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THE MYTH OF STATE SURFACE WATER REGULATION – THE 50 YEAR FLAW OF THE FEDERAL WATER POLLUTION CONTROL ACT JURISDICTIONAL DEBATE

BY

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IN 1972, WHEN THE FEDERAL GOVERNMENT TOOK THE LEAD IN PROTECTING OUR NATION'S WATERS FROM POLLUTION AND DESTRUCTION, IT INTENDED TO ASSERT FEDERAL JURISDICTION AS BROADLY AS POSSIBLE. NONETHELESS, FOR THE LAST FIFTY YEARS, THE PRECISE CONTOURS OF FEDERAL JURISDICTION (THE EXTENT OF "WATERS OF THE UNITED STATES" OR "WOTUS) HAVE BEEN IN DISPUTE, WITH MULTIPLE ALTERNATIVE ADMINISTRATIVE PROPOSALS TO DEFINE THE LEGISLATION REJECTED BY THE SUPREME COURT. A PART OF THIS DEBATE HAS BEEN ABOUT BOTH THE WISDOM OF EXTENSIVE FEDERAL JURISDICTION AS WELL AS THE ASSERTION THAT STATES, IF ALLOWED, WOULD STEP IN AND REGULATE WATER POLLUTION AND DESTRUCTION THEMSELVES. AT VARIOUS POINTS THE ARGUMENT HAS THUS BEEN ABOUT THE PROPER BALANCE OF FEDERAL AND STATE POWER. THOUGH THIS ARGUMENT HAS THEORETICAL APPEAL, AND THOUGH WE MAY HAVE NO CHOICE BUT TO LOOK TO STATES TO PROTECT CERTAIN WATERS IF THE SUPREME COURT CONTINUES TO NARROW FEDERAL JURISDICTION, THE TRUTH IS THAT THIS IS NOT GOING TO HAPPEN. MOST STATES ARE NEVER GOING TO EXPAND THEIR JURISDICTION TO PROTECT WATERS NOT PROTECTED AT THE FEDERAL LEVEL . THIS IS DEMONSTRATED BY THEORIES OF FEDERALISM, EMPIRICAL DATA OF STATE REGULATORY HISTORY, AND ACTIONS THE STATES HAVE POSITIVELY TAKEN TO LIMIT JURISDICTION.

PRETENDING THAT STATES' ASSERTING JURISDICTION IS A REAL POSSIBILITY AND OR A VALID DATA POINT IS THUS POINTLESS AND ALSO DESTRUCTIVE. IT DETRACTS FROM THE REAL IMPACTS THAT LIMITING FEDERAL JURISDICTION

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I. INTRODUCTION

Which "waters" Congress intended to include under the term "Waters of the United States" in the Clean Water Act[1] has been the subject of disagreements, administrative actions, and court cases for decades. As stated by Justice Sotomayor:

> "In decades past, the EPA and the Corps (collectively, the agencies) have struggled to define and apply that statutory term. And this Court, in turn, has considered those regulatory efforts on several occasions . . ."[2]

"Waters of the United States" or "WOTUS" is defined in the Act as "the waters of the United States, including the territorial seas."[3] The statute does not itself define WOTUS further, and the definition of the term was left to regulation by the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Army Corps").

Throughout the extensive litigation over the extent of federal jurisdiction, the possibility that states could take over regulation of wetlands left out of federal jurisdiction has been an important part of the debate.[4] The Environmental Law Institute even undertook an in-depth study of state likelihood of taking over wetlands jurisdiction in the aftermath of the *Rapanos* case.[5]

Mischaracterizing information from this document, the Trump Administration went so far as to base its positive cost-benefit analysis of redefining jurisdiction in the National Waters Protection Rule on the theory that many states would assert jurisdiction were federal jurisdiction to go away.[6]

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[1] Aka Federal Waters Pollution Control Act, 33 U.S.C. 1251 et seq.

[2] *National Association of Manufacturers (NAM) v. Department of Defense*, 538 U.S. __, 138 S. Ct. 617, 625 (2018) (citations omitted).

