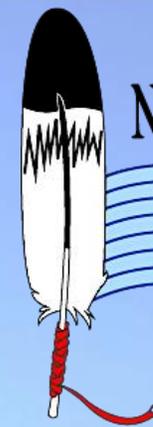
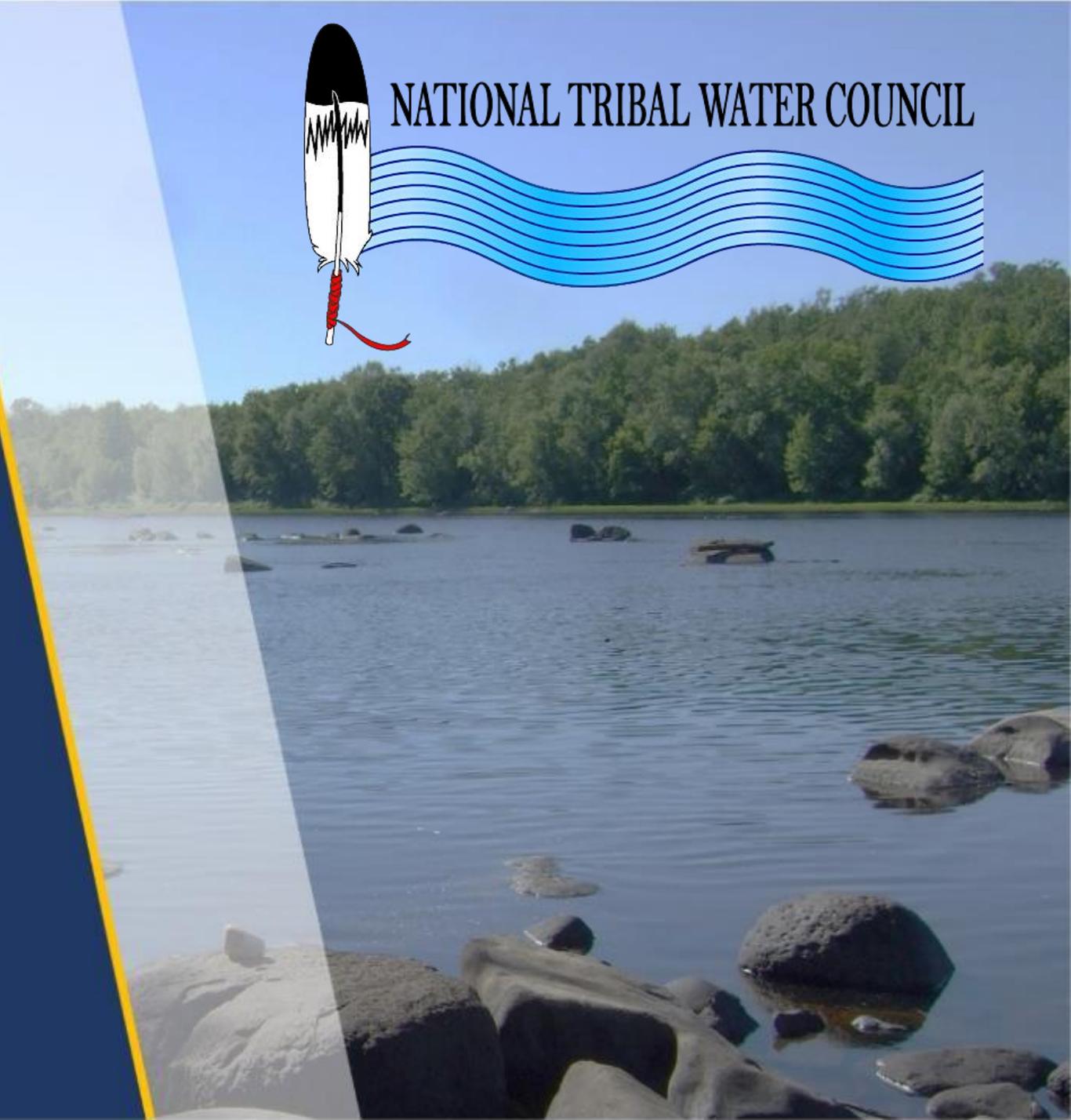


