

Arizona's Clean Water Act Protections Are In "Jurisdictional Limbo"

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Abstract--*The jurisdiction of the Clean Water Act over aquatic and riparian habitats in the Western US is continuing to shrink in response to past Supreme Court decisions, leaving a gap in water quality governance for an increasing number of streams in the Western US. Arizona is preparing to remove certain streams, springs, wetlands, and lakes from the state's water quality standards based on these decisions. Arizona also seeks primacy for future determinations of Clean Water Act jurisdiction under Section 404 for non-navigable waters. Transfer of those Clean Water Act responsibilities to the state will remove the need for Endangered Species Act Section 7 consultations and mitigation of a project's effect to federally protected species, unless the project has some other federal nexus.*

BACKGROUND

Congress enacted the Clean Water Act (the "Act") in 1972 to "restore and maintain the chemical, physical, and biological integrity" (33 U.S.C. § 1251(a)) of the nation's water by setting minimum standards for discharge of pollutants. Over the years, local communities began treating their sewage and states began regulating pollution, often with support of Congressional funding (Andreen 2013). Pima County, Arizona, for instance, received over \$50 million in federal assistance for the construction of sewage treatment facilities by 1982 (unpublished Pima County data).

The U. S. Environmental Protection Agency (EPA) reviews and approves changes to state-administered programs. The Agency serves as the regulator for the National Pollutant Discharge Elimination System (NPDES) in the few states that have not yet taken on this responsibility. Arizona was one of the last states to take responsibility for NPDES permits. Arizona assumed NPDES permitting responsibility under Section 402 of the Clean Water Act in 2002. This eliminated Endangered Species Act (Section 7) reviews that were required when NPDES permits were federally administered, with particular consequences to taxa like the cactus ferruginous pygmy-owl (*Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007)).

The U. S. Army Corps of Engineers (Corps) continues to administer dredge and fill permits under Section 404 of the Clean Water Act throughout the Western U.S. Section 404 permits regulate physical modification to streams and wetlands, as opposed to point and non-point source discharges. Because these permits are federal actions, they are subject to endangered species reviews. Species consultations under Section 7 of the Endangered Species Act have been a focus of much litigation in the West.

ARIZONA MOVES TO ASSUME 404 POWERS

Arizona is actively pursuing powers that would allow the state to determine which streams and wetlands will be regulated under Section 404 of the Act unless the stream is a traditionally navigable water in which case the Corps would continue to have jurisdiction over it and adjacent wetlands. Draft legislation (Senate Bill 1493) was introduced in Arizona in February 2018 to assume these powers. New Jersey and Michigan are the only states in the union which currently administer Section 404 for non-navigable waters and their adjacent wetlands, although many others have evaluated state assumption (NACEPT 2017).

State assumption of Clean Water Act Section 404 powers would eliminate the protection of individual Section 7 consultations about effects to species unless a project has some other federal nexus, such as funding or use of federal lands. Even absent a federal nexus, applicants would still be subject to the Endangered Species Act's taking prohibition and anyone who cannot avoid the take of species would be required to apply for authorization under Section 10 of the Act. Section 10 incidental take permits can take years to obtain. Pima County holds Section 10 permits for incidental take of many listed and unlisted species, but it took over a decade to formulate and obtain the permit.

ARIZONA BEGINS TO ALIGN WATER QUALITY STANDARDS

Arizona Department of Environmental Quality (ADEQ) is evaluating water quality standards for over 900 Arizona water bodies used for fishing, wading, agriculture, water supply, and other uses. The objective of ADEQ's review, as expressed in a memorandum to the Governor's Office, is to "realign Arizona's categories of navigable waters, taking into account U. S. Supreme Court decisions of the past ten years." (ADEQ 2016, Appendix 1). An exemption from the Governor's rule-making moratorium authorizes staff to "prepare the necessary studies to withstand EPA's scrutiny and gather information and supporting documentation on stakeholder's views, especially as to aligning how Arizona categorizes Waters of the US (WOTUS)." (ADEQ 2016).

A preliminary classification of WOTUS offered for the Governor's Office proposed removing 47 lakes and 21 streams from Arizona's Clean Water Act list (ADEQ 2017a). The same analysis identified 74 lakes and 336 streams that might not continue to be regarded as protected by federal Clean Water Act authority based on current Corps standards and data available to its staff.

