

*Clean Water Act Update*  
*March 22, 2018*

**2018 Gatekeeper Regulatory  
Roundup**

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# Acronym Primer

- *WOTUS = Waters of the United States/Navigable Waters*
- *SCOTUS = Supreme Court of the United States*
- *CWA = Clean Water Act*
- *NPDES = National Pollutant Discharge Elimination System*
- *EPA= Environmental Protection Agency*
- *404 = CWA § 404 aka dredge/fill permit program*
- *UIC = Underground Injection Control*
- *CORPS = United States Army Corps of Engineers*
- *TNW = Traditionally Navigable Water*

# WOTUS

- 6/29/15 EPA and Corps Finalize “2015 Revision” to WOTUS definition
  - *Rapanos* “significant nexus” (broad) approach (Kennedy)
- 8/27/15 – N.D. Dist. Ct. stays 2015 Revision in 13 states (AZ included)
- 8/28/15 – Effective Date of 2015 Revision
- 10/9/15 – 6<sup>th</sup> Cir. Stays 2015 Revision Nationwide

## *WOTUS (Cont'd)*

- 1/13/17 – SCOTUS agrees to hear issue of whether Federal District or Appeals courts have jurisdiction
- 2/28/17 – Trump Executive Orders – review and revise or rescind and consider Scalia opinion
- 7/27/17 – Agencies propose to rescind and revise
- 1/22/18 – SCOTUS decides District Courts should hear WOTUS challenge to 2015 Revision
- 2/6/18 – EPA/Corps Extend Effective Date of 2015 Rule for 2 Years
- Current Status: Pre-2015 regulations apply including cases, guidance.

# DOJ ENFORCEMENT MEMOS

- 01/25/18 DOJ memo prohibits DOJ from citing violations of guidance documents
- Enforcement must be based on rules
- Impact on CWA enforcement?

# CWA ENFORCEMENT

- *U.S. v. Robertson* (9<sup>th</sup> Cir. 11/27/17)
- 78 yr old disabled Navy veteran constructed ponds on creek
  - discharged fill material into wetlands and tributary to tributary to tributary to TNW (60 miles away)
- Court relied on the *Rapanos* “significant nexus” test (Kennedy)
- Robertson argued for *Rapanos* Scalia test: waters adjacent to or continuous surface connection to WOTUS
- Convicted and sentenced to 18 mos.

# Groundwater Discharges

- CWA Requires NPDES Permit for Discharge of Pollutant from Point Source to Navigable Waters
- *Hawaii Wildlife Fund v. County of Maui* (9<sup>th</sup> Cir. 2/1/18)
  - NPDES permit required for discharges to groundwater via injection wells, with direct hydrologic connection to Pacific Ocean
    - 3.5M gal. treated wastewater daily
    - Pollutants were “fairly traceable” to the wells, functional equivalent of discharge to WOTUS
    - Pollutant levels greater than de minimus
    - Court adopts “direct hydrologic connection” theory
    - Irony Alert! Court cites Scalia opinion in *Rapanos*

# Groundwater Discharges (Cont'd)

- Three Court Positions to Date:
  - Groundwater never regulated under CWA (D. Ore)
  - Discharge to groundwater regulated if direct hydrologic connection to WOTUS
  - Isolated groundwater not regulated
- Other Cases Pending (2<sup>nd</sup>, 4<sup>th</sup> & 6<sup>th</sup> Cir.)
  - Basement seepage
  - Pipeline leaks
  - Coal ash ponds



# Groundwater Discharges (Cont'd)

- 2/20/18 EPA requested comments (by 5/21/18)
  - Direct hydrologic connection theory
  - Other regulation programs sufficient?

Q: Who cares?

