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Rule Drafted That Would Dilute the Clean Water Act

If implemented, streams and wetlands would be open to development. California and other parts of the arid West would bear the brunt.

By Elizabeth Shogren,

WASHINGTON - Bush administration officials have drafted a rule that would significantly narrow the scope of the Clean Water Act, stripping many wetlands and streams of federal pollution controls and making them available to being filled for commercial development.

The rule, spelled out in an internal document provided to the Times by a senior government official, says that Clean Water Act protection would no longer be provided to "ephemeral washes or streams" that do not have groundwater as a source. Streams that flow for less than six months a year would also lose protection, as would many wetlands, according to the document.

State and federal officials have estimated that up to 20 million acres of wetlands, 20% of the wetlands outside of Alaska, could lose protection under a new rule like the one in the draft. The effect would be greater in California and other parts of the arid West, where many streams flow only seasonally or after rain or snowmelts.

Administration officials cautioned that no rule change could happen without a public process, which would take many months and offer the public a chance to comment. However, the draft was the first indication of the direction that at least some administration officials want to take in rewriting the rule.

The new rule-making exercise was triggered by a 2001 Supreme Court ruling that limited federal jurisdiction over isolated, non-navigable, intrastate waters and wetlands. But the draft rule circulating within the administration would leave a much broader range of waters and wetlands outside the strictures of the Clean Water Act.

Government officials declined to comment on the draft rule until it becomes a public proposal.

If implemented, the change would represent one of the most consequential of the actions the Bush administration has taken to ease environmental regulations.

"It would dramatically cut back the scope of Clean Water Act jurisdiction," said the official who provided the document on the condition that neither he nor his agency be identified. "It would eliminate protections for ephemeral streams, which could be in the millions of miles of streams, particularly out West where many streams do not flow all year long."

Julie Sibbing, a wetlands policy expert at the National Wildlife Federation, said, "It's like writing off the entire Southwest from the Clean Water Act, where water is more precious than in any other region of the country. Up to 80% to 90% of streams in the Southwest would not fall under the Clean Water Act if this rule were to go forward."

Examples of areas in California that could lose protection, according to a state official who asked not to be named, are the Tujunga Wash in the northeast San Fernando Valley and San

Francisco wetlands that are diked and cut off from the bay. The same fate might await headwater streams of the Klamath, Eel and Salmon rivers on the north coast, important spawning grounds for salmon, including the endangered Coho.

In January, the Environmental Protection Agency and the Army Corps of Engineers announced that they were considering rewriting the regulations that establish what wetlands and streams are included in definitions of waters of the United States, and thereby protected by a variety of Clean Water Act regulations. The EPA is responsible for enforcing the Clean Water Act; the corps issues permits for filling waters and streams.

In comments on the agencies' plan, states almost unanimously urged the federal government to retain a broad definition of waters of the United States.

"As with many other states, California will not be able to comprehensively replicate the corps' regulatory role in the foreseeable future because of its current budget crisis," the California EPA said in its comments on a rule change. "The entirely foreseeable result would be dramatic impacts to the potentially affected waters."

State water quality officials and conservationists said the wetlands and streams that would lose protection under a rule change are essential to maintaining the health of the larger rivers and lakes that would still be protected by the law. Wetlands filter pollutants and retain water after rainfalls to lessen flooding. Ephemeral streams reduce flooding. Both provide healthy habitats for fish, birds and other wildlife. The government received more than 130,000 comments about its proposal to rewrite the rules, and EPA and White House officials said the government had not yet decided whether to follow through with a new rule.

The draft revision of the rule defining waters of the United States was prepared by officials at the Army Corps of Engineers and Justice Department, according to the official who provided the document. Copies of the document were circulated to officials at other agencies in recent weeks, the official said. Corps spokeswoman Cynthia Smith said there would be no comment on a leaked draft. Justice Department officials also refused to comment.

James Connaughton, chairman of the White House Council on Environmental Quality, which coordinates multi-agency policymaking, said he had not seen the draft. He stressed that the EPA would have the lead part in rewriting the rule, although the corps would also have a significant role.

Conservation, hunting and fishing organizations that saw the draft criticized it as a major rollback.

"This is a worst-case scenario," said Dr. Alan Wentz, Ducks Unlimited's senior group manager for conservation. "It represents a radical change of direction from 30 years of Clean Water Act implementation and judicial interpretation, and if this becomes the corps' interpretation of the law, it will create irreparable harm to those wetlands of greatest value to waterfowl, such as the prairie potholes of the northern Great Plains."