THE MYTH OF STATE SURFACE WATER REGULATION—THE FIFTY YEAR FLAW OF THE FEDERAL WATER POLLUTION CONTROL ACT JURISDICTIONAL DEBATE

BY

VICTOR FLATT*

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, Congressional observations in passing the 1972 Amendments, 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 or a valid data point is thus pointless and also destructive. It detracts from the real impacts limiting federal jurisdiction.

*Professor Victor B. Flatt is the Dwight Olds Chair in Law and the Faculty Co-Director of the Environment, Energy, and Natural Resources (EENR) Center at the University of Houston Law Center (UHLC). The author recently worked on the External Economics Advisory Committee in examining the economic analyses used to justify the National Waters Protection Rule (NWPR), promulgated by President Trump. The author would like to thank the hard-working editors at *Environmental Law*, and in particular thank Editor in Chief, Amy Kraitchman.

I. INTRODUCTION

Which "waters" Congress intended to include under the term "waters of the United States" in the Clean Water Act (CWA)[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" comes from the term "navigable waters," defined in the CWA as "the waters of the United States, including the territorial seas."[3] The statute does not further define WOTUS, 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 (ELI) has twice undertaken an in-depth study of the likelihood that states would assert jurisdiction over wetlands in the aftermath of *Rapanos v. United States*.[5]

---

[1] Federal Water Pollution Control Act (CWA), 33 U.S.C. §§ 1251–1388 (2018).

[2] Nat'l Ass'n of Mfrs. (NAM) v. Dep't of Def., 138 S. Ct. 617, 625 (2018) (citations omitted).

[3] 33 U.S.C. § 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) (explaining how states can create stricter standards than the federal standards under environmental statutes); Andrew Hecht, *Obstacles to the Devolution of Environmental Protection: States' Self-Imposed Limitations on Rulemaking*, 15 DUKE ENV'T L. & POL'Y F. 105, 111 (2004); Darren Springer, *How States Can Help to Resolve the Rapanos/Carabell Dilemma*, 21 TUL. ENV'T L.J. 83, 89 (2007); Jamison E. Colburn, *Don't Go in the Water: On Pathological Jurisdiction Splitting*, 39 STAN. ENV'T L.J. 3, 52–56 (2019).

[5] 547 U.S. 715 (2006); ENV'T L. INST., STATE WETLAND PROTECTION: STATUS, TRENDS & MODEL APPROACHES 6 (2008), https://perma.cc/CPG9-6H8Z; *see also* State Constraints:

Mischaracterizing information from the 2013 document, the Trump administration went so far as to base its positive cost-benefit analysis of redefining jurisdiction in the Navigable Waters Protection Rule on the theory that many states would assert jurisdiction were federal jurisdiction to go away.[6]

The truth, however, is quite plainly that the states are never going to assert this jurisdiction, demonstrated by legislative history, federalism theory, 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 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 action that shrinks CWA jurisdiction should be evaluated as a net negative in a cost-benefit analysis, and therefore, unless justified by currently unknown reasons, would be arbitrary and capricious.

This Article 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 Article 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 continues to grow. In 2008, the Army Corps and the EPA, using the new ecosystem services theory, attempted to better assess wetland 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 those ecosystems provide, such as water purification, if we were to lose these common

State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act, (2013), https://perma.cc/GK72-PLRS.

[6] Brooks Smith et al., *Trump Administration Publishes Final Navigable Waters Protection Rule*, ENV'T L. & POL'Y MONITOR (Apr. 21, 2020), https://perma.cc/NZ53-E242; DAVID A KEISER ET AL., EXTERNAL ENV'T ECON. ADVISORY COMM., 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) 5 (Dec. 2020), https://perma.cc/PP73-LUFX.

[7] U.S. ENV'T PROT. AGENCY, NATIONAL MANAGEMENT MEASURES TO PROTECT AND RESTORE WETLANDS AND RIPARIAN AREAS FOR THE ABATEMENT OF NONPOINT SOURCE POLLUTION 1, 21 (2005), https://perma.cc/4QQ9-PTJK.

