pipes that together make up a distinct point source under the CWA: a MS4. This specific point source cannot—at the same time—be a WOTUS.

In fact, until the Rule, this specific point source had not been treated as a WOTUS. Contrary to Intervenors' claims that the Rule changes little for MS4s, ECF 72 at 15, the Rule in fact covers vast portions of MS4s that have never before been deemed to be WOTUS. It does this by introducing new language regarding stormwater conveyances constructed "in dry land." 33 CFR § 328.3(b)(6). While this new language is part of the MS4-specific exclusion to WOTUS, separate and apart from the wastewater treatment exclusion, which presumably no longer applies to MS4s, the words "in dry land" drastically limits its operation.

Palm Beach County's current MS4 permit, for example, defines *all* the components of the county's stormwater management system as falling outside WOTUS jurisdiction.[3] The Village of Wellington's MS4 has since 1997 "define[d] WOTUS as the receiving water bodies that accept discharges from the MS4," not components of its system.[4] Under the Rule, however, only those components of the MS4 systems constructed "in dry land"—an undefined and vague phrase—would be excluded. 33 CFR § 328.3(b)(6). A generic reference to "longstanding practice," based on nothing more than a response to comments, ECF 72 at 15, does not change the fact that the entirety of these MS4 systems were never before subject to WOTUS jurisdiction. They are now. This is a drastic change. The Intervenors' "background" is thus misleading and "[un]helpful." ECF 72 at 15.

[3] EPA-HQ-OW-2011-0880-13218.
[4] EPA-HQ-OW-2011-0880-15654.

Second, the Intervenors wrongly suggest that all ditches are point sources and that all ditches can simultaneously be point sources and WOTUS. ECF 72 at 21–22. Their reliance on section 404(f)(1)(C) of the CWA is emblematic of this mistake. *Id.* at 21. Section 404(f)(1)(C) concerns an exclusion for a certain subset of ditches from the CWA's dredge and fill permitting requirements that apply in WOTUS. 33 U.S.C. § 1344(f)(1)(C). This exclusion for a certain subset of ditches does not mean that all ditches are point sources or that all ditches are WOTUS. Only ditches that are "discernable, confined and discrete conveyance[s] . . . from which pollutants are or may be discharged" are "point sources." *Id.* § 1362(14). Other ditches can be WOTUS. This is true of permanently flooded, man-made ditches used for navigation purposes. *Rapanos*, 547 U.S. at 736 n. 7 (plurality). We call such ditches canals—like the Erie Canal. The Erie Canal is a WOTUS and so point source discharges into the canal require permits; however, the Erie Canal is *not* in itself a point source and so no permits are required for discharges from the canal or from one portion of the canal to another portion.[5]

Third, neither the 1975 EPA General Counsel's opinion nor the cases cited in the Technical Support Document require a contrary result. The opinion predates regulation of MS4s. *See* 53 Fed. Reg. 49,416 (Dec. 7, 1988). The cases support

[5] The EPA promulgated a rule in 2008 that applies to waters like the Erie Canal; the Water Transfers Rule "clarify[ied] that water transfers are not subject to regulation under the [CWA]." *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1219 (11th Cir. 2009) (citing 40 C.F.R. § 122.3(i)).

only the general proposition that ditches can sometimes be point sources or sometimes be WOTUS. ECF 72 at 22.[6] None of the cases allow for the *same* ditch to be both a point source and a WOTUS at the *same* time.

Finally, there is the plain text of the CWA. The CWA defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7). It defines "discharge of pollutants" as "any addition of any pollutant to navigable waters from any point source," thereby making a distinction between WOTUS and point sources. *Id.* § 1362(12)(A). The CWA doubles-down on the distinction when requiring permits only for "discharges from municipal storm sewers" into navigable waters. *Id.* § 1342(p)(3)(B). A conveyance—whether a ditch, canal, or something else—cannot simultaneously be a point source and a WOTUS; the conveyance cannot discharge into itself because that would make no sense. But the Rule ignores these statutory and logical constraints in allowing MS4s to simultaneously be treated as point sources and WOTUS. The Intervenors make no attempt to justify this violation of the CWA's text and common sense.

Thus, the Intervenors, like the Agencies, fail to respond to the Municipal Interests' primary argument—the one that requires the Agencies to exclude MS4s from the definition of WOTUS. If "[t]he maxim of the law is silence gives consent," then it seems the Agencies and Intervenors agree that, at a minimum, the

[6] EPA-HQ-OW-2011-0880-20869.

Rule should have excluded MS4s from its definition of WOTUS. Robert Bolt, *A Man for All Seasons* act 2, at 88 (1962).

