UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ENVIRONMENTAL INTEGRITY PROJECT
1000 Vermont Avenue NW, Suite 1100
Washington, DC 20005,

FOOD & WATER WATCH
1616 P Street NW
Washington, DC 20003,

GUNPOWDER RIVERKEEPER
P.O. Box 156
Monkton, MD 21111

LOWER SUSQUEHANNA RIVERKEEPER
2098 Long Level Road
Wrightsville, PA 17368

and

PATUXENT RIVERKEEPER
17412 Nottingham Road
Upper Marlboro, MD 20772

Plaintiffs,

v.

ANDREW WHEELER, in his official capacity as Administrator of the United States Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
1200 Pennsylvania Ave., NW
Washington, DC 20460

RICKEY DALE "R.D." JAMES, in his official capacity as Assistant Secretary of the

Civil Action No. 1:20-cv-1734

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

United States Army Corps of Engineers (Civil Works)
441 G Street NW
Washington, DC 20314

and

UNITED STATES ARMY CORPS OF ENGINEERS
441 G Street NW
Washington, DC 20314

Defendants.

INTRODUCTION

1. Plaintiffs Environmental Integrity Project, Food & Water Watch, Gunpowder Riverkeeper, Lower Susquehanna Riverkeeper, and Patuxent Riverkeeper (collectively, "Plaintiffs"), bring this action for declaratory and injunctive relief against the United States Environmental Protection Agency ("EPA"); Andrew R. Wheeler, in his capacity as Administrator of EPA; the United States Army Corps of Engineers ("Army Corps" or "the Corps"); and Ricky Dale James, in his capacity as Assistant Secretary of the Corps (collectively, the "Agencies").

2. Plaintiffs seek judicial review under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*. ("APA") of the Agencies' recently promulgated final rule entitled "The Navigable Waters Protection Rule: Definition of 'Waters of the United States,'" 85 Fed. Reg. 22,250 (Apr. 21, 2020) ("2020 Final Rule").

3. In the 2020 Final Rule, the Agencies seek to substantially revise the interpretation of the term "waters of the United States," which establishes the waters subject to jurisdiction under the Clean Water Act, 33 U.S.C. § 1251 *et seq*. ("CWA" or "Act").

4. Because the term "waters of the United States" defines the scope of which waters are subject to the Act's substantive requirements—including the Act's permitting requirements—the scope of its definition is of fundamental importance to the faithful execution of and attainment with the Act's overarching objective: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

5. The 2020 Final Rule is the final step in the Agencies' efforts to repeal and replace their 2015 rule defining the "waters of the United States," which sought to implement the "significant nexus" standard articulated by Justice Anthony Kennedy's concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006), and was based upon the Agencies' considerable expertise, extensive scientific analyses, and factual findings about the chemical, physical, and biological connectivity of waterbodies. *See* 80 Fed. Reg. 37,054 (June 29, 2015) ("2015 Clean Water Rule"). In promulgating the 2015 Clean Water Rule, the Agencies compiled and relied upon a substantial record that demonstrated the waterbodies regulated by the rule had significant and cumulative effects on the water quality and integrity of downstream jurisdictional waters.

6. On February 28, 2017, President Donald Trump issued Executive Order 13778, which ordered the Agencies to "publish for notice and comment a proposed rule rescinding or revising" the 2015 Clean Water Rule and to propose a new definition of "waters of the United States" consistent with the President's stated policy objectives of "promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution."

7. Executive Order 13778 further ordered that for purposes of this proposed rule, the Agencies "shall consider interpreting the term 'navigable waters…' in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos*."

8. Shortly after the issuance of Executive Order 13778, the Agencies initiated a two-step process, consisting of two parallel rulemakings, intended to first repeal the 2015 Clean Water Rule and then replace it with a revised definition of "waters of the United States."

9. In "step one" of the process, the Agencies issued a proposed rule seeking to repeal the 2015 Clean Water Rule and re-codify the definition of "waters of the United States" that had previously been established by the Agencies in 1986. *See generally* 82 Fed. Reg. 34,899 (July 27, 2017). In 2019, the Agencies promulgated their final rule repealing the 2015 Clean Water Rule and re-codifying the 1986 definitions. *See generally* 84 Fed. Reg. 56,626 (Oct. 22, 2019).

10. As "step two" of the process, the Agencies issued a proposed rule "intended to review and revise the definition of 'waters of the United States' consistent with" Executive Order 13778. *See* Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154, 4154 (February 14, 2019) (the "2019 Proposed Rule"). The Agencies concluded their process with the promulgation of the 2020 Final Rule, which replaced the 1986 definition of "waters of the United States" with an even narrower definition categorically excluding many waters over which the Agencies have asserted CWA jurisdiction since the CWA's enactment.

11. The Agencies adopted the 2020 Final Rule over the sustained objections of the Agencies' own experts and EPA's Science Advisory Board, whose comments on the 2019 Proposed Rule stated that the Agencies' proposed bright-line definitions—in particular the categorical exclusion of any waters connected to jurisdictional waters by subsurface hydrological connections—contradicted all established science, failed to provide long-term regulatory clarity, would likely result in unjustified new risks to human and environmental health, and were inconsistent with the plain text and objectives of the Act and the Agencies' interpretation of the Act since its enactment. *See, e.g.*, 2020 Final Rule at 22,261.

12. As instructed by Executive Order 13778, the 2020 Final Rule discarded the "significant nexus" standard established by *Rapanos*—which had been endorsed by a majority of Justices on the Court—and instead crafted a new standard consistent with Justice Scalia's interpretation—which had been rejected by a majority of Justices.

13. The Agencies justified this profound and abrupt departure from their own long-standing policies and the overwhelmingly contrary weight of scientific evidence by asserting that an agency is free to change its policies so long as it provides "a reasoned explanation for the actions it takes," and that "[a] change in administration… is a perfectly reasonable basis" for an agency to revise its policies. 2019 Proposed Rule at 4,169.

14. The 2020 Final Rule states that "as directed by Executive Order 13778… the agencies are establishing this line-drawing based primarily on their interpretation of their authority under the Constitution and the language, structure, and legislative history of the CWA, as articulated in decisions by the Supreme Court." 2020 Final Rule at 22,270.

15. The 2020 Final Rule also states that the Agencies based the rule on their "unifying legal theory for federal jurisdiction over those waters and wetlands that maintain a sufficient surface water connection to traditional navigable waters… that preserves the traditional sovereignty of States over their own land and water resources" and "is intended to ensure that the agencies operate within the scope of the Federal government's authority over navigable waters under the CWA and the Commerce Clause of the U.S. Constitution." *Id.* at 22,252.

16. On April 23, 2020, a six-Justice majority of the Supreme Court rejected the Agencies' revised interpretation of the CWA as expressed by the Solicitor General, who at the time argued consistent with the position that would be taken in the 2020 Final Rule that "all releases of pollutants to groundwater are excluded from the scope of the permitting program,

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