[3] CWA, 33 U.S.C. Sec. 1362(7)

[4] See e.g. Jerome M. Organ, Limitations on State Agency Authority to Adopt Environmental Standards More Stringent Than Federal Standards: Policy Considerations and Interpretive Problems, 54 Md. L. Rev. 1373 (1995); Andrew Hecht, Obstacles to the Devolution of Environmental Protection: States' Self-Imposed Limitations on Rulemaking, 15 Duke Envtl. L. & Pol'y F. 105 (2004); Darren Springer, How States Can Help to Resolve the Rapanos/carabell Dilemma, 21 Tul. Envtl. L.J. 83 (2007); Jamison E. Colburn, Don't Go in the Water: On Pathological Jurisdiction Splitting, 39 Stan. Envtl. L.J. 3 (2019).

[5] Environmental Law Institute, State Wetland Protection: Status, Trends & Model Approaches A 50-state study by the Environmental Law Institute (2008), at

[6] Keiser, Olmstead, Boyle, Flatt, Keeler, Phaneuf, Shapiro, and Shimshak, *Report on the Repeal of the Clean Water Rule and its Replacement with the Navigable Waters Protection Rule to Define Waters of the United States (WOTUS)*

The truth however is quite plainly that the states are never going to assert this jurisdiction, and this has been shown time and time again by federalism theory, by empirical evidence, and the states' own actions prohibiting such jurisdiction. This means that any reduction of federal jurisdiction over the wetlands program will most definitely be of a net harm to our society. While this may not settle the question of what the Supreme Court determines to be the intended jurisdiction of the CWA, it should certainly settle the question of whether any administration would be able to justify a shrinking of jurisdiction. Administrative shrinking of Clean Water Act jurisdiction would evaluate as a net negative in a cost benefit analysis, and therefore, unless justified by heretofore unknown reasons, would be arbitrary and capricious.

This Essay proceeds in three parts. It briefly reviews the important values and functions of wetlands, and then explores various reasons why the states will not take over such an important function. The Essay then concludes.

II. THE VALUE OF WETLANDS

The value of wetlands is now firmly established. Wetlands provide water purification services, flood control, habitat, and carbon sequestration, in addition to their recreational and aesthetic values.[7] Recognition of the importance and value of these services continue to grow. In 2008 the Army Corps of Engineers and the EPA, using the new ecosystem services theory, attempted to better assess wetlands values in the regulatory program.[8] Ecosystem services theory recognizes that the value of wetlands and other ecosystems could be partially calculated by looking at how much it would cost to provide the services, such as water purification, if we were to lose the commons resources.[9] The monetary values of wetlands are not fully settled, and owing to the

5, prepared by the External Environmental Economics Advisory Panel (E-EEAC) (December 2020), at https://cb4388c0-f641-4b7b-a3ad-281c0e6f8e88.filesusr.com/ugd/669644_5aa4f5f0493a4902a3aaed117bd92aef.pdf

[7] See National Management Measures to Protect and Restore **Wetlands** and Riparian Areas for the Abatement of Nonpoint Source Pollution, EPA-841-B-05-003 Envtl. Protec. Agency Off. of Water 21 (EPA July 2005).

[8] J.B. Ruhl, James Salzman, Iris Goodman, *Implementing the New Ecosystem Service Mandate of the Section 404 Compensatory Mitigation Program*, 38 Stetson L. Rev. 251, 252 (2008).

[9] See generally James Salzman, Barton H. Thomson, Jr.& Gretchen C. Daily, *Protecting Ecosystem Services: Science, Economics, and Law*, 20 Stan. Envtl. L.J. 309, (2001).

variability and dynamism of wetlands systems, its is difficult to fully capture the distribution of its values.[10] But it is clear that the values are considerable.