FEDERAL JURISDICTION IS CHANGING

Even without state assumption, federal jurisdiction over discharges to ephemeral streams will continue to shrink through the slow accumulation of project-level decisions by the Corps. Approved jurisdictional determinations (AJDs) by the Corps have reduced the number of Arizona's watercourses and lakes that are protected against water quality degradation under Section 404 of the Act. Until the 2006 *Rapanos* decision, discharges of fill into nearly all ephemeral streams in Arizona were regulated or presumed to be regulated by the Corps. *Rapanos v. United States*, 547 U.S. 715 (2006).

The guidance issued by the Corps and the U.S. Environmental Protection Agency on December 2, 2008 indicates that the agencies will assert jurisdiction over non-navigable tributaries of traditionally navigable water in two instances. First, jurisdiction will be asserted when the tributary is relatively permanent – a water that has a flow that is at least seasonal. Second, jurisdiction will be asserted when the Corps staff establishes, on a case-by-case basis, that a tributary that is not relatively permanent will significantly affect the chemical, physical, or biological integrity of traditionally navigable waters (USEPA & Corps 2008). In performing this task, the agencies indicated that they would consider the volume, duration, and frequency of the flow and its proximity to a traditionally navigable water, based on "any available hydrologic information" and physical characteristics of the tributary (USEPA & Corps 2008). In addition, the agencies agreed to consider the potential of tributaries to carry pollutants and floodwaters to traditional navigable waters. Other relevant factors include the ecological functions performed by the tributary such as the capacity to transfer nutrients and organic carbon downstream, habitat services, sediment trapping and retention, and pollutant trapping and filtration.

ADEQ expressed concerns over the Corps' draft guidance for implementing the significant nexus test. ADEQ estimated that 96% of Arizona's streams are non-perennial, and it predicted that "the jurisdictional determinations made in accordance with the Guidance will affect the ability of our agency to benefit from and to implement all Clean Water Act programs. ...The State has no role in the implementation of the Guidance....If an Arizona water body stands to lose Clean Water Act protections, the State should receive early notice, an opportunity to comment before the agencies make the final decision, and standing to appeal such a decision (ADEQ 2007)". The final guidance (Corps, 2008) did not address these concerns, and the *Oberstar Memorandum* (2008) found that Clean Water Act enforcement declined as a result.

Recent AJDs (SPL-2015-00520; SPL-2011-00160; SPL-2015-00129) based on this guidance have found that a number of dry streams in the mining districts south of Tucson have no "significant nexus" to the traditionally navigable Santa Cruz River located downstream (Figure 1). Under the 2008 guidance document, the Corps must have a "more