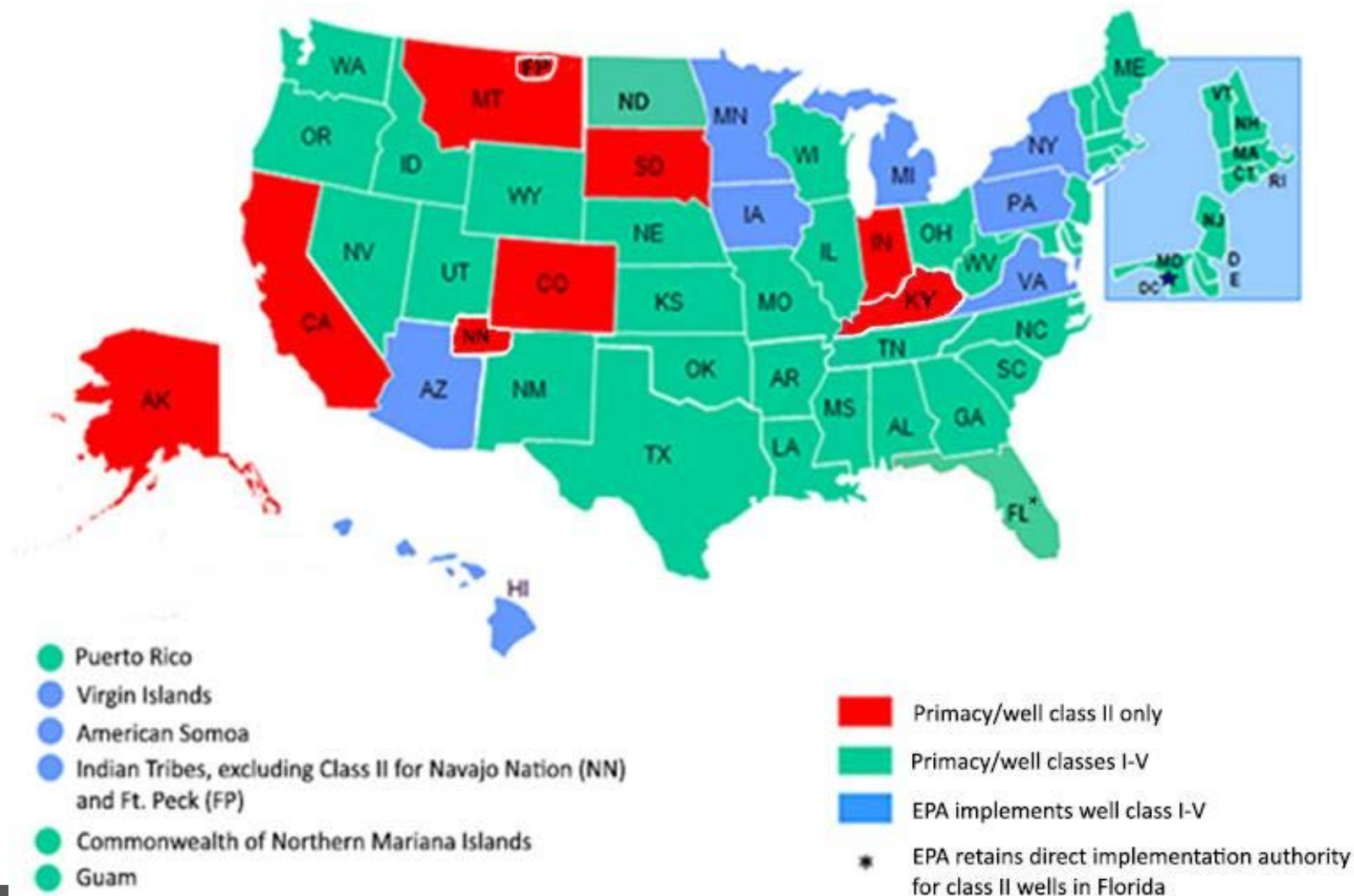
A: Any facility that discharges pollutants to land or groundwater if the pollutants reach WOTUS, and the facility has no NPDES permit!