The protection of wetlands also comes with a cost. For every wetland that is protected, other uses may be foreclosed. In particular, depending on location, wetlands regulation may impact the ability of land development, which in turn affects the value of land, and private wealth. How much that would be if all wetlands destruction were stopped is still in dispute, reflecting debates about the "costs" (foregone uses) of conservation.[11]

But of course that is not what happens. In the current federal wetlands regulatory system, permits for wetlands fill or destruction are only supposed to be granted when any harm to wetlands functions is mitigated.[12] So even when development is allowed, any mitigation required by (currently federal) regulation costs something. In theory, this number should be somewhat easier to estimate by simply totaling all monies spent in any wetlands mitigation project, but a total US number is also hard to come by.[13] Perhaps a better cost comparison is comparing cost per acre of wetlands creation when permitted, but this too is variable. Even however, assuming a high cost (for construction of new wetlands) of $10,000 per acre[14], this would be substantially lower than the value of the land for development in most cases.

But whatever the cost, the process of wetlands permitting that requires mitigation should theoretically be an economically more efficient outcome than not filling the wetland at all as it ostensibly provides all of the value of the land development while still preserving the wetlands services function at a lower cost than not developing the land at all.[15]

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[10] Ruhl, Salzmanm and Goodman, supra n. 8.

[11] Christopher Nolte, High Resolution Land-Value Maps Reveal Underestimation of Conservation Costs in the United States, Proceedings of the National Academy of Sciences, November 24, 2020 117 (47) 29577-29583; first published November 9, 2020; https://doi.org/10.1073/pnas.2012865117

[12] Robin Craig, "Stationarity is Dead" – Long Live Transformation: Five Principles for Climate Change Adaptation Law, 34 Harv. Envtl. L. Rev. 9, 34 (2010)

[13] Mitigation Credit Price Report (MCPR) | EASI (easillc.com)

[14] See e.g. Clare Condon, What Does Wetlands Mitigation Cost, Environmental Health, and Safety Advisor (2018), at What Does Wetlands Mitigation Cost? - EHS Daily Advisor (blr.com)

[15] Presumably when a single entity bears the cost of no development or development with money spent to mitigate, they would make the economically efficient choice.

This is an incomplete picture of course since all wetlands that are destroyed are not required to be mitigated, and even those that are ostensibly regulated under the Federal Clean Water Act as a WOTUS, may be harmed or destroyed without any mitigation outside of the system, or the mitigation may not in fact mitigate the functions that are lost.

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III. Evidence Establishing that States will not assert wetlands jurisdiction

A. Current State practice

Despite the large positive value of maintaining wetlands or mitigating their lost values, this very important public benefit is not provided by our states. While wetlands under federal jurisdiction and their values are thus somewhat protected, this is not true of wetlands outside of that jurisdictional requirement. While states have inherent police power to protect wetlands values, for the most part, states do not engage in this practice. According to a 2013 report by the Environmental Law Institute, only 8 states regulate any waters beyond WOTUS, and many of these may only be including groundwater regulation, which is inapplicable to wetlands.[16]

As of 2018 only 2 states had received approval to take over regulation of the federal program.[17] This indicates that historically only two states have had the administrative infrastructure to administer a wetlands program at all.

Even more interesting are those that are prohibited from regulating wetlands. The 2013 ELI report states that 27 states are prohibited by law from asserting any jurisdiction beyond federal

[16] Environmental Law Institute. 2013. State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act. Environmental Law Institute 34. URL: https://www.eli.org/research-report/state-constraints-state-imposed-limitations-authority-agenciesregulate-waters.

[17] David A. Keiser, Sheila M. Olmstead, Kevin J. Boyle, Victor B. Flatt, Bonnie L. Keeler, Daniel J. Phaneuf, Joseph S. Shapiro, Jay P. Shimshack, Report on the Repeal of the Clean Water Rule and its Replacement with the Navigable Waters Protection Rule to Define Waters of the United States (WOTUS) 27, at

environmental jurisdiction.[18] According to Andrew Hecht, these "no more stringent rulemaking requirements" or NMSRs were passed because of state concerns over competitiveness.