[8] J.B. Ruhl et al., *Implementing the New Ecosystem Services Mandate of the Section 404 Compensatory Mitigation Program—A Catalyst for Advancing Science and Policy,* 38 STETSON L. REV. 251, 251–52 (2009).

resources.[9] The monetary values of wetlands are not fully settled, and owing to the variability and dynamism of wetlands systems, fully capturing the distribution of values wetlands provide is difficult.[10] However, these values are clearly 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 to develop land, which in turn affects the value of land and private wealth.[11] How much value would be lost if wetlands destruction were stopped is still in dispute, reflecting debates about the "costs" (foregone uses) of conservation.[12]

But of course, that is not what happens. Under the current federal wetlands regulatory system, permits for wetlands fill or destruction should only be granted when any harms to wetlands functions are mitigated.[13] So even when development is allowed, the mitigation required by 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 the costs of wetlands mitigation is not comparable across US Army Corps Districts.[14] Perhaps a better cost comparison is established by comparing the cost per acre of wetlands created to mitigate harms due to permitted fill, but this too is variable.[15] However, even assuming a high cost of $10,000 per acre for the construction of new wetlands, this cost would be substantially lower in most cases than the value of the land if instead used for development.[16]

But whatever the cost, the current wetlands permitting process that requires harm mitigation should theoretically produce a more economically efficient outcome than not filling wetlands at all as it ostensibly provides all of the value of the land development while still

---

[9] *See generally* James Salzman et al., *Protecting Ecosystem Services: Science, Economics, and Law*, 20 STAN. ENV'T L.J. 309, 311–13 (2001) (discussing the benefits of an ecosystem services perspective to environmental law and policy).

[10] Ruhl et al., *supra* note 8, at 255–56.

[11] Christoph Nolte, *High Resolution Land Value Maps Reveal Underestimation of Conservation Costs in the United States*, 117 PROC. NAT'L ACAD. SCIS. 29577, 29577 (2020), https://perma.cc/MK69-6627.

[12] Katherine A. Kiel, *The Impact of Wetlands Rules on the Prices of Regulated and Proximate Houses: A Case Study*, 1–2 (New England Public Policy Center at the Federal Reserve Bank of Boston, Working Paper 07-3) https://perma.cc/DD7L-BTXV.

[13] Robin K. Craig, *"Stationarity is Dead" – Long Live Transformation: Five Principles for Climate Change Adaptation Law*, 34 HARV. ENV'T L. REV. 9, 34 (2010).

[14] *See* JESSICA WILKINSON & JARED THOMPSON, ENV'T L. INST, 2005 STATUS REPORT ON COMPENSATORY MITIGATION IN THE UNITED STATES 28 (2006), https://perma.cc/72K6-SCTB (giving some cost estimates for different mitigation types and explaining why a national average mitigation cost is difficult to calculate).

[15] DENNIS M. KING & CURTIS C. BOHLEN, A TECHNICAL SUMMARY OF WETLAND RESTORATION COSTS IN THE CONTINENTAL UNITED STATES 5, 15 (1994).

[16] *See, e.g.*, Clare Condon, *What Does Wetlands Mitigation Cost?,* ENV'T HEALTH & SAFETY DAILY ADVISOR, https://perma.cc/D9TC-TTA4 (Apr. 13, 2018) (noting wetland mitigation costs vary depending on the market demand, however the price of a wetland credit takes into account such things as the presence of other mitigation banks, the demand in the region, expense to manage the site, and the willingness to pay for the credit).

preserving the wetlands services function at a lower cost than not developing the land at all.[17]

This is an incomplete picture, of course, since not all destroyed wetlands are required to be mitigated, and even those that are ostensibly regulated under the CWA 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.