- 3/1/18 Petition for rehearing filed

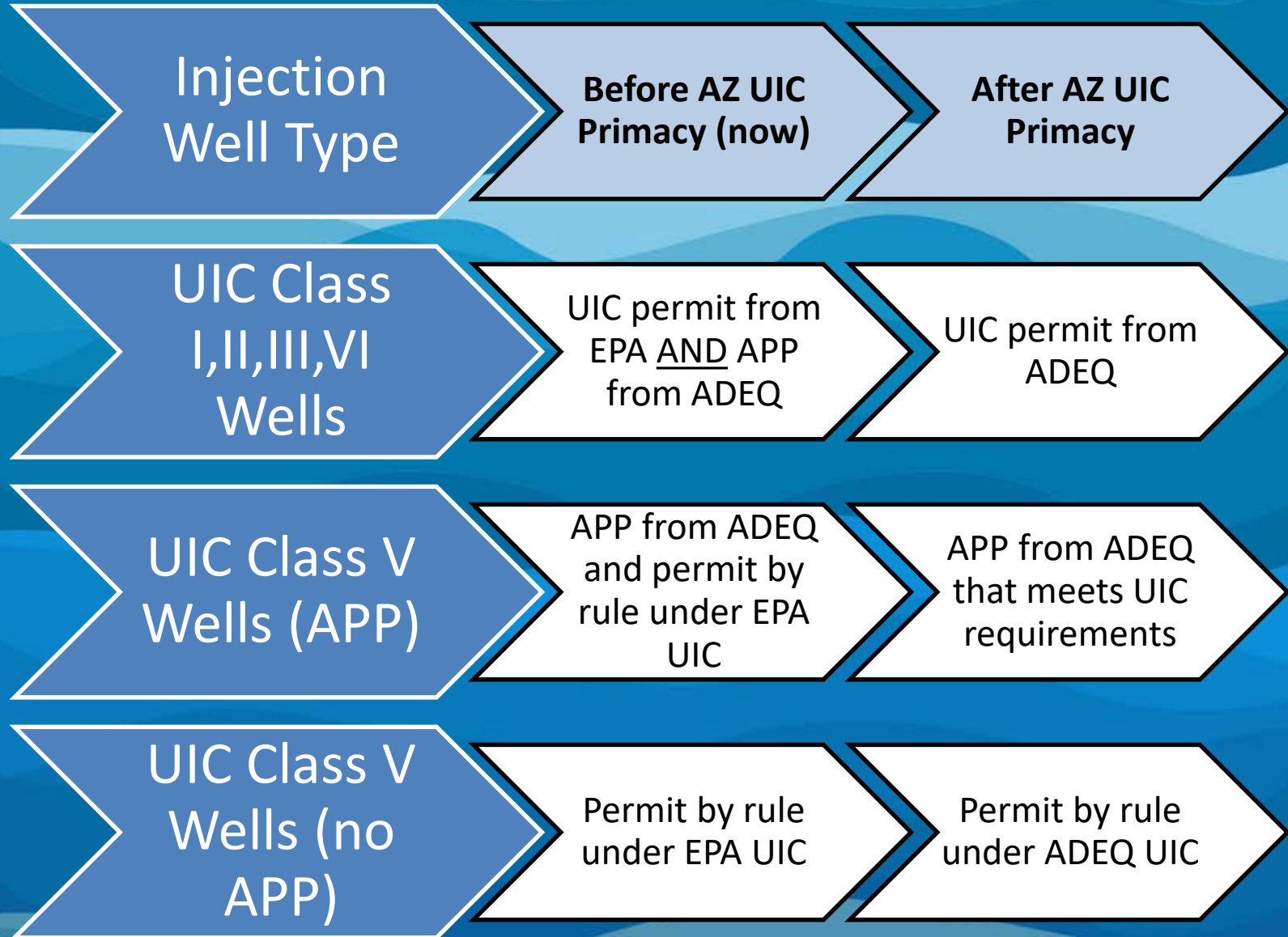
# ADEQ PRIMACY

- 12/4/17 – Kicks off stakeholder process re: 404 and UIC Programs
- 3/19/18 – UIC Bill (SB 1494), 404 bill (SB 1493) both close to Governor's desk
- Legislative Authority ✓
- Rulemaking Proposals
- Stakeholder Input
- Authorization by EPA