> "The policy justifications for NMSRs are clearly based on concerns with states' inability to compete economically that may arise as a consequence of devolution. State legislatures do not want their environmental rulemaking agencies to promulgate (or in some cases maintain) regulations that are any stronger than necessary for fear that those regulations will raise the cost of doing business in the state, leading to a flight of industry and jobs."[19]

It is true of course that states could change these rules. But the fact that they have been implemented at all suggests that *expanding* regulatory jurisdiction is not to be anticipated. Empirical analysis supports this. Many of the states that could have expanded wetlands jurisdiction in the past are also the states that have sued to limit that jurisdiction.[20] Perhaps most telling is that while the Supreme Court has in practical terms shrunk federal jurisdiction of waters of the United States (in SWANNC and *Rapanos*), no states have jumped in to fill the void in the last twenty years.[21]

B. Congressional Understanding of the Failure of States to Act

The legislative history of the 1972 Clean Water Act Amendments supports the theory that states are simply not willing or capable of protecting their own environments in a national economy. While courts are still considering how far Congress intended jurisdiction to extend under the Clean Water Act Amendments of 1972, it seems clear that partially at least due to state inaction, Congress intended to regulate waters to the limits of its jurisdiction.

[18] ELI Report 2013, supra n. 16.

[19] Andrew Hecht, Obstacles to the Devolution of Environmental Protection: States' Self-Imposed Limitation on Rulemaking, 15 Duke Envtl. L. & Pol'y F. 105, 112 (2004).

[20] David A. Keiser, Sheila M. Olmstead, Kevin J. Boyle, Victor B. Flatt, Bonnie L. Keeler, Daniel J. Phaneuf, Joseph S. Shapiro, Jay P. Shimshack, *A Water Rule that Turns A Blind Eye to Transboundary Pollution*, 372 Science, 241, 242 (Aril 16, 2021).

[21] See ELI 2013 report, supra n. ___ at ___ (noting that no states had filled the regulatory void from the time of SWANCC until 2013).

The federal government has been navigating "navigable waters" pursuant to its Interstate Commerce power since 1824.[22] This included statutory regulation of "obstructions" to navigable waters in the Rivers and Harbors Act of 1899.[23] While historically such regulation was limited to waters that were navigable in fact, the latter half of the 20th century saw an expansion of that term to things that could "affect" navigable waters.[24] Recognizing this expansion, and the nature of pollution, the 1972 Amendments that created the modern Clean Water Act, then redefined "navigable waters" as simply "waters of the United States."[25] Conference reports of the legislative debate indicate that at least some members of Congress wanted to expand jurisdiction as wide as possible, and Representative Dingell stated that the new definition should encompass "all waterbodies."[26] Thus, the 1972 Amendments reflects the change in concerns over surface waters and the desire to expand federal jurisdiction. In *Resources Defense Council v. Calloway* [27] the DC District Court stated that:

> "Congress by defining the term "navigable waters"…to mean "the waters of the United States, including the territorial seas," asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term is not limited to the traditional test of navigability." [28]

But the passage of the 1972 Amendments also recognized the states' failures in protecting waters themselves. As stated by Professor Glicksman and attorney Matthew Batzel, by the mid-1960s, "Congress was ready to further expand the federal role, in part because of the almost total lack of enforcement of the 1948 statute, which depended on cooperation by the states."[29]

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[22] Bradford C. Mank, Implementing Rapanos – Will Justic Kennedy's Significant Nexus Test Provide A Way Forward, 40 Ind. L. Rev. 291, 296 (2006) (citing *Gibbons v. Ogden*)
[23] 33 U.S.C. Sec. 403.
[24] Mank, supra n. 5 at 297.
[25] 33 U.S.C. Sec. 1362(7) (2000)
[26] 118 Cong. Rec. 33,757 (1972) (statement of Rep. Dingell).
[27] 392 F. Supp. 685 (D.D.C. 1975).
[28] Id.
[29] Robert Glicksman and Matthew Batzel, Science, Politics, Law, and the Arc of the Clean Water Act: The Role of Assumptions in the Adoption of a Pollution Control Landmark, 32 WASH. U. J. L. & POL'Y 99, 102 (2010).

