
Coastal Wetlands at Parker River National Wildlife Refuge in Newburyport, MA.
Credit: Kelly Fike/USFWS.

Cross-posted on CPRBlog.

People on both sides of the political spectrum agree that the boundaries of federal jurisdiction under the Clean Water Act are murky, to say the least. But efforts by EPA and the Corps of Engineers to clarify those boundaries have been tied up in the White House for more than a year, with no explanation and to no apparent useful purpose. The President is fond of telling that nation that it should place more trust in government. No wonder he's not convincing his political opponents — he doesn't appear to believe the message himself. The White House Office of Management and Budget has become a black hole not just for new regulations, but even for attempts to clarify existing law. It simply swallows proposals, leaving them forever in limbo, and forever subject to continued politicking. The Clean Water Act jurisdiction guidance surely isn't perfect, but that shouldn't be the test. EPA should be allowed to issue its guidance, and to correct it when and if experience shows that to be necessary.

The jurisdictional issue has been problematic for a dozen years now. The law requires a permit for the addition of pollutants to "navigable waters," which it defines as "the waters of the United States." That seemed clear enough in 1985, when the Supreme Court decided *U.S. v. Riverside Bayview Homes*. At that point, most observers thought the Clean Water Act covered all waters constitutionally subject to federal authority, and that the Commerce Clause extended federal authority to the vast majority of the waters in the country. Federal jurisdiction was hardly ever in question.

But then the underlying assumptions changed. In the late 1990s the Supreme Court indicated a renewed interest in establishing boundaries to federal Commerce Clause jurisdiction. And in 2001 in *Solid Waste Agency of Northern Cook County v. US Army Corps of Engineers* (SWANCC) the Court ruled that the Clean Water Act does not cover at least some "isolated" waters, but provided little guidance on where the jurisdictional line lies.

The Court revisited that question in 2006 in *Rapanos v. United States*. Sean posted this explanation four years ago of the mess left by *Rapanos*. The short version is that no opinion commanded a majority of the Court. Four justices, led by Justice Scalia, would have limited federal jurisdiction to relatively permanent bodies of water connected to traditionally navigable waterways and wetlands with a continuous surface connection to jurisdictional waters. Four others would have deferred to the Corps of Engineers' broad reading. Justice

Kennedy, writing only for himself, opined that jurisdiction over wetlands and waters that are not navigable in the traditional sense "depends upon the existence of a significant nexus" with navigable waters. Because Kennedy's was the swing vote, his "significant nexus" test has been seen as controlling by most courts and commenters. But that test is hardly self-explaining, and confusion remains over whether Scalia's "relatively permanent waters and adjacent wetlands" test is an alternative path to jurisdiction.

EPA and the Corps of Engineers, which implement the Clean Water Act and its wetland protection provision, could and should help clear up the confusion. In *Rapanos* itself, Chief Justice Roberts wrote a separate opinion criticizing the agencies for not having revised the regulatory definition of "waters of the United States" after SWANCC, while Justice Breyer wrote one urging them to do so speedily following *Rapanos*.

Seven years after *Rapanos* and a dozen years after *SWANCC*, however, no new rules have been proposed. The agencies considered a rulemaking in 2003, but instead issued a memorandum intended to provide "clarifying guidance." A new guidance memorandum was issued in 2007, following *Rapanos*, and re-issued in slightly revised form in 2008. Following the election of President Obama, the administration's view of the scope of Clean Water Act jurisdiction changed. Accordingly in April 2011, EPA and the Corps of Engineers issued a new draft guidance memorandum, and invited public comment for 90 days.

The 2011 Draft Guidance is deliberately broader than its 2008 predecessor:

> The agencies expect, based on relevant science and recent field experience, that under the understandings stated in this draft guidance, the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of waters over which jurisdiction has been asserted under existing guidance, though certainly not to the full extent that it was typically asserted prior to the Supreme Court decisions in SWANCC and Rapanos.

It was accompanied by a cost-benefit analysis, which estimated the incremental costs of the broader interpretation would be in the range of $87 to $171 million, while the benefits would be nearly double that, $162 to $368 million. Mitigation costs would increase because more wetlands would be subject to federal permitting requirements, but the ecosystem service benefits to the public would, the agencies concluded, substantially outweigh those added costs.

The comment period on the Draft Guidance ended on August 1, 2011. So why hasn't a final version been issued? Well, it did take a while to go through the 230,000 comments submitted. But that's not the major cause of delay. For the last 15 months, since February 21, 2012, the Draft Guidance has been languishing at the White House, in the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA).

No information is publicly available about what OIRA has been doing over that time, when it might finish its mysterious process, or what objections it might have to the agencies' proposal or analysis. OIRA does provide a minimal list of meetings and outside communications on its web site, if you're willing to sift through entire agencies or major agency divisions — see, for example, OIRA's list of meetings involving EPA's Office of Water. In this case, OIRA appears to have been true to its public commitment to meet with any interested party to discuss matters under review. It has had 13 meetings on the CWA Guidance, the most recent on March 5, 2013. Meeting participants have included environmental groups, industry organizations, and state and local agencies. No notes of the meetings are publicly available, but any documents submitted are posted on the OIRA web site. A quick glance at them suggests that OIRA meetings with external stakeholders do not add any value. They are just a place to repeat comments already submitted to EPA and the Corps.

This example suggests that the White House review process is badly in need of reining in. First, it should be limited to economically or otherwise significant rulemaking actions, as provided by Executive Order 12866. As I've explained before, there is currently no legal authority for the White House to swallow other actions, including clarifying guidance, which by definition cannot change the law. Perhaps there are good reasons for some guidance to be centrally reviewed, but if so that ought to be explained and the relevant boundaries publicly delimited in a new executive order. At a minimum there ought to be time limits on review. Executive Order 12866 requires that review of proposed regulations be finished in 90 days. Review of guidance should, if anything, be faster.

It's hard to imagine what's taking OIRA so long in this case, or why it should be calling the shots rather than EPA and the Corps of Engineers. EPA and the Corps have (or at least should have) greater expertise than OIRA on the ecological consequences of their approach to identifying jurisdictional waters, and on the purposes of the Clean Water Act and how their guidance will advance those purposes. OIRA does have expertise in the conduct of cost-benefit analysis, and it might provide a useful outside eye on the agencies' explanation of the need for and consequences of changes from the 2008 guidance. It might also be appropriate for the White House to try to keep a broad eye on how agencies are doing their work, and to require rulemaking rather than guidance in some cases. I would be

sympathetic to that conclusion here; I think EPA and the Corps should do a rulemaking rather than another guidance memorandum. But none of those things would take 15 months to determine.

Instead, it looks like the White House is sitting on the guidance because it fears the political consequences of allowing EPA to go forward. That’s understandable. There have already been a series of attempts in Congress to prohibit EPA from implementing the guidance (one such proposal recently got 52 votes in the Senate but fell short of the 60 needed to pass under the procedure being used). But if the White House wants to squelch agency action for political reasons it should be willing to take the political heat for doing so, rather than exercising a kind of pocket veto of agency action.