EPA, Corps of Engineers may relax Clean Water Act rules

Court case interpreted more loosely

By Douglas Jehl
N.Y. Times News Service

WASHINGTON | The Bush administration opened the way on Friday for a redefinition of federal rules that could remove obstacles to development on millions of acres of isolated wetlands historically protected under the Clean Water Act.

Inviting public comment on the shaping of new rules, the administration said it was acting in response to a 2001 Supreme Court ruling that limited the scope of the Clean Water Act's jurisdiction over isolated wetlands.

But in contrast to the Clinton administration, which interpreted that opinion very narrowly, the Bush administration signaled its willingness to consider a much broader approach that could ultimately remove from federal jurisdiction up to 20 percent of the country's wetlands.

The Environmental Protection Agency and the Army Corps of Engineers said the action would "clarify and reaffirm" the agencies' authority "over a vast majority of the nation's wetlands."

But critics, including leading environmental organizations, said the plan could reduce the scope of the Clean Water Act well beyond what the court had required.

Depending on the outcome of the rule-making process, they said, developers would no longer need to seek federal permits before filling in land on millions of acres of wetlands where their actions have until now been strictly regulated.

In the meantime, until any new rules are made final, the corps and the EPA issued new guidance to their field offices discouraging them from asserting jurisdiction over wetlands unless they lie adjacent to traditional navigable rivers, streams and their tributaries.

In cases involving isolated, intrastate, non-navigable waters, the groups said, formal approval from the agency's headquarters would now be required to assert federal jurisdiction.

The administration move could benefit homebuilders and other developers, who have long complained that federal agencies unlawfully extended the reach of the Clean Water Act to include waters and wetlands that should not fall under the jurisdiction of the federal government.

Homebuilders' organizations backed the challenge to the rule that was upheld by the Supreme Court in January 2001, in Solid Waste Agency of Northern Cook County v. Corps of Engineers.

At issue is the question of how far the Clean Water Act should extend to isolated wetlands.

The Supreme Court decision in the 2001 case, involving an isolated pond, invalidated the corps' "migratory bird rule" as the basis for regulating wetlands with no connection to navigable waterways.

That rule said that because migratory birds, which use isolated wetlands, are significant to interstate commerce, the federal government may regulate ponds, even if they have no other connection to commerce or federal waters.

But the Supreme Court's decision striking down that rule created confusion among federal and state officials over which waters remain under federal control.

Friday's action by the administration did not settle the issue, but it went well beyond strict compliance with the Supreme Court decision.

As a test of which waterways and wetlands might fall under the Clean Water Act, it ruled out those that were completely isolated and whose sole qualification for federal jurisdiction was their use by migratory birds, the one standard the court explicitly rejected.

According to the agency, the country has about 100 million acres of wetlands, and at least 80 percent of them will remain subject to the Clean Water Act because they lie adjacent to traditional navigable waters and their tributaries, under standards that the Bush administration has not opened to review.

The agency says it does not know what portion of the remainder, up to 20 million acres, has qualified solely because of its use by migratory birds, and what portion might still qualify under other standards not struck down by the Supreme Court.

The new policy would "roll back 30 years of progress."

Sen. James Jeffords
Ind-Vt., on the administration's proposal to loosen federal regulations regarding protected wetlands.