

# Updates on Current Clean Water Act Developments Impacting Arizona

***ITCA Tribal Leaders Water Policy Council Meeting***

*Susan B. Montgomery*

*Mia A. Montoya Hammersley*

*April 24, 2020*



# WOTUS is No longer! We now have the Navigable Waters Protection Rule

- On April 21, 2020, EPA published its new rule under the Clean Water Act, the Navigable Waters Protection Rule (NWPR), replacing the prior “WOTUS” rule
- The Rule plays a key role under the Clean Water Act (CWA), because it determines which surface water (rivers, lakes, streams, wetlands and washes) are protected from discharges of pollutants under the CWA, such as:
  - Discharges of pollutants from point sources, like wastewater treatment plants, mining operations, etc.
  - Dredge and fill materials under Sec. 404 of the CWA
- **The rule is to become effective on June 22, 2020, but litigation may delay it, potentially resulting in a patchwork of applicability, based upon federal circuits**





# What Does the New NWPR Cover?

## Waters Included:

- Territorial Seas and Traditional Navigable Waters
- Perennial and Intermittent Tributaries to Traditional Navigable Waters (must flow more often than just after a single precipitation event)
- Certain lakes, ponds, and impoundments
- Wetlands adjacent to jurisdictional waters (must have a direct surface water connection)

## Waters Excluded:

- Ephemeral Waters
- **Groundwater**
- Diffuse Stormwater runoff
- Certain ditches
- Prior converted cropland
- Artificially irrigated areas
- Artificial lakes and ponds
- Water-filled depressions incidental to mining, construction, or fill activity

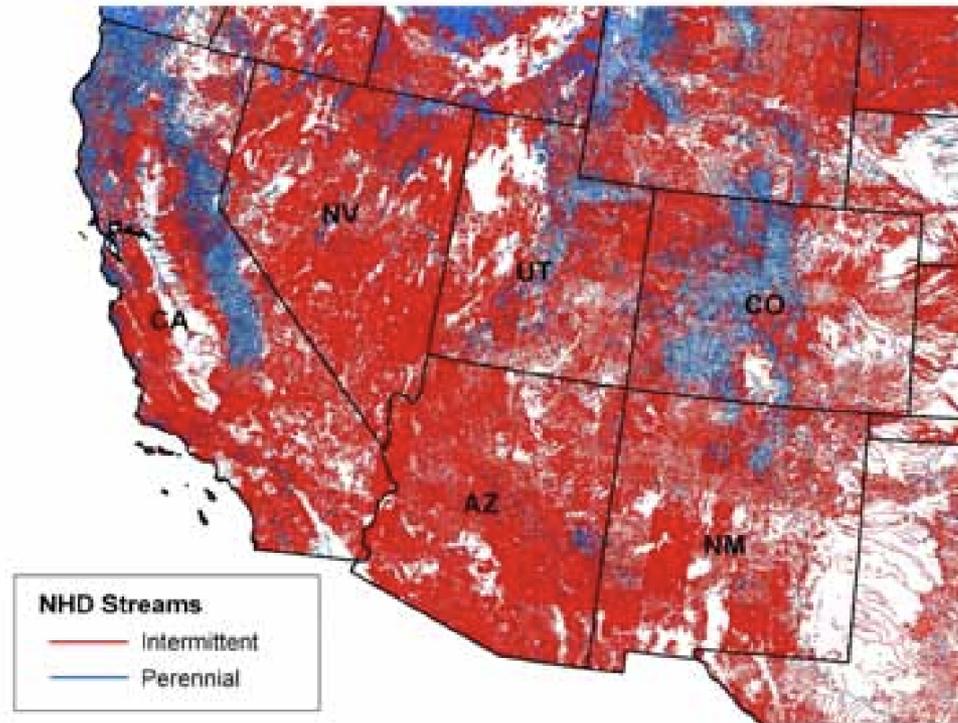
# \**Breaking News* About the Clean Water Act and Groundwater

- The United States Supreme Court just (yesterday) issued its decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund et al.*
- **Question:** Does the Clean Water Act require a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, **such as groundwater?**
- **Answer:** In some instances. This means that the CWA now applies to \*some\* groundwater pollution
  - Court describes a “functional equivalent test” that looks at how distant the discharge of a pollutant is from the jurisdictional surface water, and how long it takes that water to travel to the surface water via underground
  - Court also will look at the “nature and material through which the pollutant travels and the extent to which the pollutant is diluted or chemically changed as it travels.”

What does this mean for the Navigable Waters Protection Rule?

