

Water IS Life

Water Resource Protections in Arizona: How current deliberations could impact birds and all of us

Background: The Clean Water Act (CWA), Waters of the U.S. (WOTUS), and the 2015 Clean Water Rule

- Established in 1972, the CWA is the only federal legislation aimed at assuring water quality. It provides guidance on how specifically designated WOTUS should be regulated and how otherwise unavoidable impacts to WOTUS should be mitigated. In 2015, the Clean Water Rule (Rule) was proposed to clarify previous court decisions on how to define WOTUS, recognizing the complex connections between perennial waterways which flow year-round and those that do not, such as the many ephemeral and intermittent streams that characterize much of the western United States. Fortunately for Arizonans and our birds, the 2015 Rule determined that any waterway with a significant nexus to waterways with year-round flows is covered by the CWA. Arizona residents and wildlife benefit from that sensible definition. From erosion and flooding, to chemical pollutants, to impacts from development, we need the CWA and 2015 Rule to ensure the values, health and functions of our watersheds and the ecosystems our lives depend upon.

Characteristics specific to Arizona

- Arizona has lost over 75% of our historic riparian habitat. 94% of Arizona waterways are ephemeral or intermittent, which we see in action every monsoon season even though they do not flow year-round. Nonetheless, our riparian areas nourish us with clean water and provide crucial habitat to 80% of the wildlife in Arizona. Examples: The San Pedro Riparian system supports more than 400 bird species – as many as 4 million birds every year - as they migrate, forage, nest and raise their young. The Santa Cruz River, much of which is effluent dependent, provides habitat for threatened and endangered species and numerous birds. The Arizona Game and Fish Department and partners have recently released the Santa Cruz Watershed Management Plan <https://inthecurrent.org/fs/the-santa-cruz-watershed-management-plan-is-now-available/>.

Important federal actions

- On June 27, 2017, the Trump administration officially proposed dismantling the 2015 Rule. This announcement has left water users, providers and regulators once again uncertain, if not confused, over what will be considered a WOTUS. Governor Ducey has asked the EPA to revise federal rules to give states the power to decide which streams will be protected as “Waters of the U.S.” Ephemeral washes such as the Rillito River, Pantano Wash and a host of washes near the proposed Rosemont Mine site southeast of Tucson, including Barrel Canyon and McCleary Canyon, would not be considered WOTUS per the Governor’s recommendation http://tucson.com/news/local/gov-doug-ducey-asks-epa-for-power-to-regulate-arizona/article_fb9fe0ee-0da1-561e-af4b-b209ee0857ec.html.

What are the implications of the Arizona Department of Environmental Quality (ADEQ) considering the assumption of the responsibilities of implementation and enforcement of the Section 404 Permit Program of the Clean Water Act?

The CWA 404 Permit Program is currently administered by the U.S. Army Corps of Engineers in Arizona and takes over 600 permit actions per year. Section 404 of the CWA allows states or tribal governments to assume control of dredge and fill permitting from the U.S. Army Corps of Engineers (ACE) under oversight of the U.S. Environmental Protection Agency (EPA). Some states have developed wetlands and aquatic protection programs, and have assumed partial control over the permitting process, but have not assumed responsibility for the entire Section 404 permitting program. In order to assume control of the entire CWA Section 404 permitting program, states or tribes need to develop a wetland permitting program consistent with the requirements of the CWA regulations at 40 CFR Part 233 and submit an application to the EPA and ACE to assume the program. They need to have permitting standards and procedures compliant with Section 404(b)(1) guidelines, regulate similar activities, be able to adequately staff and fund the program, provide for public participation, and prove jurisdictional and regulatory authority, environmental compliance, and enforcement authority. They must prove they meet the above criteria by including a statement from the state Attorney General certifying that their state laws provide adequate authorities. The EPA then has 120 days to review the application and, when deemed complete, initiate a public comment period and public hearing(s), following which the EPA renders its decision. Since 1972, only two states have successfully completed the process. Assumption is much more difficult now than it was in the 1980s and 1990s, because of how much the program has changed from court cases and legal challenges which have “muddied the waters” defining WOUS.

Why would a state pursue this option and what benefits and obstacles can be expected?

