Vernal Pools: Evolving legal protections and an uncertain future

Prof. Dan Rohlf

Lewis and Clark Law School

Portland, Oregon

Wetlands jurisdiction: A potential "legal lifeline" for vernal pools

- Vernal pools often occur on private or other non-federal land, where restrictions on development much less stringent
- Clean Water Act requires federal permit prior to filling wetlands that fall within definition of "waters of the U.S." and thus subject to regulation by the Corps/EPA
- Federal jurisdiction and permit requirement brings along other legal protections, such as NEPA and ESA

That was then, this is now…

2015 WOTUS rule

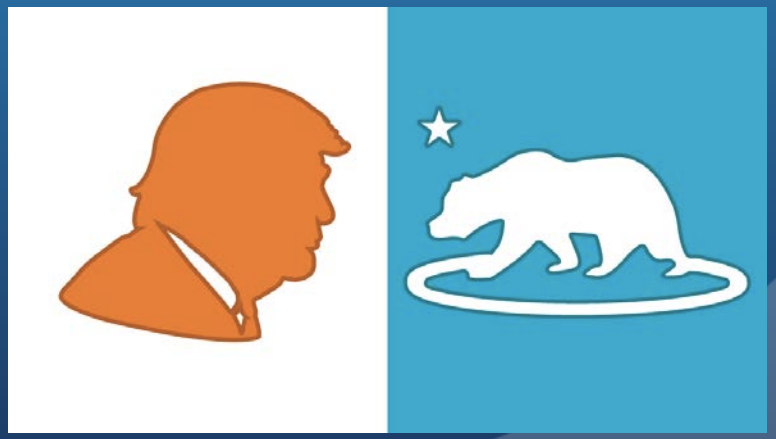
- SWANCC
- EPA reports during Obama era recognized link between even "isolated" wetlands and navigable waters
- Would likely allow for assertion of federal jurisdiction over some vernal pools ("significant nexus")

Trump Admin

- Narrowing federal wetlands jurisdiction key policy goal
- "Delay rule" in place suspending 2015 rule until 2020
- Administration working on own WOTUS definition (surface water connection)
- Everyone litigating
- Now, vernal pools unlikely to trigger federal jurisdiction

A little good news...?

- California Water Board considering proposal that would largely encompass broader definition of jurisdictional wetlands under state law
- May provide significant state law protections for vernal pools in California, though federal protections such as NEPA and ESA likely still out of picture
- Adoption???



Not huge ESA/habitat fans…

ESA 4(d) limits

- Imminent move to repeal FWS "blanket 4(d)" rule
- Prohibitions in section 9 of ESA (including "take" ban) apply by statute only to species listed as endangered
- Current FWS 4(d) rule automatically applies same protections to threatened species
- Eliminating blanket 4(d) rule makes it likely that FWS will not prohibit many actions, including all or significant take, for future threatened species

What about recovery?

- Trend – even under Obama Admin – for FWS to narrowly define "recovery" under ESA
- Example: bull trout recovery plan allows for 25% reduction in remaining "core" habitat – but still defines result as meeting goal of "recovery"
- Tough cases, too
  - D.C. Cir: FWS may delist species even if it does not meet criteria in recovery plan; no need to revise plan
  - Oregon dist ct: No one can challenge recovery plan in court

Other ESA rollbacks?

- Section 7 consultation procedures
- Definition of “destruction or adverse modification” of critical habitat (but bad vernal pool caselaw already…)
- Designation of critical habitat (Supreme Court dusky gopher frog case)

Hope...?