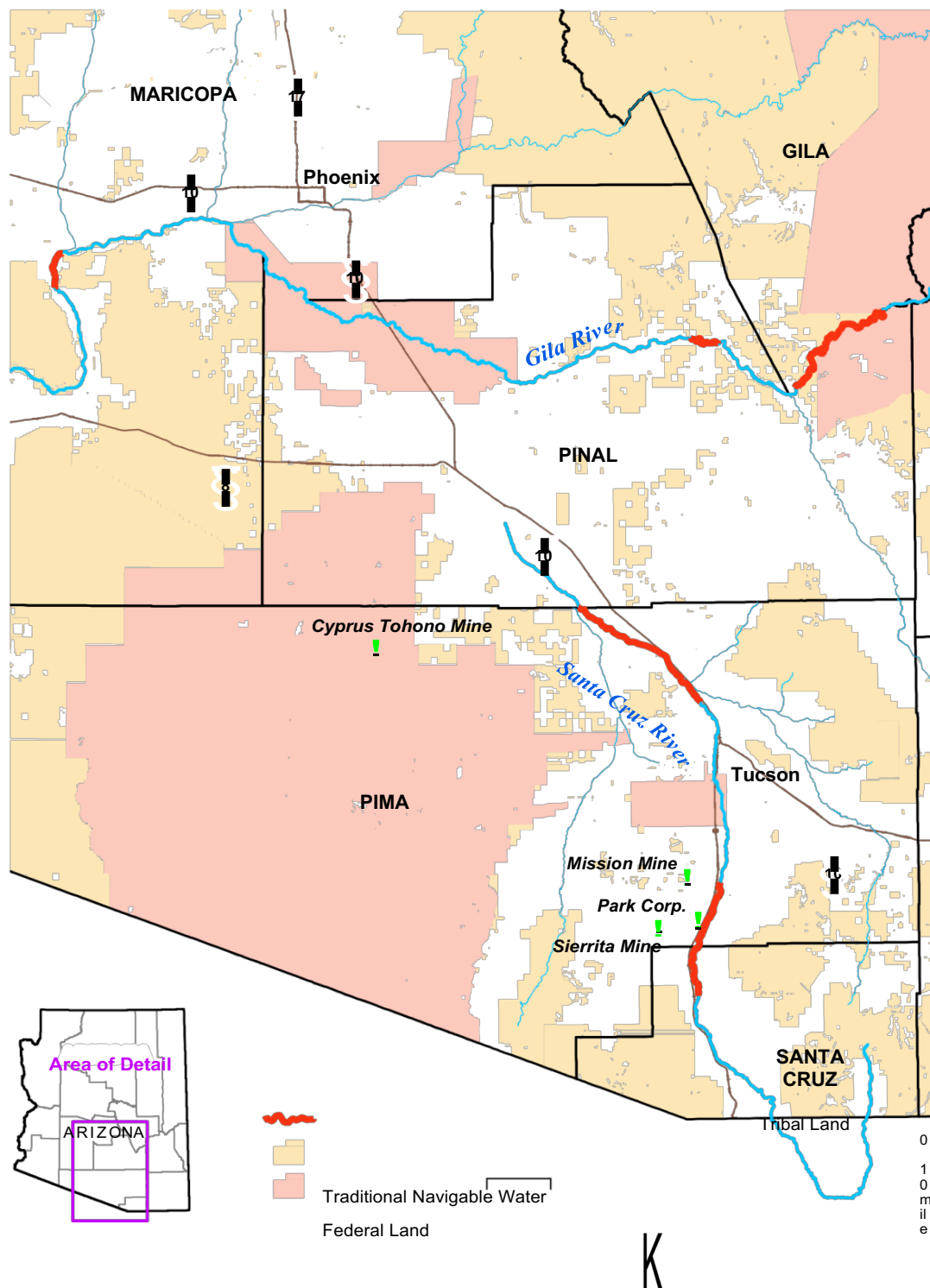


Figure 1--Location of Approved Jurisdictional Determinations (AJDs) mentioned in the text (Pima County map based on U. S. Army Corps of Engineers AJDs)

than speculative or insubstantial” basis for finding significant nexus. The recent determinations made by the Los Angeles District for projects in Pima County rely principally on maps and photographs submitted by the applicant to document a lack of relatively permanent waters or wetlands (Corps 2015a, 2015b, 2014, 2012). For the Sierrita mine analysis area, seventy-five drainage areas were determined to be isolated because they were cut off by the past mining activities that effectively impounded drainage on-site. For the remaining watercourses, the size of the project’s watershed relative to the size of the Santa Cruz watershed, and the distance from the mines to the traditionally navigable reaches of the Santa Cruz River were important factors in the significant nexus decisions.

Some watersheds in both mining districts remain as WOTUS, but for different reasons. At the Sierrita Mine, the ephemeral streams discharging to the Santa Cruz River upstream of Continental Road are deemed WOTUS because they drain directly to a traditionally navigable reach of the Santa Cruz River (Figure 1). At the Mission Mine, no request was made to review the portion of the mine on tribal lands, so those watersheds remain under federal purview (Michael Langley, U. S. Army Corps, personal communication to the author, September 12, 2017). Other tribal watercourses have been found to be non-jurisdictional, for example, at the Cyprus Tohono Mine (AJD SPL-2012-00548, Figure 1).

A GAP IN WATER QUALITY GOVERNANCE

The shrinking scope of the Clean Water Act’s jurisdiction leaves a gap in water quality regulation in Arizona for those watercourses deemed not to be WOTUS (Environmental Law Institute (ELI) 2013). As defined by ADEQ (2007), the permitting requirements for point source discharge, stream monitoring and assessment, non-point source remediation, and other state programs depend on the Act’s jurisdiction. Most importantly, the state’s authority to issue NPDES permits derives from the Act rather than any independent state authority. Recent Corps AJDs call into question the validity and enforceability of existing NPDES permits for wastewater treatment facilities, mines, and other entities on such water bodies. Consequently, Arizona is reviewing the status of its NPDES permits in relation to recent Corps determinations (Andy Koester, ADEQ, personal communication to the author, September 12, 2017). Statewide, there are seven ponds or lakes receiving discharges under AZPDES permits that are considered “problem areas for ADEQ” because they are not WOTUS (ADEQ 2017a), and over 400 other regulated waterbodies that are in “jurisdictional limbo” (ADEQ 2017b).

Arizona could set standards for waters of the state that are no longer WOTUS, based on Arizona Revised Statutes §49-221. New rule making would be needed to develop standards for these “waters of the state.” ADEQ has identified lakes and 336 streams such as the tributaries to the Willcox Playa that could be potential “waters of the state” (ADEQ 2017a). Currently, the state’s sole regulatory authority to protect water quality in waters of the state derives from its aquifer water quality regulations. Ephemeral streams play an important role in recharging the aquifer and purifying the infiltrating waters in Arizona; however, no rule making to protect those streams has been proposed (as of May 2018).

