

Editorial: Washington moves to fill wetland regulatory void

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The Washington Department of Ecology wants to pick up where the U.S. Supreme Court left off.

Don Jenkins/Capital Press file

Bureaucrats abhor a regulatory vacuum, so it was no surprise that Washington’s Department of Ecology quickly stepped in after the U.S. Supreme Court last year severely limited the definition of wetlands that could be regulated by the federal government.

Heaven help Washington landowners.

The Clean Water Act gives federal regulators jurisdiction over “waters of the United States.” Navigable lakes and streams are specified in the act, but it left to rulemakers to decide how to treat tributaries, wetlands and even seemingly unrelated waters.

Disputes over the definition have raged for more than two decades. Over that time the rules were written and rewritten by successive Republican and Democrat administrations, and further muddled by two conflicting Supreme Court decisions.

Last May the court provided clarity.

“In sum, we hold that the CWA extends to only those ‘wetlands with a continuous surface connection to bodies that are waters of the United States in their own right,’ so that they are ‘indistinguishable’ from those waters,” the court ruled.

That removed from federal jurisdiction ephemeral wetlands and waters, ditches, swales and mud puddles without a constant physical connection to a river, stream or lake.

What the court gaveth, the Inslee administration is taking away.

The Department of Ecology’s 2024 budget proposal requests \$2.4 million to do the reviews and write rules for a new state-issued dredge-and-fill permit.

Ecology claims authority to regulate wetlands under the state Water Pollution Control Act, which it says gives it the responsibility to protect wetlands not regulated by the federal government.

In 1990, the U.S. Department of the Interior published a report that estimated that Washington had 938,000 acres of wetlands. It’s a figure still quoted by the Department of Ecology.

It says that some 450,000 acres of wetlands, nearly half the total, once under federal jurisdiction will now be regulated by the state.

The department can’t show you where these wetlands are, and can’t really prove that they exist at all. There is no map, and the state’s estimate of non-federal wetlands is based on a model developed by St. Mary’s University of Minnesota.

Luckily for Ecology, Washington law is written to be interpreted generously.

State waters include “lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and watercourses within the jurisdiction of the state of Washington.”

State law defines a wetland as “areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”

No wonder landowners are sweating bullets. There’s no objective way for them to know if their land is a regulated wetland.

They need not worry. The regulators are sure to know a wetland when they see one.