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.[18] While under federal jurisdiction, wetlands and their values are somewhat protected, this is not true of most wetlands outside of that jurisdictional requirement.[19] While states have inherent police power that can be used to protect wetlands' values, for the most part, states do not engage in this practice.[20] According to a 2013 report by the ELI, only eight states regulate any waters beyond the WOTUS in the CWA and are not prohibited from regulating more stringently, and many of these state laws may only be regulating groundwater and there jurisdictional expansions are thus inapplicable to wetlands.[21]

Additionally, as of 2018, only two states had received approval to take over regulation of the federal program.[22] Thus only two states would have demonstrated to the Army Corps that they have sufficient administrative infrastructure to take over the federal permitting process. It is not clear whether other states could step up with such infrastructure if it were to be called for by a reduction in federal jurisdiction.

Even more interesting are the states prohibited from regulating wetlands. The 2013 ELI report states that twenty-eight states are prohibited by law from asserting any jurisdiction beyond federal environmental jurisdiction.[23] According to Andrew Hecht, these "no more

---

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

[18] *Wetlands: An Overview of Issues*, EVERYCRSREPORT.COM (Jan. 5, 2017), https://perma.cc/58Z4-RQS6.

[19] *Id.*

[20] *Id.* at 19.

[21] ENV'T L. INST., STATE CONSTRAINTS: STATE-IMPOSED LIMITATIONS ON THE AUTHORITY OF AGENCIES TO REGULATE WATERS BEYOND THE SCOPE OF THE FEDERAL CLEAN WATER ACT 2, 36 (2013), https://perma.cc/PUM2-DW7T [hereinafter ELI 2013 REPORT].

[22] KEISER ET AL., *supra* note 6, at 27.

[23] ELI 2013 REPORT, *supra* note 21, at 1.

stringent rulemaking requirements," or NMSRs, were passed because of state concerns over competitiveness.[24]

> 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.[25]

Of course, 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.[26] Perhaps most telling is that while the Supreme Court, in practical terms, shrank the scope of federal jurisdiction of WOTUS in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (*SWANCC*)[27] and *Rapanos*, no states have jumped in to fill the void in the last twenty years.[28]

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.[29] While courts are still considering how far Congress intended jurisdiction to extend under the Clean Water Act Amendments of 1972, some sources have asserted that in light of state inaction, Congress intended to regulate waters to the limits of its jurisdiction.[30]

The federal government has been regulating "navigable waters" pursuant to its Interstate Commerce power since 1824.[31] This power

---

[24] Hecht, *supra* note 4, at 113.

[25] *Id.*

[26] David A. Keiser et al., *A Water Rule that Turns a Blind Eye to Transboundary Pollution*, 372 SCIENCE 241, 242 (2021) https://perma.cc/3D9Y-LUH7.

[27] 531 U.S. 159, 174 (2001).

[28] *See* ELI 2013 REPORT, *supra* note 21, at 2 (explaining that states "are not currently 'filling the gap' left by U.S. Supreme Court rulings . . . and face significant obstacles to doing so").

[29] Mark Rouvalis, *Restoration of Wetlands Under Section 404 of the Clean Water Act: An Analytic Synthesis of Statutory and Case Law Principles*, 15 B.C. ENV'T AFFS. L. REV. 295, 301–02 (1988).

[30] *See* Nat. Res. Def. Council v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975) (declaring that Congress meant to assert "federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution").

[31] Bradford C. Mank, *Implementing Rapanos—Will Justice Kennedy's Significant Nexus Test Provide a Workable Standard for Lower Courts, Regulators, and Developers?*, 40 IND. L. REV. 291, 296–97 (2007) (citing Gibbons v. Ogden, 22 U.S. 1, 189–90 (1824)).

includes the statutory authority to regulate "obstructions" to navigable waters under the Rivers and Harbors Act of 1899.[32] While historically, such regulation was limited to waters that were navigable in fact, the latter half of the 20th century saw an expansion of regulation to things that could "affect" navigable waters.[33] Recognizing this expansion and the nature of pollution, the 1972 Amendments that created the modern CWA then redefined "navigable waters" as simply "waters of the United States."[34] Conference reports of the legislative debate indicate that at least some members of Congress wanted to expand jurisdiction as far as possible, and Representative Dingell stated that the new definition should encompass "all water bodies."[35] Thus, the 1972 Amendments reflect the change in concerns over surface waters and the desire to expand federal jurisdiction. In *Natural Resources Defense Council v. Calloway*,[36] the D.C. 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.[37]