# National Picture for UIC



# What will Happen?



# UIC Primacy Questions

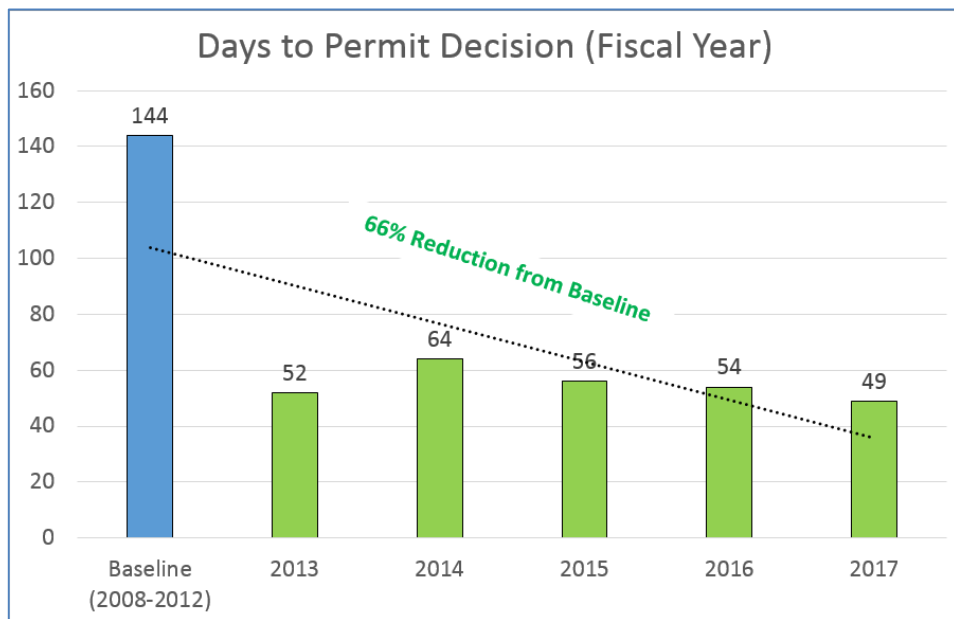
I have an APP to inject treated effluent, what will change?

I have an AZ registered drywell, will I need to re-register under UIC?

How will ADEQ have the resources to administer the UIC program and to issue permits?

Will the ADEQ UIC program be as stringently protective of groundwater as the EPA program?