The primary reason states seek to assume control of the Section 404 permitting program is that they imagine they can streamline the permitting process better than the federal government by either matching their program to the requirements of the federal program or by developing a new program greater than or equal to federal law. This requires enabling legislation and rulemaking. States must, at minimum, comply with CWA regulations at 40 CFR Part 233, including over a dozen categories of requirements, most of which have their own unique set of rules. In addition, the financial cost of implementing a new program is significant, and it is often difficult, if not impossible, for states to manage. While the federal government provides grants for the development of a wetland program, such grants do not continue for the implementation period of a program. Immediately upon assumption, the state must absorb financial responsibility for a large number of new tasks and must have already hired and trained staff to handle the permitting process. For example, the oversight of approved compensatory mitigation program(s) under the 2008 Mitigation Rule, to offset unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved, is required in perpetuity. Such endeavors can significantly increase a state’s budget via direct and indirect costs. In an EPA report, members of EPA’s Wetlands Division interviewed nine states and found that the lack of implementation funding is a “threshold barrier to assumption.”

Even if a state were to assume control over the CWA Section 404 permitting program, the state does not gain control over *all* waterways and *all* programs. Applications still frequently face a need for a dual-agency process requiring multiple permits and confusion may remain over who controls what water body <https://www.epa.gov/cwa-404/state-or-tribal-assumption-section-404-permit-program>. Examples: States have no jurisdiction over tribal waters; the EPA and the ACE have jurisdiction over Section 10 of the Rivers and Harbors Act (the Colorado River), and; the U.S. Fish and Wildlife Service (FWS) and the U.S. National Oceanic and Atmospheric Administration (NOAA) Fisheries Service have jurisdiction over compliance with the Endangered Species Act (ESA). All projects with a federal nexus are required to comply with the National Environmental Policy Act (NEPA), providing opportunities for the public to comment and be involved in the decision-making process. Thus far, most states have found it to be more trouble than it is worth but, under the current administration, many are looking to Arizona as a bellwether state.

The CWA has been remarkably successful in protecting public health and safety by discouraging industry and agricultural pollution and abuses. When the Cuyahoga River outside of Cleveland, Ohio was so polluted it caught on fire in 1969, it prompted the America people, and eventually Congress, to consider greater protections for our water and helped to spur the environmental movement. In Tucson, the Santa Cruz River effluent stream used to be one of the most toxic in the country – people were warned not to touch it! Now it is one of the cleanest and is supporting an endangered aquatic species after an absence of 74 years – the Gila topminnow http://tucson.com/news/local/endangered-topminnow-s-return-to-santa-cruz-river-in-tucson/article_ea215f68-69de-5ec2-bb8a-168c60b3b513.htm. To weaken, or lose any of our environmental protections would be a huge step backward. If anything, we need to strengthen the CWA, the Clean Air Act and the ESA – they are our best hope and our defense to ensure our own and future generations' health and safety.

What are the implications of the ADEQ considering the assumption of Primacy for Underground Injection Control (UIC)?

As with the CWA 404 permitting program, Arizona previously tried and failed to take over the EPA's UIC federal program which is mandated to protect underground sources of drinking water (USDWs) via permitting, construction, operation, and closure of injection wells <https://www.epa.gov/uic/primary-enforcement-authority-underground-injection-control-program>. Currently, thirty-four states and three territories have EPA approved primacy programs for well classes I (industrial and municipal waste disposal), II (oil and gas related), III (solution mining), IV (shallow injection of hazardous and radioactive materials) and V (non-hazardous fluids into or above underground sources of drinking water). Additionally, seven states and two tribes have applied for and received primacy approval for Class II (oil and gas related) wells only. As yet, no Class VI (carbon sequestration) primacy applications have been approved by EPA. Achieving primacy for any class will require ongoing additional funding, enabling legislation, and rulemaking. State law currently requires an aquifer protection permit (APP) program to control discharges of any pollutant or combination of pollutants that are reaching or may with a reasonable probability reach an aquifer and a permit program for underground injection control described in the safe drinking water act but, the APP, while similar, significantly differs from the UIC. Similar to the rationale for assuming the CWA 404 permitting program, "streamlining the permitting

process” and “enhancing environmentally responsible growth” are stated goals and will require a fee for services structure.

What are the implications of the ADEQ Triennial Review of Outstanding Arizona Waters (OAWs)?

