Vernal Pools: Evolving legal protections and an uncertain future

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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...

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<th>2015 WOTUS rule</th>
<th>Trump Admin</th>
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<td>• SWANCC</td>
<td>• Narrowing federal wetlands jurisdiction key policy goal</td>
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<td>• EPA reports during Obama era recognized link between even “isolated” wetlands and navigable waters</td>
<td>• “Delay rule” in place suspending 2015 rule until 2020</td>
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<td>• Would likely allow for assertion of federal jurisdiction over some vernal pools (“significant nexus”)</td>
<td>• Administration working on own WOTUS definition (surface water connection)</td>
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<td>• Everyone litigating</td>
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<td>• Now, vernal pools unlikely to trigger federal jurisdiction</td>
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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...?

STATE LAWS

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Midterm election