# Benefits of 404 assumption?



Increased speed

Local Control – Cooperative Federalism

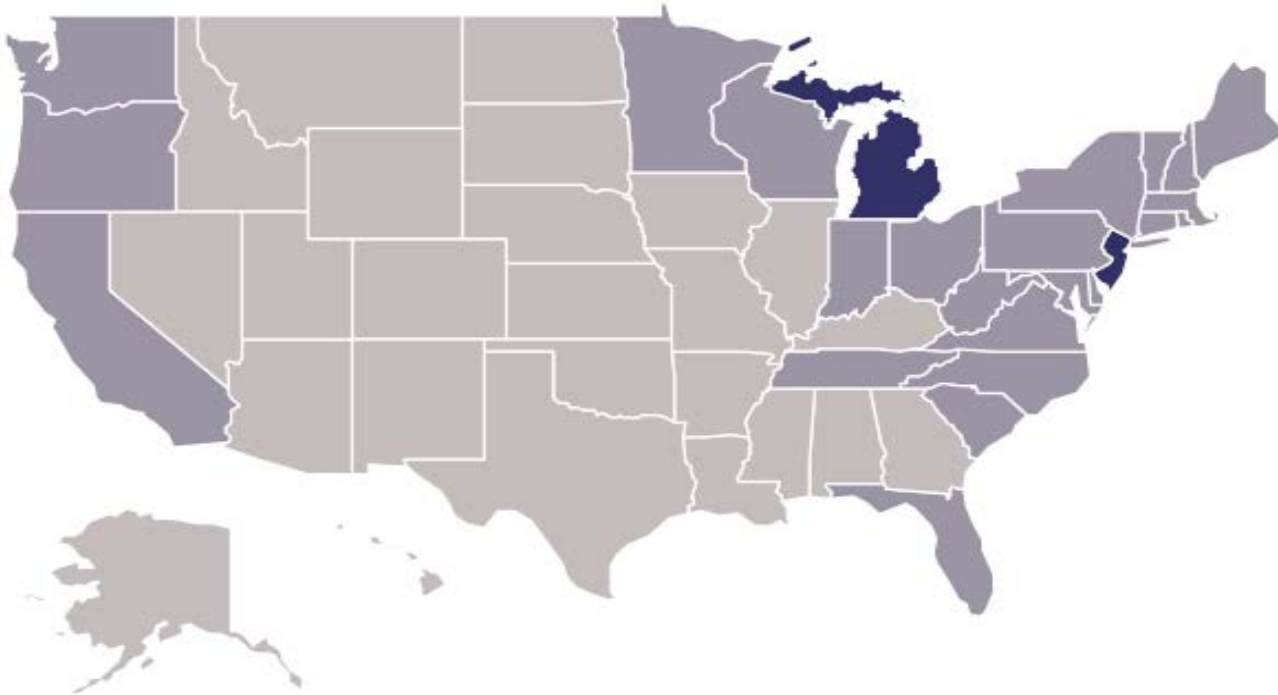
Better customer service

Alignment of CWA programs

Reduced lifecycle costs

ADEQ Permit Timeframes from 2012 to 2017

# The National Picture



- Corps-administered 404, no state wetland program regulating dredge and fill
- Corps-administered 404 + state wetland program\*
- Full assumption of the 404 program

*\*may have State Programmatic General Permits to eliminate duplication between state wetland permits and 404 permits*

# What Does “Assumption” Mean?

- Determine what waters are regulated under the Clean Water Act
- Prevent and mitigate impact from dredge and fill activities in Waters of the United States in Arizona
- Assume primary responsibility to approve, deny, and condition dredge and fill permits.

**Section 10  
Waters  
(Colorado  
River)**

**Tribal  
Waters**



# 404 Questions

1. Will ADEQ keep existing jurisdictional determinations?
2. Will ADEQ adopt Corps general permits?
3. How will permitting process differ from the Corps?
4. How will fees be structured?
5. Will there be a loss of priority for public entities (e.g. ADOT)?
6. How will ADEQ cover litigation costs?
7. How will biological assessments work, including Endangered Species Act aspects?
8. Will state have the same "sway" with EPA that the Corps does?
9. How will ADEQ address EPA objections to permits?

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- Mike Ford has more than 20 years of experience working with clients ranging from religious orders to global corporations in navigating the complex web of environmental and workplace safety issues impacting industrial operations and commercial transactions. Mike has worked with businesses including miners, manufacturers, recyclers, metal platers, developers and retailers on regulatory compliance, enforcement defense and mitigating liability risks associated with corporate and real estate transactions. He has handled matters under all of the major federal environmental, health and safety statutes, including the Clean Air Act, Clean Water Act, Comprehensive Environmental Response, Compensation, and Liability Act, Emergency Planning and Community Right to Know Act, Federal Insecticide, Fungicide and Rodenticide Act, Mine Safety and Health Act, Occupational Safety and Health Act, and Resource Conservation and Recovery Act, as well as many key state environmental laws, including Arizona's Aquifer Protection Program and California's Proposition 65.
- Mike has helped clients efficiently resolve their government enforcement issues using voluntary disclosures, administrative settlement agreements and judicial consent decrees. He has managed environmental due diligence and negotiations in deals involving everything from mom-and-pop drycleaners to large scale mining facilities. Mike has worked extensively on issues impacting the mining industry, including groundwater and surface water permitting and compliance, chemical reporting, release response and closure operations. He also has considerable experience in mobile source emissions compliance and enforcement defense, particularly regarding Chinese imports. His experience in Brownfields development includes project feasibility analysis and due diligence, contract negotiation, voluntary cleanup programs,