Playas in Peril, Wetlands in Jeopardy:

Playas and Other Wetlands Face Their Gravest Legal Threat So Far

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As this edition of *Prairie Wings* was in the final stages of preparation, the EPA and U.S. Army announced on September 12, 2019, a revised definition of the "Waters of the United States" (WOTUS). Pursuant to the February 2017 Presidential Executive Order 13778, entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule, under the pretext of "minimizing regulatory uncertainty" occasioned by differing court decisions on the 2015 WOTUS Rule, this measure not only erases much of the 2015 rule, but reverses the entire pattern of interpretation since 2008. The change in the rule was justified by the agencies "to ensure that the Nation's navigable waters are kept free from pollution," "to ensure economic growth," minimize regulatory uncertainty, and restore regulatory power to the states and tribes "under the Constitution." (From the news release, "EPA, U.S. Army Repeal 2015 Rule Defining 'Waters of the United States' Ending Regulatory Patchwork." 09.12.2019; https://www.epa.gov/wotus-rule/step-two-revise.) There is no mention of consideration of scientific, hydrological evidence, of the conservation of wildlife and habitat that are effectively the property of the people of the United States, or even of preservation of clean water or appropriate availability of water in the United States, except in waterways defined, in essentially nineteenth-century terms, as "navigable waterways." What was considered in the new WOTUS definition was provision of "greater regulatory certainty for farmers, landowners, home builders, and developers nationwide." [News Release of 9.12.2019]

The newly revised WOTUS Rule excludes from the Federal jurisdiction of the EPA and the Army "ephemeral streams, isolated waters," and "any feature that flows only during or immediately after it rains," as well as groundwater and "prior converted cropland." In the name of efficiency and consistency, "the proposal would eliminate the time-consuming and uncertain process of determining whether a 'significant nexus' exists between a water and a downstream traditional navigable water." "No ephemeral features are considered jurisdictional under the proposal," and "only surface water connections are 'jurisdictional.'" [https://www.epa.gov/sites/production/files/2018-12/documents/factsheet_-_wotus_revision_overview_12.10_1.pdf]

This radical shift in policy reverses the whole tendency of interpretation of WOTUS before the October 9, 2015 decision by the Sixth Circuit Court of Appeals to suspend the EPA's enforcement of the 2015 Rule. The whole legal history of previous regulation under the Clean Water Act was on the whole, until now, based on broader interpretation of WOTUS.

The new restriction will render it impossible to "ensure that the Nation's navigable waters are kept free from pollution," as pollutants deposited in non-jurisdictional ditches, ephemeral streams, and non-adjacent wetlands will inevitably be carried into navigable "waters of the United States" by occasional flood events, subsurface channels, and as leaching into "waters of the United States" from polluted waters that do not have a surface connection is not subject to control. Polluted waters do not need a year-round *surface* connection to reach vast areas downstream.

The tendency of the Administration's proposal is to narrow the interpretation of WOTUS to the point where most of the "waters of the United States" would lie outside the regulatory authority of the EPA and the Corps of Engineers. Surely such redefinition and recodification would belie the original objective of the CWA: "The objective of the CWA, as established by Congress, is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a).

Furthermore, protection of isolated wetlands and ephemeral waters like playas ought to be the right of the federal govern-

ment under exercise of jurisdiction based on the Migratory Bird Rule, an issue apparently ignored by the current EPA and Army in their deliberations. Indeed, the conference report accompanying enactment of the CWA in 1972 states that "the conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation ..."[9], seemingly an instance of a "clear statement from Congress that it intended that [interpretive] result." And surely the maintenance of the integrity of ecosystems—"the biological integrity of the Nation's waters"—should allow the Migratory Bird Act some effect on the decision-making process.

Scientists recognize the value of wetlands like playas in contributing to water quality, providing flood damage protection, and recharging groundwater. A 1995 National Research Council report asserted that, because of groundwater connections between isolated wetlands and surface waters, these functions are not confined to contiguous wetlands or those with surface connections to navigable streams.. And the value of small wetlands like playas to waterfowl for food and forage is demonstrable. As noted in both articles in this issue, even wetlands that may be completely dry for several years can be important for storing flood waters and can have distinctive water-dependent biota (plants and animals) that persist over dry intervals but return when water returns to the site (as noted particularly in Miruh Hamend's article above).[14]

The fundamental clash here comes down to the Administration arguing that "The line between Federal and State waters is a legal distinction, not a scientific one," in line with the whole tendency of the Administration's view to marginalize scientific and expert evidence in favor of the narrowest legalistic interpretation of statute language, taking authority and jurisdiction away from the Federal government and remanding it to the states. The Administration is breaking with previous administrations not just in privileging the narrowest interpretation of WOTUS, but also in deciding which waterways and wetlands are to be protected is merely a matter of law, not science—while the agencies concerned have maintained back into the 1970s that science matters in this question.

The playas of the Central Plains have played an essential role in restoring groundwater and the aquifer, in offering habitat to unique ecosystems, and in affording forage and resting areas to the great flocks of migrating shorebirds and waterfowl, as well as resident birds and wildlife. Nevertheless, unless challenged in court and overturned, this redefinition of WOTUS, marginalizing science and the environment, privileging private economic interests over the public good and the long-term sustainability of the environment, probably spells the demise of these already beleaguered and essential wetlands in our backyard.

Wetland Reserve Easement program is Beneficial for Landowners and Wildlife

Despite the unfortunate proposed change to WOTUS, Federal assistance is still available from the USDA which offers conservation easements through the Agricultural Conservation Easement Program or ACEP, a Farm Bill program. The Natural Resources Conservation Service provides technical and financial assistance to private landowners to protect, restore, and enhance wetlands and other sensitive lands. Projected payments authorized for perpetual Wetland Reserve Easements for 2020 range from around $1,900/acre to around $3,200/acre, depending on the region within Kansas. Landowners and others with additional questions are encouraged to contact their county NRCS office, or Lynn E. Thurlow, Soil Conservationist/Easement Program Manager at 785-823-4548 or by email at lynn.thurlow@usda.gov