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Washington Section

E.P.A. Scaled Back Rules on Wetlands

By John M. Broder

Washington, July 5 -- After a concerted lobbying effort by property developers, mine owners and farm groups, the Bush administration scaled back proposed guidelines for enforcing a key Supreme Court ruling governing protected wetlands and streams.

The administration last fall prepared broad new rules for interpreting the decision, handed down by a divided Supreme Court in June 2006, that could have brought thousands of small streams and wetlands under the protection of the Clean Water Act of 1972. The draft guidelines, for example, would allow the government to protect marsh lands and temporary ponds that form during heavy rains if they could potentially affect water quality in a nearby navigable waterway.

But just before the new guidelines were to be issued last September, they were pulled back in the face of objections from lobbyists and lawyers for groups concerned that the rules could lead to federal protection of isolated and insignificant swamps, potholes and ditches.

The Environmental Protection Agency and the Army Corps of Engineers, charged with enforcing the Clean Water Act, finally issued new guidelines last month, which environmental and recreational groups complained were much more narrowly drawn. These groups argue that the final guidelines will leave thousands of sensitive wetlands and streams unprotected.

The changes in wording between the September and June versions of the guidelines were subtle, hinging on broad scientific questions raised by the Supreme Court ruling over the nature of wetlands and natural drainage systems.

The most nettlesome of these issues was whether regulators need to show that a wetland is directly connected to a navigable body of water in deciding if they have jurisdiction to require permits under the Clean Water Act. The alternate reading, favored by environmental groups, is that it is enough to prove that a wetland or stream is part of a large watershed that drains into such waters.

Environmental advocates said the policy adopted in the June guidance reflected the concerns of developers and polluters and could have a profound effect on how federal water laws are applied.

“There are definitely waters that will not be protected because of this latest guidance,” said Navis Bermudez, a water policy analyst at the Sierra Club. “The final guidance is clearly weaker than what we saw in the September guidance.”

The guidelines are the government’s first attempt to interpret the Supreme Court decision in *Rapanos v. United States*, in which the court left a muddled definition of what constituted a protected waterway.

The court divided into two four-member blocs, with Justice Anthony M. Kennedy's opinion controlling the outcome but leaving government lawyers and outsiders puzzled as to how to carry out the ruling.

Administration officials involved in drafting the guidelines said that the rules went through a routine interagency review and that industry lawyers and lobbyists did not exert improper influence.

The E.P.A. official responsible for enforcing clean water rules declined to comment on how the rules evolved. That official, Benjamin H. Grumbles, the agency's assistant administrator for water, said that the agency "participated in routine discussions with stakeholders, including environmental groups and members of industry," in drafting the rules.

Draft guidelines were completed in September and officials at E.P.A. and the Corps of Engineers prepared a press release outlining the new rules. But at that point the process halted and the guidelines moved to the White House, where the Council on Environmental Quality began a review. Officials at the council described this as a routine part of the rule-making process.

The draft guidelines, leaked to environmental groups by someone within the government, allowed officials to look at the impact of dredging or discharge of pollutants on a wide region or watershed, potentially putting millions of acres of land adjacent to streams and wetlands off limits to industry, agriculture and development. Lobbyists for these groups immediately raised objections.

Virginia S. Albrecht, a prominent Washington lawyer representing developers, wrote to the White House in September to express concerns about the breadth of the proposed rules. Among her chief objections was that the rules as written would allow the government to regulate development over a wide region even if the impact on a stream or swamp of a proposed project was highly localized. She also said that projects should be reviewed on a case-by-case basis to see if they meet the tests set out by the Rapanos decision.

The National Cattlemen's Beef Association and Alliance Coal, one of the nation's largest coal producers, also weighed in on the proposed guidelines, expressing concern that the new rules would affect temporary drainage ditches and "ephemeral" streams that appear only after heavy rain.

The Sierra Club, Earth Justice and other environmental groups concerned about the new rules obtained their communications with the White House under the Freedom of Information Act.

Ms. Albrecht and Alliance Coal declined to comment. Jeffrey Eisenberg, a Washington lobbyist for the beef association, said that his concern was that the new rules be clear enough for farmers and ranchers to be able to predict what lands and waters would be covered.

A White House official involved in the process said that trying to interpret Justice Kennedy's language was frustrating because his decision was open to differing interpretations. He said the process took months because of the complexity and the large number of agencies and interests involved. He also said there was no significant intervention by Vice President Cheney or any Cabinet officer.

"We hashed it out and I think we ended up with a pretty effective policy," said the official, who spoke about internal administration discussions only on condition of anonymity. "I don't think anybody claimed victory publicly, and I don't think anybody thinks we're done with this issue either."