Waters of the US Impacts to Tribal Nations and Waters

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Ken Norton



NATIONAL TRIBAL WATER COUNCIL



National Tribal Water Council

- Established in 2008 to assist EPA, federally recognized Indian Tribes, Alaska Native Tribes with research & information for decision-making on water issues and water-related concerns



WOTUS Rule Impacts to Tribal Nations and Waters

Overall, the Final Rule:

- Diminishes where and when EPA can intervene to protect tribal waters & resources.
- Diminishes opportunities Tribes have to assume and assert EPA delegations of authorities on tribal lands.
- Disproportionally impacts tribal governments and raises concerns related to the federal trust responsibility & violations of reserved water rights.



Fewer Tribal Waters Protected

- EPA will grant TAS and approve WQS for waters covered by the CWA (that is, waters defined as “WOTUS”).
- Only federally approved WQS must be considered by upstream point source dischargers of the reservation.
- Fewer NPDES and CWA 404 permits will be required, which means Tribes have fewer opportunities to obtain protection of their WQS through the CWA 401 permit certification process.



Impacts to Federal Trust Obligations to Indian Tribes & Reserved Water Rights

- Breach of the federal government's obligation to protect tribal water resources, due to agencies' reduced permitting oversight.
- Tribes left to fend for themselves, regardless of contamination to ephemeral and intermittent streams used for drinking, irrigation, and ceremonial practices.
- Rule fails to consider tribal reserved water rights.
 - There's no distinction in federal Indian water law as to the type of water flow (i.e., perennial, ephemeral, intermittent, or connected to navigable waters) that is subject to a tribe's reserved water rights. The waters that satisfy those rights are trust assets subject to federal protection and jurisdiction.
- Of the 300 tribes that have reservations with water bodies, only 30 -35 tribes have adjudicated or settled water rights.



Tribes are Disproportionally Impacted

- Only ~10% of tribal governments have their own water quality standards, and none has NPDES or CWA 404 permit programs.
- Tribes with federally approved WQS rely on EPA and its permitting programs to protect their waters; the narrow WOTUS definition lessens this protection and has a disproportionate impact on tribes.
- Rule could result in even fewer tribal waters being protected in the future.
 - Human activities and climate change may shift many perennial and intermittent streams to ephemeral streams; and
 - This change could disproportionately impact many of the large land-based tribal nations, especially in the arid Southwest.

Rule Places Strong Emphasis on States/Tribes Exercising their Authority

- For waters that are not WOTUS, the new rule claims States and Tribes are “free” to manage their waters under their independent authorities.
 - Oversimplifies the jurisdictional and regulatory relationship between states and tribes.
 - Sweeping reduction in federal protection for water features, such as non-connected wetlands and ephemeral streams disproportionately impact Tribes because Tribal lands are more likely to abut to other federal lands and most Tribes will not be able to protect those waters due to resource and capacity constraints.
 - Tribes are subject to state regulatory regimes that often do not adequately consider tribal interests.

Administering CWA Grant Programs Under the New Rule

- The final rule will not have an impact on Tribes seeking CWA Section 104 (b)(3) Wetland Development, 106 Clean Water Protection, and 319 Non-Point Source Management grant programs.
- No reduction in allocations to these CWA financial assistance programs.

Tribal Water Quality Standards Guidance

- NTWC is developing a guide (handbook) as a resource for tribes to develop their own water quality standards (“WQS”) under their own tribal authorities, separate from federally approved WQS.
- It is important to note, tribally adopted WQS are limited in preventing off-reservation pollutant discharges, but can be considered on a case-by-case basis.
- Other constraints:
 - Tribally adopted WQS are not covered by CWA provisions.
 - Difficult to enforce on nontribal lands within the reservation.



Thank you / Contact Information

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