II. The word "navigable" must be given some meaning consistent with the English language.

The Intervenors also dismiss as mere "rhetoric" the Rule's failure to give any effect to the word "navigable." ECF 72 at 18. The Intervenors rely on "peer-reviewed literature" and "scientific evidence" to justify regulatory jurisdiction over dry ditches, isolated wetlands, and the like because they are in some way connected to navigable waters. *Id.* at 20. But as the Agencies recognize, neither they nor the Intervenors can rely on "environmental conclusions in place of interpreting the statutory text and other indicia of Congressional intent" to ensure that agency action remains within their "statutory authority to regulate." 83 Fed. Reg. 32,227, 32,241 (Jul. 12, 2018).

So even the broadest possible reading of the word "navigable" must avoid stretching the word beyond recognition. "[W]hat Congress had in mind as its authority for enacting the CWA" was its "power over navigation"—"over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC v. Army Corps of Eng'rs*, 531 U.S. 159, 168 n.3, 172 (2001). Justice Kennedy agreed that "the word 'navigable'" must "be given some importance." *Rapanos*, 547 U.S. at 778. The Agencies may not regulate as "navigable" waters

"drains, ditches, and streams remote from any navigable-in-fact water" that carries "only minor water volumes toward it." *Id.* at 781.

The Rule ignores the Supreme Court's admonitions and would regulate the Dade City Canal as a WOTUS. The Dade City Canal is not "navigable" for steamboats, canoes, or paper boats.

Dade City Canal, FSA Comments, Figure 1.[7]

While "many a curbstone philosopher has observed [that] everything is related to everything else," Congress chose to extend federal jurisdiction only over "navigable" waters. *DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S.

[7] EPA-HQ-OW-2011-0880-7965.

806, 813 n.7 (1997). Dismissing the word "navigable" as mere rhetoric and waving a scientific wand over any connection the word has to the English language is inconsistent with *SWANCC* and *Rapanos*. *See Georgia v. Pruitt,* 326 F. Supp. 3d 1356, 1365 (S.D. Ga. 2018) (noting that the Rule "asserts that, standing alone, a significant 'biological effect'—including an effect on 'life cycle dependent aquatic habitat[s]'—would place a water within the CWA's jurisdiction" and should thus "fail for the same reason that the rule in *SWANCC* failed").

III. The Rule violates the U.S. Constitution.

The expansive definition of "navigable" and the inclusion of the phrases such as "ordinary high water mark" and "dry land" also raise serious constitutional concerns. The former is a violation of the Commerce Clause and the latter renders the Rule void for vagueness.

Commerce Clause—Because the Rule applies to features that do not "substantially affect[] interstate commerce," it violates the Commerce Clause. *United States v. Lopez,* 514 U.S. 549, 559 (1995). The Intervenors' argument to the contrary is premised on the false notion that application of the significant nexus test captures only those waters that significantly affect interstate commerce. ECF 72 at 39–40. But the Rule captures much more than waters that substantially affect interstate commerce—it captures waters and features far removed from

navigable-in-fact waters or waters that can otherwise be used as channels of interstate commerce. This violates the Commerce Clause.

Void for Vagueness—What the Intervenors call "flexibility" in the Rule, ECF 72 at 43, is really an irresponsibly ambiguous set of phrases that expose the public to severe civil and criminal penalties under the CWA.

As the GAO lamented, "the difficulty and ambiguity associated with identifying" an "ordinary high water mark" means that "if [one] asked three different [Corps] district staff to make a jurisdictional determination, [one] would probably get three different assessments." GAO, *Waters and Wetlands: Corps of Engineers Need to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297 at 20–22 (Feb. 2004). The Rule exacerbates the problem by allowing "[o]ther evidence, besides direct field observation" to "establish" an "ordinary high water mark." 80 Fed. Reg. at 37,076. Desktop computer models can also be "independently [used] to infer" jurisdiction where "physical characteristics" are "absent in the field." *Id.* 37,077. "Ordinary high water marks" are thus whatever a particular Corps staff member in a particular Corps office says on a particular day.

The phrase "dry land" fares no better. We are told that "because [something] lacks water at a given time" does not make it "dry land." 80 Fed. Reg.

at 37,098. The definition of "dry land" also changes based on "geographic and regional variability." *Id.* So we are left to wonder what "dry land" actually means.

Guessing at the meaning of words and phrases to avoid liability or relying on the benevolence of some bureaucrat to avoid liability are the very things the void for vagueness doctrine is designed to prevent. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 254 (2012).

IV. The definitions of "tributary" and "adjacent" are inconsistent with Supreme Court precedent interpreting the CWA.

The Intervenors' defense of the definitions of "tributary" and "adjacent" again masks an inconsistency with statutory text as merely a reliance on what the Intervenors call "scientific evidence." ECF 72 at 23–27.