This in turn is attributable to the failure of the states to use their police powers to protect the health of their citizens from pollution and other environmental degradation. Whether this was caused by the race to the bottom argument or the lack of resources in states has been debated.[30]

With respect to the wetlands provisions in the 1972 law, it seems that total wetlands protection *per se* wasn't anticipated, but legislative history does indicate Congressional concern with wetlands degradation affecting the aquatic environment generally.[31] Moreover, Congress vested the wetlands program in two federal agencies (the US Army Corps of Engineers and the EPA), eschewing protection by the states.[32]

C. Theoretical analysis indicates that states cannot fill this void

The External Environmental Economics Council's report on the Trump National Waters Protection Rule pulls together a lot of theoretical data regarding state gap filling in federal environmental laws, as well as federalism in general. According to this report:

> "Sigman . . . shows that water pollution downstream of states authorized to permit facilities and to monitor and enforce standards within the National Pollution Discharge Elimination System (NPDES), a key portion of the CWA, is elevated relative to that downstream of states for which the federal government plays this role. This is precisely the kind of free-riding that federalism theory would predict in the presence of inter-state pollution under the CWA, though the estimated cost of this behavior appears to be modest. Helland and Whitford find a similar pattern with respect to both air and water pollutants regulated under the Toxics Release Inventory. . .Empirical studies have also confirmed that states and countries export water pollution to downstream neighbors outside of the United States." [33]

The EEAC also documents extensive literature indicating that a "race to the bottom" in environmental protection can occur without a federal program, though it does not that that the

[30] Hecht, supra n. ____, at _____.
[31] Mark Rouvalis, Restoration of Wetlands Under the Clean Water Act: An Analytic Synthesis of Legislative and Case Law History, 15 B.C. Envtl. Aff. L. Rev. 295, 303 (1988).
[32] Id.
[33] EEAC, supra n. ___, at 17.

empirical evidence is mixed.[34] The evidence does indicate, however, that general assumptions about state taking up additional jurisdiction is not warranted.[35]

IV. CONCLUSION

All of the foregoing analysis indicates that the possibility of states taking over federal jurisdiction in the wake of a retraction of federal WOTUS jurisdiction is a myth. Congress could not have been clearer in 1972 that this was of concern. And yet this myth continues to be trotted out with regularity to ameliorate concerns about loss of wetlands protection.[36]

It is time to put a stake in the heart of this myth, and at least administratively, it would seem impossible to revive it. Given the enormous value associated with wetlands services, and the near impossibility that states will take over jurisdiction if it is removed at the federal level, it then is clear that if jurisdiction is moved from the federal government to state jurisdiction, some amount of cost will occur. And herein is a defense against administrative reduction in federal jurisdiction over WOTUS.

All major federal regulations are now required to undergo cost- benefit analysis. As noted in the Funk, Shapiro and Weaver's seminal Administrative Law textbook, cost-benefit analysis has been required of all major federal regulations since the Reagan era, and "[t]he requirement that agencies study the costs and benefits of potential regulation is the most prominent analysis requirement imposed by presidents."[37] This means that to provide "good" numbers for an administrative rollback of the waters of the United States rule, some amount of states would have to be assumed to be taking over intrastate jurisdiction of wetlands that would be considered newly non-jurisdictional after such an administrative change.

We need our wetlands. And in our current society, and our society for the past 50+ years, these wetlands will not be protected by the state. As we celebrate the success of the Clean Water

[34] Id. at 19.
[35] Id.
[36] See e.g. Darren Springer, How States Can Help to Resolve the Rapanos/Carabell Dilemma, 21 Tul. Envtl. L. J. 83 (2007).
[37] Funk, Shapiro, and Weaver, Administrative Procedure and Practice, a Contemporary Approach 130-131 (6th Ed. 2018)

Act at 50, let us remember, what it was trying to correct, and not make the same dangerous mistakes that we made before WOTUS wetlands regulation.