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EPA's new waters rule may affect oversight of Los Alamos stormwater

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The U.S. Environmental Protection Agency's new navigable waters rule could lead to a reversal of its decision to regulate Los Alamos County's contaminated stormwater, which flows into streams and the Rio Grande.

The EPA determined in December that runoff from Los Alamos National Laboratory and other parts of the county should require a pollution permit under the Clean Water Act because it contains toxins such as mercury, copper, nickel, cyanide, radiation and polychlorinated biphenyls, commonly known as PCBs.

A September lawsuit by the Taos-based advocacy group Amigos Bravos called for the agency to make a decision based on research showing some pollutants far exceeded state health and water quality standards. The lawsuit was a follow-up to the group's 2014 petition to the EPA requesting federal oversight of the tainted runoff.

The state Environment Department has pegged PCBs, a carcinogen, at 14,000 times the level deemed safe for human health in Sandia Canyon and 11,000 times the limit in Los Alamos Canyon.

Then last month, the EPA issued a nationwide rule that narrows the definition of waters that qualify for federal protection. If the agency follows the new rule to the letter, it could withdraw its oversight of Los Alamos' polluted runoff, some of which drains into the Rio Grande, a primary source of drinking water.

"I would say that is possible," Charles de Saillan, an attorney with the New Mexico Environmental Law Center, said on whether the EPA might nix the permit.

If the EPA reverses its decision to regulate Los Alamos' runoff, the law center will take action, de Saillan said.

EPA representatives told *The New Mexican* they would look into whether the agency would suspend or move forward with the Los Alamos pollution permit, but they offered no immediate answers.

Another potential hurdle is Los Alamos County opposing the federal pollution permit. The county filed a challenge with the federal Environmental Appeals Board, arguing the EPA took far too long to act on Amigos Bravos' 2014 petition and based its decision on insufficient data.

The EPA contends the administrative board is an improper venue to resolve the dispute and wants the case to be heard in federal court.

Legal wrangling ahead

Under the new rule, federal protection will be extended to navigable waters that exist year-round — such as the Cimarron and Pecos rivers and the Rio Grande — as well as “intermittent waters,” or those that flow seasonally.

“Ephemeral waters” created by heavy rains are excluded, even if they drain into navigable rivers. That would disqualify Los Alamos' runoff.

Environmentalists, state regulators and lawmakers have condemned the rule, saying it bars most of New Mexico's waters from federal protection. Gov. Michelle Lujan Grisham, who called it a disaster, is among those who have vowed to fight the rule in court if necessary.

“This is a massive giveaway to polluters,” said Rachel Conn, projects director for Amigos Bravos.

Conn said more than 50 groups submitted comments to the EPA opposing “the dirty water rule.”

This rule, she said, not only removes waterways protected under Obama's Clean Water Rule but ones that qualified for federal oversight in the Reagan administration.

Amigos Bravos is preparing to file a lawsuit to challenge the rule, Conn said. The legal battles that will ensue are bound to stall the rule, just as lawsuits blocked Obama's water policy from taking effect, said Andrew Hawley, an attorney with the Oregon-based Western Environmental Law Center, which assisted Amigos Bravos in pushing for Los Alamos' pollution permit.

In the meantime, Hawley is hopeful the EPA will follow through with its decision to regulate Los Alamos stormwater, given the health hazards.

“The EPA made the right decision that these water bodies are impaired,” Hawley said.

Constitutional or not?

Last year, de Saillan and Conn co-wrote and submitted a comment to the EPA about the rule it was proposing.

They argued it was a flawed reading of the Constitution and Clean Water Act to not regulate ephemeral streams that flow into navigable waterways like the Rio Grande.

The agency was ignoring the downstream impacts that polluted stormwater might have on these water bodies, they wrote. They noted the EPA has issued almost a dozen other pollution permits to the Los Alamos lab for stormwater discharges that are ephemeral.

“If these permits are canceled due to lack of jurisdiction, water quality in the canyons and downstream in the Rio Grande would be degraded,” they wrote.

The EPA, they said, was relying too heavily on Justice Antonin Scalia’s opinion in *Rapanos v. The United States*, in which he said only continuously flowing or standing waters fall under federal jurisdiction. Scalia made some allowance for seasonal waters.

But in that same case, five justices agreed that a stream need only have a significant “nexus” or link to a navigable waterway to have federal protection. By that standard, Los Alamos’ stormwater should be regulated, Conn said.

Los Alamos County, however, argues the EPA should never have imposed federal permitting.

The agency made a final determination on a 5-year-old petition by Amigos Bravos after the group prodded it to do so in September, the county wrote in its appeal. The EPA should have made a decision within 90 days after the petition was filed, and not 2,004 days later, the county argued.

In 2014, the agency would have had to reject pollution permitting because the rules at the time would not have allowed Los Alamos runoff to be declared a federal waterway, the county said.

EPA also cited pollution data in letters it received, including from the state Environment Department, rather than conducting its own tests, the county said.

“The County is demanding no more of the federal government than any citizen should demand from any government,” County Manager Harry Burgess said in an emailed statement. “Namely, that the government not exceed the limits placed on its authority by the governed, that the government follow the rules, and that any decision made by that government be based on sound facts and reason.”

The county supports a clean environment, Burgess said, but can't get behind a federal agency trying to regulate waters that, according to the Constitution, are outside of its jurisdiction.

"It will be up to the federal courts to rule on these issues," he said.

Conn said the county apparently would rather have dirty stormwater than work with other agencies to clean up and filter contaminants.

"It's very disappointing that one of our counties is not stepping up and taking responsibility for pollution running off the structures, parking lots and roads," Conn said. "We need, as a state and a county, to take responsibility."

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Reporter