Tributaries—The Rule depends on "ordinary high water marks" with "bed and banks" between them to make a tributary jurisdictional. ECF 69 at 29. This allows for the Rule to assert jurisdiction over "remote" and "minor" features with only "minor" connections to navigable waters—features like the Dade City Canal—that, "in many cases," are "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Rapanos*, 547 U.S. at 781–82 (Kennedy, J., concurring). This violates the statute.

The Intervenors respond by parroting the Agencies' comment that ordinary high water marks, bed, and banks are only created when water flows at a "substantial enough . . . volume or power." ECF 72 at 27. The Intervenors further

state that "[n]either Justice Kennedy nor the litigants in *Rapanos* had the benefit of more than 1,200 peer-reviewed scientific publications and hundreds of pages of technical support to identify which waters have a significant nexus to traditional navigable waters." *Id.* at 25 n.7. Ignore for a moment the ample peer-reviewed scientific evidence and six Corps studies that refute this point.[8] Defining jurisdictional tributaries by physical characteristics alone is still antithetical to Justice Kennedy's opinion in *Rapanos*. Try as they might, refer as they may to their favorite scientific studies, the Intervenors still cannot show that the definition of "tributary" is consistent with the statutory meaning as elucidated by the Supreme Court. *See Georgia*, 326 F. Supp. 3d at 1365 (discussing "tributary").

Adjacent—The Intervenors' defense of "adjacent" waters having a "significant nexus" to traditional navigable waters follows a similar theme and suffers from a similar flaw. ECF 72 at 24–27, 30–34. Justice Kennedy rejected the idea that mere adjacency to a tributary could be "the determinative measure" of whether a wetland was "likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood." *Rapanos*, 547 U.S. at 781. In fact, Justice Kennedy voted to vacate the assertion of jurisdiction over wetlands supposedly "adjacent" to a ditch that indirectly fed into a navigable lake. *Id.* at 764. While claiming that the science now supports the

[8] EPA-HQ-OW-2011-0880-13951; EPA-HQ-OW-2011-0880-14135.

very thing vacated earlier, the Intervenors do not actually point to any scientific materials showing that mere adjacency to certain categories of covered features, like the Dade City Canal, establish a significant nexus to navigable waters.

Defense of the adjacency thresholds miss the mark as well. Under the Rule, waters and features within 100 feet of a traditional navigable water or, *inter alia*, a tributary, are jurisdictional. 33 C.F.R. § 328.3(c)(2)(i). Waters or features within the 100-year floodplain of a jurisdictional water and within 1,500 feet of that water are also jurisdictional. *Id.* § 328.3(c)(2)(ii). While the record justifies a general need to protect floodplains or features in close proximity to navigable waters, ECF 72 at 31–32, the Intervenors can cite to no justification for the specific distance thresholds or offer an explanation for why a 50-year or 500-year floodplain is any better or worse. That is a critical flaw. An agency "may not pluck a number out of thin air" and say that that number is reasonable because it is reasonable. *WJG Tel. v. FCC*, 675 F.2d 386, 388–89 (D.C. Cir. 1982).

Even the Intervenors concede that "[w]hen a line has to be drawn . . . the figure selected by the agency [must] reflect[] its *informed discretion*." ECF 72 at 33 (quoting *WJG*, 675 F.2d at 389 (emphasis added)). In *WJG* the agency justified the line it drew as an appropriate means of balancing the agency's "conflicting desires" to provide maritime radio service without stifling competition. *Id.* Here the Agencies provide no justification. There is no information, scientific or

otherwise, to judge what informed their discretion. All we have is a generic statement about the need to regulate waters and features in floodplains.

V. The Agencies promulgated the Rule without observing procedural requirements.

Logical Outgrowth—The adjacency thresholds together with the Final Connectivity Report[9] reflect some of the most drastic changes made between the proposed and final rules. The Agencies and Intervenors suggest that these drastic changes were justified because the final rule was a logical outgrowth of the proposal and therefore gave the public an adequate opportunity to participate in the rulemaking process. ECF 72 at 34–36. The logical outgrowth test, however, cannot save a rule where "interested parties would have had to divine [the Agencies'] unspoken thoughts." *CSX Transp. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009).

Consider the adjacency thresholds. The Agencies claim that they provided sufficient notice of their intent by noting "their intent to . . . define the lateral reach" of the term. ECF 73 at 18 (quoting 79 Fed. Reg. at 22,207). But that is not what the agencies said:

> *The agencies therefore request comment on whether there are other reasonable options for providing clarity . . . Options could include* asserting jurisdiction over all waters connected through a shallow subsurface hydrologic connection or confined surface hydrologic connection regardless of distance; asserting jurisdiction over adjacent

[9] EPA-HQ-OW-2011-0880-20858.

