

Environmental groups sue EPA for reducing local oversight of waterways

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Three conservation groups have sued the Environmental Protection Agency over rule changes reducing state and tribal oversight of projects that may harm local waterways.

Taos-based Amigos Bravos joined the Natural Resources Defense Council and the Waterkeeper Alliance in filing a lawsuit this week against the EPA for revamping the Clean Water Act's 401 section, which defines states' authority in federal pollution permitting.

This lawsuit comes after a coalition of 21 state attorneys general, including New Mexico's, sued the EPA last month over the agency's rule changes, which went into effect July 13.

The changes most under fire limit the conditions that a state can impose on a project's permit to protect waterways, tightens the time frame that data and public comments can be collected on a project and makes it easier for federal agencies to overrule the state.

"In the end we're going to have less authority, less power and less voice for the local community ... and less protection for our waterways," said Frank Holleman, an attorney for the Southern Environmental Law Center, which is representing the conservation groups. "It's an approach that no administration going back to the Nixon administration has ever attempted before."

EPA officials said they don't comment on pending litigation.

The revised rule will hit New Mexico hard because it is one of just three states with no delegated authority from the EPA to regulate polluted discharges into rivers, streams and lakes under the Clean Water Act, said Rachel Conn, projects director for Amigos Bravos.

So it's even more important that the state can add a broad range of permit requirements to protect water ecosystems, Conn said.

The EPA's new rule limits the state to imposing conditions on a specific source of pollution affecting water quality, she said. If a construction project also dumps silt into a tributary, which doesn't hurt water quality but harms wildlife habitat, it doesn't count, she said.

State oversight of discharges is mainly limited to those flowing into navigable waters, Conn said. The EPA recently changed the rule defining navigable waters, excluding as “ephemeral” storm-generated streams and tributaries that flow intermittently and not in regular seasons.

That disqualifies most of New Mexico’s waters from federal protection, she said. It also means the state will be tightly restricted in imposing limits on discharges, she added.

“It’s a one-two punch,” Conn said.

Holleman said the EPA’s new navigable waters rule was supposed to shift more oversight to the states, and now the agency is taking away much of that authority.

“The only unifying theme here is to reduce protections of the nation’s waters and to aid polluters,” Holleman said.

Under the rule change, the state can require that a company building a bridge across a river clean up any runoff from the bridge work, Holleman said. But it can’t mandate that contaminants spilled into the water from other types of work at the site be mitigated, he said.

State Environment Secretary James Kenney also opposes the rule changes.

“The proposed rule infringes on states’ authority and autonomy to manage and protect water resources within their borders,” Kenney wrote in an October 2019 letter to EPA chief Andrew Wheeler.

The new rule not only diminishes state authority but undermines New Mexico’s pueblos in safeguarding the waters on their tribal lands, he said.

Kenney said he also is concerned about the compressed time frame for gathering public comment and determining guidelines for projects.

The standard time for establishing a 401 permit has been a year, Holleman said. In the past, the clock didn’t start ticking until after some research and fact-finding was done, both by the public and the developers, he said.

But the rule changes now require the clock to begin when the application for the project is submitted, he said. It also doesn’t allow the state to order an application to be withdrawn if certain guidelines aren’t met, he said.

And it allows an agency like the EPA to override any permit conditions the state imposes that go beyond federal regulations, Holleman said.

The EPA is weakening a rule that Congress created to give citizens the power to keep their water clean, which makes it different from most environmental rules, he said.

“Local groups, local people have the authority to ensure their waterways are protected by compliance with the conditions of the permit,” Holleman said. “But if those conditions never get in the permit ... there’s nothing to enforce.”