# The Importance of Ephemeral Waters

Arizona	94%
Nevada	89%
New Mexico	88%
Utah	79%
Colorado	68%
California	66%



**Figure 3. Map of the Southwestern U.S. showing the National Hydrography Dataset (NHD) intermittent/ephemeral (red) and perennial (blue) streams.**

# What Does the NWPR Mean for Arizona Tribes?



Credit Dan Sorensen / Western Rivers Conservancy

**Has the EPA consulted  
with your Tribe yet?**

- Tribal water sources that arise both on and off the Reservation will have limited protections from the discharge of pollutants under the CWA
- Important places, such as cultural resources or sacred sites located off the Reservation, which are supported or enhanced by healthy water sources and riparian areas, will have less protection from being polluted or degraded from discharges associated with developments, mining activities or other projects
- CWA 404 permits (dredge and fill) will be required less often – removing a significant “federal nexus” for NEPA, NHPA, and other laws
- On Reservation developments and projects may have less obligations for permitting under the CWA, like their off-reservation counterparts
- There will be a period of uncertainty for potential permit applicants (tribal and non-tribal alike) who need to get safely permitted under the CWA for their projects, due to ongoing litigation

# Replacing the Clean Water Act: ADEQ's Waters of Arizona Program

- In order to address the lack of protections under the NWPR in Arizona, ADEQ has begun developing the **“Waters of Arizona Program”**, which could take **several years to finalize**
- ADEQ will host additional Stakeholder and Tribal Information Sessions in the future
- Issues of Concern:
  1. Will the state's program go far enough to protect AZ waters?
  2. What about the “gap” between the new NWPR and implementation of the state's program?
  3. Is this 404 All Over Again?



Waters of Arizona | Surface Water Protection

# Which Waters Will Arizona's New Waters Program Cover?

- It depends!
- **Typical Year Analysis:**
  - The new Clean Water Act Rule excludes ephemeral water **AND** all water upstream of the ephemeral stretch....
  - **UNLESS** the ephemeral stretch flows during a “typical year,” based on a 30-year average
- It will take several years to fully determine the jurisdiction of Arizona's program

An inter-agency group of data and GIS specialists is working on creating a methodology for making these determinations.

**Is there anyone from your tribe who could contribute?**

# The Regulation Gap

- The new CWA rule is supposed to go into effect across the United States on June 22, 2020
- However, the Waters of Arizona Program is not expected to go into place until **2023**
- **That leaves a period of approximately 3 years where much of Arizona's waters will have no protection at all under the CWA or a State program!**
- Can this failure be addressed legislatively? Unlikely.

**How can Tribes protect their water resources during the Gap?**



# The State Program May be Limited in its Ability to Protect Tribal Resources

- Remember the efforts by ADEQ to assume Section 404 Assumption? Many of the same issues apply here:
  - Important federal laws, such as NEPA, the NHPA, and the ESA, may not apply
  - Where Arizona's state based Cultural & Historic Preservation laws apply, there is little means to resolve adverse affects of require mitigation (unlike NHPA)
  - The Federal Trust Relationship is not invoked in state programs
  - There will likely be political pressure for less stringent protections
- How will ADEQ engage with Tribes?
  - Unfinished revisions to ADEQ Consultation Policy?
  - A "Tribal Advisory" Group?
  - Other?
  - **You can Ask ADEQ, because they are up next!**



# The Stakeholder Advisory Group (SAG)

Misael Cabrera, Director  
ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY  
Attn: WQD | WOAZ  
1110 W. Washington St.  
Phoenix, AZ 85007

**RE: Inter Tribal Association of Arizona, Inc. Response to Invitation to Serve on the Waters of Arizona Stakeholder Advisory Group**

Dear Director Cabrera:

This letter will serve as official response to your email sent on March 18, 2020 inviting the Inter Tribal Association of Arizona, Inc. (ITAA) to appoint a representative to serve on the Waters of Arizona Stakeholder Advisory Group (SAG). ITAA accepts the invitation to serve on the SAG and appoints Susan B. Montgomery and alternate, Mia A. Montoya Hammersley, General Counsel to ITAA, as SAG representatives. ITAA believes Susan and Mia are the right choice to represent ITAA since in addition to serving as ITAA's General Counsel, they also have expertise in the area of water quality and the Clean Water Act.

ITAA appreciates ADEQ's invitation to participate in this important process. However, we also wish to once again urge ADEQ to extend formal invitations to serve on the SAG to all 22 Arizona Tribes. This request was first made by representatives of ITAA at the Waters of Arizona Tribal Information Session in Phoenix on February 20, 2020, and again in an email to Leonard Drago on March 5, 2020.

As you know, ITAA is an inter-tribal consortium of 21 federally recognized Indian Tribes governed by the highest elected Tribal officials from each Tribe, including Tribal chairpersons, presidents and governors. However, ITAA is not authorized to speak on behalf of any particular Member Tribe and certainly should not serve as the singular voice for all Arizona Tribes on the SAG.

# Cultural & Historic Resources and the State Program



Gaan Canyon at Oak Flat, photo by Sky Jacobs

- **What is a use-based regulatory program?** Water quality standards are set based on the particular use of a given water body.
- Recently SAG Identified uses (not final):
  - Drinking Water
  - Aquatic and Wildlife
  - Recreation
  - Fish Consumption
  - Swimming
  - **Cultural and Historic Resources**
  - Irrigation
  - Wading
  - Aesthetics
  - Livestock Watering
- **Pushback anticipated!**

# Questions?