> waters only if they are located in the floodplain or riparian zone of a jurisdictional water; considering only confined surface connections but not shallow subsurface connections for purposes of determining adjacency; or *establishing specific geographic limits* for using shallow subsurface or confined surface hydrological connections as a basis for determining adjacency, including, for example, distance limitations based on ratios compared to the bank-to-bank width of the water to which the water is adjacent. The agencies note that under the proposed Rule any waters not fitting within (a)(1) through (a)(6) categories would instead be treated as "other waters."

79 Fed. Reg. at 22,208 (emphases added).

"[G]eographical limits" were one of several possibilities to better define the lateral reach. *Id.* Read in context, the Agencies appeared to be asking whether geographical limits should be used, how such limits should be selected, or which geographical features should be selected. There was no mention whatsoever of using numeric distances; "feet" were not mentioned at all in the proposed rule, *see id.*, but mentioned 189 times in the final rule. 80 Fed. Reg. 37,053. Descriptions devoid of "sufficient detail or rationale" fail to provide the necessary notice. *Horsehead Res. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994). As do "bootstrap arguments predicating notice on public comments alone." *Id*.

Citing cases like *City of Waukesha v. EPA*, 320 F.3d 228 (D.C. Cir. 2003), the Agencies and Intervenors also argue that they did not need to provide precise numeric limits in any proposed rule. ECF 73 at 18–21; ECF 72 at 36. That misses the point. While a precise number was not required, the Agencies had to tell the public that numeric limits were on the table. EPA did just that in *City of Waukesha*

when putting the public on notice that limits of 20, 40, or 80 micro grams per liter for naturally occurring uranium were being considered before settling on 30 as the relevant threshold. 320 F.3d at 232. The Agencies did not do that here.

The Final Connectivity Report[10] suffers from similar flaws. The Agencies say that the final report "simply clarified and expanded upon concepts and topics in the Draft Science Report," the public does not have a right to comment on every bit of information that informs an agency's actions, and the public would not have provided different comments because the final report simply revised previously discussed approaches rather than recommending new ones. ECF 73 at 24. The Intervenors agree. ECF 72 at 36–39.

It is beyond dispute, however, that the Final Connectivity Report cited 349 scientific and academic sources that were not included in the earlier draft report, including 36 sources published between when the draft and final reports were issued. *Compare* Draft Connectivity Report[11] *with* Final Connectivity Report.[12] If scientific evidence is the key to defending the Rule as the Intervenors suggest, ECF 72 at 4, then surely being able to comment on the scientific underpinnings of a controversial part of the Rule is essential. *See Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008) ("[S]tudies upon which an agency relies

[10] EPA-HQ-OW-2011-0880-20858.
[11] EPA-HQ-OW-2011-0880-0004.
[12] EPA-HQ-OW-2011-0880-20858.

in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity to comment"); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) ("One cannot ask for comment on a scientific paper without allowing the participants to read the paper.").

With an opportunity to comment the public could have dissuaded or helped the Agencies fine-tune the *new* continuum-based approach to analyzing the connectivity of particular "[d]imensions." Report 1–4.[13] The public could also have helped persuade the Agencies to judge "significant nexus" in a clearer, binary manner rather than as a gradient. But the public never had a chance to comment on the report that "provide[d] much of the technical basis for the [R]ule." 80 Fed. Reg. at 37, 057.

Closed Mind—Failure to adhere to the Anti-Lobbying Act highlights an additional procedural flaw with the Rule. In arguing that Act does not create a private cause of action, the Agencies and Intervenors miss the point. ECF 72 at 45; ECF 73 at 24–26. Regardless of whether there exists a private cause of action, the Agencies' failure to adhere to the statutory requirements showed a closed mind. The APA and fundamental due process entitle the Municipal Interests to a decisionmaker who listens and considers—not one who has pre-judged the issues.

[13] EPA-HQ-OW-2011-0880-20858.

See Iowa League of Cities v. EPA, 711 F.3d 844, 871 (8th Cir. 2013) (requiring "fairness and transparency" under the APA).

Economic Impact—The inaccurate and misleading economic certification for purposes of the Regulatory Flexibility Act similarly casts a dark pall over the rulemaking process. "[A] reviewing court should consider the regulatory flexibility analysis as part of its overall judgment [concerning] whether a rule is reasonable and may, in an appropriate case, strike down a rule because of a defect in the flexibility analysis." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 539 (D.C. Cir. 1983).

VI. Vacatur or, at the very least, exclusion of MS4s is necessary.

The Agencies take no position on the substance of the Rule. The Intervenors attempt to fill the gaps and attempt to clothe themselves in the deference to which the Agencies may have been entitled. But no level of deference can save a Rule that violates statutory text or constitutional constraints. The Rule should be vacated. At the very least, the MS4s should be excluded.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this filing complies with the size and font requirements in the local rules. It contains 3,867 words.

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Respectfully submitted by:

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