CONCLUSION

Recent, approved jurisdictional determinations indicate the Act’s waning influence on polluting activities, leaving the state with some tough decisions about enforcement of existing NPDES permits the state administers. Because of the prevalence of ephemeral streams in the arid and semi-arid Western United States, the shrinking jurisdictional limits have broad implications for wildlife and their riparian and aquatic habitats. There will be fewer measures to avoid, minimize and mitigate project impacts to streams, wetlands, lakes and federally protected wildlife as the geographic scope of the Clean Water Act continues to shrink over the coming years.

AJDs resolve questions about which waters are subject to the Clean Water Act on a project basis. However, they are compounding regulatory questions in States like Arizona that currently rely on the Act to regulate pollutants entering its predominantly ephemeral streams. Arizona’s assumption of Section 404 duties for non-navigable streams would not solve the growing disjunct between Section 404 jurisdiction and NPDES-related responsibilities, because Arizona would still be subject to same Supreme Court rulings as the Corps.

new rulemaking at the national level to resolve the limits of the Clean Water Act on ephemeral and intermittent waterbodies in the United States and other issues is widely known, but hotly disputed. In July 2017, the U. S. proposed to rescind the definition of WOTUS which currently governs administration of the Clean Water Act (USEPA and Corps, 2017). In a later step, the US intends to consider using Justice Scalia's narrower opinion about water permanence from *Rapanos*. Regardless whose interpretation of jurisdiction gains traction, new rule making at the state level would be needed if discharges of pollutants to those dry streams and isolated lakes that will not be considered WOTUS are to be regulated at all in Arizona.

APPENDIX 1



Memorandum

Date: November 16, 2016
To: Hunter Moore, Natural Resource Policy Advisor
From: Bret Parke, Deputy Director, ADEQ
Subject: Request for Exception from the Rulemaking Moratorium
Title 18, Chapter 11 – Water Quality Standards – Article 1. Water Quality Standards for Surface Waters

Arizona's Water Quality Standards must be updated to ensure that Arizona retains primacy and sole enforcement authority for Clean Water Act violations in Arizona. State standards must be updated to be consistent with and not more stringent than those established by the federal government, and to provide clear guidance to permittees and the general public regarding the extent of those authorities.

This memo requests that you please approve an exception to the rule making moratorium to develop with interested stakeholders a notice of proposed rulemaking for Arizona Administrative Code Title 18, Chapter 11 – Water Quality Standards – Article 1. Water Quality Standards for Surface Waters. This request complies with paragraph 2 of Executive Order 2016-03 to:

- To avoid violating a court order or federal law that would result in sanctions by a court or the federal government against an agency for failure to conduct the rulemaking action.
- To comply with a state statutory requirement (A.R.S. 49-221).

The Arizona Department of Environmental Quality (ADEQ) sets water quality standards for navigable waters, implementing one of the major requirements of the Clean Water Act. The proposed rule-making would develop standards and language that conform with federal law and reduce confusion to permittees and the general public.

Section 303(c) of the Clean Water Act requires all states to review their water quality standards, at least once every three years, and revise where appropriate (known as the "triennial review"). EPA reviews, and must approve, any revised water quality standards, and has authority to impose water quality standards if it finds a state's to be insufficient. (33 U.S.C. § 1313(c)); 40 C.F.R. §131.22.

In August 2015, ADEQ completed an update which included only minor corrections and clarifications of previous revisions. At this time, ADEQ would like to begin the research for a broader review of the standards with the next triennial review in the fall of 2016, along with a robust stakeholder outreach effort that will conclude with the

completion of the review by August 2018. The triennial review will include:

- Updating standards to conform to EPA's 2015 updates;
- Realigning Arizona's categories of navigable waters, and taking into account U.S. Supreme Court decisions of the past ten years.
- Conforming to new EPA's 2015 variance procedure, allowing some permittees additional time to comply with water quality standards.
- Clarifying how Arizona categorizes tributaries to navigable waters ("the tributary rule").

The water quality standards impact various surface water programs, such as the Arizona Pollutant Discharge Elimination System (AZPDES) permitting program and the impaired waters listing. Beginning the triennial review now will allow ADEQ to prepare the necessary studies to withstand EPA's scrutiny and gather information and supporting documentation on stakeholders' views, especially as to realigning how Arizona categorizes waters of the U.S.

This request is consistent with Arizona Revised Statute §41-1038 (C) because the rules are necessary to avoid potential sanctions by the US Environmental Protection Agency.

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