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Santa Cruz outcome will affect washes, too

By Tony Davis

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Pollution controls protecting tributaries to the Santa Cruz River hinge on the outcome of the continuing debate over whether the river is navigable.

Much of the bite that currently exists in anti-pollution rules for rivers and streams could be significantly lessened in the Tucson area if the U.S. decides not to declare the Santa Cruz a navigable stream, say several experts, including some from state and federal agencies.

Navigability is a key question determining whether rivers and tributaries fall under control of the U.S. Clean Water Act because of a 2006 Supreme Court decision limiting that law's scope.

At stake is how much authority public agencies have to control which pollutants are dumped or discharged by sewer plants, industries, individuals and others into such Santa Cruz tributaries as the Rillito River, Pantano Wash, Davidson Can-yon, Tanque Verde Creek and Cienega Creek.

Biologists have long said these washes offer some of the best havens in the Sonoran Desert for mammals, birds and other wildlife. But most of these streams — about 95 percent of all rivers and washes in the entire state, in fact — don't carry water year round and usually have water only after big storms.

The state and Pima County governments could pick up some of the regulatory slack if the federal protections disappear. The state Department of Environmental Quality has an aquifer protection program that can be used to protect streams. Pima County has an anti-dumping law that could be used to stop dumping of wastes into rivers.

But the state rules are generally less strict and sweeping than the federal rules. State and local fines are also smaller. The county has only one inspector for its anti-dumping law.

State and local governments also have limits on rules they can impose because Arizona's water-pollution controls can't be stricter than federal law.

The Environmental Protection Agency could find another way to ensure legal protection of the Santa Cruz if it isn't declared navigable, but tributaries could lose protection, Benjamin Grumbles, a top Environmental Protection Agency official in Washington, D.C., said in a recent interview.

The Santa Cruz could be protected by classifying it as an interstate stream, because it flows from Mexico into the United States, said Grumbles, EPA's assistant administrator for water programs.

"EPA believes all streams and creeks have value, but not all are protected under the Clean Water Act," Grumbles said. "The real battle is more over the creeks and tributaries to the Santa Cruz."

An EPA attorney, while declining to discuss the Santa Cruz specifically, said that in general, for rivers and streams that don't legally merit federal controls, there would be no Clean Water Act enforcement.

Rules at risk

Anti-pollution rules for rivers that are potentially at risk if the Santa Cruz isn't a navigable stream include:

- Those requiring permits for industries, sewage plants and others to discharge various kinds of wastewater into rivers. The state has issued 12 such permits in Pima County for the Santa Cruz and its tributaries.
- Those banning outright dumping of pollutants into rivers.
- Those requiring developers of new projects to get permits — 900 now existing in Pima County — to minimize discharge of pollutants in stormwater and to control erosion and sediment runoff. Urban stormwater runoff can be very polluted and without adequate controls can hurt stream water quality, state environmental officials say.

THE STORY SO FAR

Arizona's dry rivers and streams have had protection from pollution under the federal Clean Water Act since it passed in the 1970s.

The fate of those controls is now uncertain because of a 2006 U.S. Supreme Court decision in which one justice said such water bodies need a significant connection to a navigable river.

The Environmental Protection Agency took over the handling of the navigability issue last month, after the Army Corps of Engineers declared the Santa Cruz River navigable, then suspended that decision to conduct a detailed

That means no enforcement against dumping of pollutants, "be they toxic wastes, raw or partially treated effluent, industrial storm-water runoff, mining residues, or dredged or fill materials, such as those used for diversion structures or construction projects," said the attorney, Jessica Kao, a deputy general counsel in EPA's San Francisco-based regional office.

"I can put sand, gravel or concrete blocks in a river, divert it, fill it up or put water underground there, and from a federal perspective I am not going to do anything about it," Kao added. "The state and county may be able to do something, but we can't do anything about it."

Losing one specific form of federal pollution control — the right to issue permits to sewage plants under the Clean Water Act — would be a "disaster," said Joan Card, water quality division director for the Arizona Department of Environmental Quality.

That's because the Clean Water Act offers protections to ensure that rivers are OK for wildlife, farming and livestock irrigation, but state anti-pollution programs don't, she said.

The state aquifer protection program requires many industries and agencies to get permits to protect groundwater from their discharges. It could be used to regulate discharges into rivers and streams.

But the state rules don't have water quality standards for nearly as many pollutants as the Clean Water Act has, said Card.

Roger Ferland, a Phoenix attorney who represents manufacturing companies, government agencies and Indian tribes, said he's not sure the consequences for river protection would be as dire as the agencies say.

But it's hard to be certain, Ferland added, because the Supreme Court ruling and various federal agency guidelines have been very unclear.

"No one really knows what the rules are because of the uncertainty," Ferland said. "With the uncertainty, the regulatory agencies don't make decisions, and when they don't make decisions, everybody loses."

For a tributary that carries water only after rains, Ferland questions whether you need the same standards as you do for rivers that run year-round.

If the river isn't declared navigable, EPA officials could still protect tributaries from pollution by showing that a toxic chemical dumped into it will ultimately hurt the Santa Cruz, said law professors from Vermont Law School and Case Western Reserve University in Ohio.

"I doubt EPA will throw in the towel and write off an entire watershed like the Santa Cruz," said Vermont Law School's Pat Parenteau.

But such a link between a polluted tributary and the river would be hard to prove, said an environmentalist from the group Earthjustice.

"You have to wait for the pollutant to get to navigable water" before the feds can regulate it, and by then they would have huge problems proving who discharged it, said Joan Mulhern, Earthjustice's legislative counsel.

A success story under the Clean Water Act is playing out on the Santa Cruz River just north of Nogales. There, authorities are spending \$59 million at the Nogales International Wastewater Treatment plant to build a series of new basins, pipes and other equipment.

When the upgraded plant goes on-line next year, it will remove ammonia from sewage effluent coming from Nogales, Ariz., and Nogales, Sonora.

The improvements were done primarily to meet federal requirements to protect the river for fish life, said a Santa Cruz County attorney who spent 14 years pushing to get this plant upgrade on track.

"This is a huge, positive thing going on down here. Everybody said we want our river," said Hugh Holub, who left Nogales city government in 2007 and now works in private practice.

Without federal Clean Water Act authority over the Santa Cruz, "we wouldn't ever have gotten the plant built," Holub said. "We would have raw sewage flowing through the Santa Cruz River."

Pima County has also committed to removing ammonia from its two big sewage plant discharges — at Roger and Ina roads along the Santa Cruz — as a condition for getting Clean Water Act permits for those plants. With debt service

review.

A decision is expected in about two months.

Meanwhile, the Supreme Court decision is having a national impact.

It has reduced U.S. enforcement of anti-pollution laws, EPA records show, and in two big cases — in Alabama and Texas — caused federal courts to limit prosecution of pollution violations.

included, the cost of upgrading the plants tops \$1 billion.

But the county won't back off those commitments even if the river itself loses federal protection, the county's wastewater chief said. The county has agreed to get Ina upgraded by 2014 and Roger upgraded by 2015.

The county has already issued contracts for much of the upgrade work and is negotiating others, said Michael Gritzuk, director of the County Regional Wastewater Reclamation Department.

When the county's sewage plant permits expire by 2011, "we'll be under construction for every one of these projects," he said. "Are we going to stop the construction? Even if we wanted to, you know what kind of a mess that would get us into."

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