Grumbles on water

By Benjamin H. Grumbles

Puddles, Potholes & Playas

"The world is mud-luscious and puddle wonderful."
— e. e. cummings

Conflicting interests and broad policies in wetland protection

I know some flood victims, cash-strapped farmers and idled homebuilders who might take a different perspective, but I, like e. e., have a soft spot for mud and puddles (unless they're in the "wrong" place such as my living room or my kids' ball fields).

Not to throw mud, but the U.S. Supreme Court muddied already murky waters in 2001 (Solid Waste Agency of Northern Cook County) and 2006 (Rapanos) on the scope of the federal Clean Water Act (CWA), and the need for certainty is growing greater every day. In fairness, the justices were trying to answer difficult questions in an already-difficult and complex field: where land and water meet, where private property rights and public interests collide, and where federal, state and local roles often conflict. The decisions, including a 1985 case (Riverside Bayview Homes), have clarified some issues, such as whether a water had to be navigable or a wetland adjacent, or whether migratory birds could be used as the sole basis for asserting jurisdiction over wetlands and other waters that are truly isolated from navigable waters.

Blurry Lines

And yet, the confusion is as great as ever for the close calls: the not-so-adjacent, relatively isolated waters and wetlands, and the washes, creeks and streams that run on a less-than-seasonal basis. The rub is whether certain wet areas and waters, such as prairie potholes, playa lakes, vernal pools, ephemeral streams and the like can be shown to have a "significant nexus" to traditionally navigable waters in support of current case law and regulations. If so, they're subject to CWA regulation, including not just the Section 404 Dredge and Fill permitting program but the Section 402 National Pollutant Discharge Elimination System program, Section 303 Water Quality Standards and Section 311 Oil and Hazardous Substance Spill Authorities. If not, it's up to state and local authorities, private-sector efforts or other possible federal tools to protect such areas.

The U.S. Army Corps of Engineers and U.S. Environmental Protection Agency (EPA) are trying to make the best of "nonbinding" guidance on how best to interpret the "recent" decisions and draw lines between what's in and what's out. But that's not enough. There's an increasingly urgent need for legally enforceable regulations on the close calls and—even more importantly—bipartisan congressional amendments to the CWA to clarify and restore jurisdiction, as well as incorporate new tools and strategies.

The first Bush administration championed a national goal of "no net loss" of wetlands. The second Bush administration, in which I served, embraced an "overall gain" goal through a combination of regulatory and cooperative conservation tools. In 2008, the Bush administration also issued interim guidance on the CWA regulatory programs to clarify the jurisdiction of the federal law in the wake of the Supreme Court decisions.

No Net Confusion

The Obama administration has its opportunity now to provide leadership as well. It's off to an interesting and thoughtful start, having issued its own guidance on April 27, 2011. While the courts and Congress continue to grapple over CWA legal and political issues, the administration needs to move forward with a rulemaking based on comments received on the latest guidance and lessons learned from the previous guidance. Just as importantly, it should signal a willingness to collaborate and compromise with state and local officials and diverse stakeholders. The administration should call for a bipartisan forum with pragmatic environmentalists and environmentally thoughtful business stakeholders to find common ground. Perhaps that could provide momentum for a bipartisan congressional fix in the next year or two.

All waters and wetlands have value, but not all are regulated and protected under the federal CWA. While "no wetland is an island" (to borrow from John Donne) and each water is connected in some way to the broader watershed, there needs to be a clearer cutoff point separating federal CWA jurisdiction from other state, local and federal authorities. This is important for legal certainty, predictability and fairness.

The environmental and public health stakes are high. The EPA has calculated about 117 million Americans who get some or all of their drinking water from sources that lack clear protection from pollution. These small streams and wetlands filter out pollution before it reaches larger rivers and help keep communities safe from floods. They support healthy fish and waterfowl populations to help sustain the American traditions of fishing and hunting. They support businesses that depend on clean water and that provide for people who enjoy swimming, fishing, boating and other outdoor activities.

No wonder we have broad policies of no net loss and overall gain when it comes to wetlands protection. Regarding federal wetlands jurisdiction, we need a no net confusion policy. WWD

Benjamin H. Grumbles is president of the Clean Water America Alliance. Views expressed in this column may not necessarily reflect those of the Alliance or its members. Grumbles can be reached at bhgrumbles@gmail.com.

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