The passage of the 1972 Amendments also recognized the states' failures in protecting waters themselves.[38] 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."[39]

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.[40] Whether this was caused by the race to the bottom argument or the lack of resources in states has been debated.[41]

With respect to the wetlands provisions in the 1972 Amendments, it seems that total wetlands protection *per se* was not anticipated, but

---

[32] CWA, 33 U.S.C. § 403 (2018).

[33] Mank, *supra* note 31, at 297–98.

[34] Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 502(7), 86 Stat. 816, 886 (to be codified at 33 U.S.C. § 1362(7)).

[35] 118 CONG. REC. 33,757 (1972) (statement of Rep. John Dingell).

[36] 392 F. Supp. 685 (D.D.C. 1975).

[37] *Id.* at 686.

[38] Robert L. Glicksman & Matthew R. 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, 123 (2010).

[39] *Id.* at 102.

[40] James R. Rasband, *Priority, Probability, and Proximate Cause: Lessons from Tort Law About Imposing ESA Responsibility for Wildlife Harm on Water Users and Other Joint Habitat Modifiers,* 33 ENV'T L. 595, 600 n.11 (2003).

[41] Hecht, *supra* note 4, at 110–11.

legislative history does indicate congressional concern with how wetlands degradation affects the aquatic environment generally.[42] Moreover, Congress vested the wetlands program in two federal agencies (the Army Corps and the EPA), eschewing protection by the states.[43]

C. Theoretical Analysis Indicates That States Cannot Fill This Void

The External Environmental Economics Advisory Committee (E-EEAC) reported on the Trump National Waters Protection Rule, pulling together a lot of theoretical data regarding state gap filling of federal environmental laws, as well as federalism in general.[44] Though the NWPR suggested that there should not be a problem with interstate spillovers, 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.[45]

The E-EEAC also documents extensive literature indicating that a "race to the bottom" in environmental protection can occur without a federal program, though it does note that the empirical evidence is mixed.[46] The evidence does indicate, however, that general assumptions about states taking up additional jurisdiction are not warranted.[47]

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 adopting the 1972 Amendments that this was of concern. And yet this

---

[42] Rouvalis, *supra* note 29, at 300.

[43] *Id.* at 303–04.

[44] KEISER ET. AL., *supra* note 6, at 4.

[45] *Id.* at 17.

[46] *Id.* at 19.

[47] *See id.* at 19–20 (explaining that, on balance, "it is hard to conclude from this literature . . . that a race to the bottom is unlikely when the federal government's jurisdiction over water quality is curtailed").

myth continues to be trotted out with regularity to ameliorate concerns about loss of wetlands protection.[48]

It is time to put a stake in the heart of this myth, and, because this means that shrinking federal jurisdiction will cause the loss of wetlands values, an administrative push to shrink jurisdiction, at least, would likely fail a cost-benefit analysis test. Given the enormous value associated with wetlands services and the near impossibility that states will assert jurisdiction over wetlands if federal jurisdiction is removed, moving jurisdiction from the federal government to states will clearly result in some amount of cost. 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."[49] This means that to provide "good" numbers to support an administrative rollback of the waters of the United States rule, some number 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 fifty plus years, these wetlands will not be protected by the states. As we celebrate the success of the Clean Water Act at fifty years old, let us remember what it was trying to correct and not make the same dangerous mistakes that we made before WOTUS wetlands regulation.

---

[48] *See, e.g.*, Darren Springer, *How States Can Help to Resolve the Rapanos/Carabell Dilemma*, 21 TUL. ENV'T L.J. 83 (2007) (explaining state initiatives in case of federal inaction or court repeal of WOTUS).

[49] WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE, A CONTEMPORARY APPROACH 131 (West Publishing 6th ed. 2018).

***