The CWA requires that surface water quality standards be reviewed and updated, if necessary, every three years through a rulemaking process known as the “Triennial Review”

<https://azriparian.org/2017/11/17/triennial-review-surface-water-quality-standards/>. New rules may be proposed that change the standards governing permissible levels of pollution in Arizona streams and lakes, revising which water bodies receive water quality protection and which are ineligible for continued protection under the CWA. Proposed revisions to the standards must be published for review by the public and local, state and federal agencies before beginning the formal state rulemaking process. Final action on the proposed rules is made by the Governor’s Regulatory Review Council. Currently, there are 22 Outstanding Arizona Waters or OAWs

<https://legacy.azdeq.gov/environ/water/permits/download/oaw.pdf>, three of which are in Pima County. They are: Buehman Canyon Creek, Davidson Canyon and Cienega Creek. The Governor’s Office has approved an exemption to the current rulemaking moratorium for the Triennial Review at the request of Hudbay Minerals Inc., who is seeking to develop the Rosemont Mine in the Santa Rita Mountains http://tucson.com/news/local/state-to-review-streams-protections-at-request-of-hudbay-minerals/article_c88f7746-df2c-5bad-be84-46dcf37db7b3.html and <http://www.rosemontminetruth.com/pima-county-rips-hudbays-backdoor-plan-to-gut-outstanding-arizona-water-protections-for-davidson-canyon/>.

Stakeholder participation is currently limited in ADEQ’s review processes. Tucson Audubon, as a founding member of the Community Water Coalition and the Sustainable Water Workgroup, advocates keeping water in our rivers and streams for nature and encourages the Governor to adopt a more open and transparent process https://www.newsdeeply.com/water/community/2017/12/15/governors-water-proposals-dont-protect-arizonas-rivers-and-streams?utm_campaign=6c8b99b2a0-EMAIL_CAMPAIGN_2017_12_14&utm_medium=email&utm_source=Water+Deeply&utm_term=0_2947becb78-6c8b99b2a0-117788501. We are especially proud of TAS Board member and co-author, Tricia Gerrodette, for her continued advocacy on behalf of our rivers!

Speaking of advocacy - take care of yourself, stay strong, and keep up your efforts – what YOU do makes a difference!

While talking to people about the myriad of conservation issues we are facing right now, we frequently hear about the all too common accompaniment to advocacy: burn out, depression and a sense of being overwhelmed. We all feel this from time to time. It is a rule of nature; we cannot always feel upbeat and positive and, especially in these times, your feelings are a normal response to the assaults on our environmental protections. It is important to practice self-care in order to stay effective in the ongoing battle for a safe and healthy environment. Here are a couple tips for self-care and words of encouragement:

- Recognize what makes you feel positive and negative in your life. Make lists and acknowledge both forces in your life. What can you do to shift your balance toward the positive?
- Make a list of activities you do which clear your mind and refresh your soul. These can be anything from reading to hiking to petting the dog.
- Set aside a little time daily to recognize what is going on in your life and schedule your time so you can regularly make space for activities which nurture and invigorate you. Get outside when you can!
- Practice gratitude as well as voicing your opinions to decision makers and demanding action. If your representative does something you appreciate, if your neighbor does something kind or if the sales clerk patiently listens to your rant at checkout, thank them! It is important to recognize when something goes right as well as pushing for change. Practice, practice, practice focusing on the good people do.

Remember:

- You are not alone! While it may seem that we are facing unprecedented threats to our environment right now, we are also in an era of strong activism and are witnessing a tsunami of positive action takers. More and more grassroots organizations and individuals are taking up the fight – thousands, if not millions of people are voicing support for our public lands! Recent elections have seen a wave of dedicated new candidates and inspiring people voted into office. Now is the time to voice your support for what you value and search out others who want to help.
- What takes years to build up can be seemingly erased in a second, but we have those years of experience and mutual support on our side. People value our public lands and the health of their families and communities. Nothing can be erased if we join together, appreciate our heritage, and fight for our future.
- Activism and the rise of collective action DOES work. Sometimes you may wonder if that letter you sent made a difference or if it matters if you call your Councilmembers, Supervisors, Senators and Representatives. Simply, it does. It really does. From Margaret Mead: “Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it’s the only thing that ever has.”

“Love isn’t just something you feel. It’s something you do every day when you go out and pick up the papers and bottles scattered the night before on the corner, when you stop and talk to a neighbor, when you argue passionately for what you believe in with whoever will listen, when you call a friend to see how they’re doing, when you write a letter to the newspaper, when you give a speech and give ‘em hell, when you never stop believing that we can all be more than we are. In other words, Love isn’t about what we did yesterday; it’s about what we do today tomorrow and the day after.” – Grace Lee Boggs, *The Next American Revolution*