EPA SAYS SUPREME COURT PRECEDENT SUPPORTS QUICK REWORK OF CWA RULE

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EPA in a newly signed *Federal Register* notice says prior Supreme Court rulings give agencies freedom to quickly revise or withdraw the Obama-era Clean Water Act (CWA) jurisdiction rule in favor of a less expansive policy based purely on shifting legal interpretations, despite the existing factual record justifying the current rule.

In a ***Federal Register*** **notice** signed March 1 and set for publication as soon as March 2, EPA and the Army Corps of Engineers -- which jointly crafted the Obama administration's water rule -- say they are acting on President Donald Trump's Feb. 28 **executive order** (EO) directing them to start reworking the jurisdiction rule, and indicate that they will do so without changing the record the Obama administration built to support it.

“Agencies have inherent authority to reconsider past decisions and to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation. . . . Importantly, such a revised decision need not be based upon a change of facts or circumstances,” the agencies claim.

“A revised rulemaking based 'on a reevaluation of which policy would be better in light of the facts' is 'well within an agency's discretion,' and '[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations,'” says the notice, which serves as an advance notice of the agencies' intent to review and either amend or rescind the existing rule.

The agencies quote the Supreme Court cases *FCC v. Fox Television Stations, Inc.*, from 2009, and *Motor Vehicles Manufacturers Association v. State Farm*, from 1983, as well as the 2012 U.S. Court of Appeals for the District of Columbia decision in *National Association of Home Builders v. EPA*, all of which deal with the limits on agencies' ability to reverse decisions by prior administrations and have figured in **subsequent cases** testing EPA's freedom to change past policies.

Legal Challenges

With states and environmental groups already pledging to sue to protect the existing rule, the administration is laying groundwork for arguments that revising the policy regardless of its factual grounding is valid based on Supreme Court precedent protecting regulators' ability to switch positions on purely legal issues.

If EPA revises and narrows the scope of the CWA jurisdiction rule, legal challenges could be made over the agency's authority to reverse course on the Obama-era rule -- but one attorney says that EPA's arguments in the *Register* notice on its power to reconsider rules could find support in the event such suits end up in the Supreme Court. The various cases cited in the *Register* notice could support reversing the Obama-era

policy, which then-EPA Administrator Gina McCarthy termed the Clean Water Rule (CWR) but is also known as the waters of the United States (WOTUS) rule, if the move is based on legal standards and policy goals rather than a finding that the factual record for the original rule is insufficient, the attorney says.
"[C]ourts give new administrations deference when reversing prior administration's rules if based on policy preferences and/or legal interpretations. If Pruitt wants to cut back on the McCarthy CWR, it will not be based on a factual record but based primarily on legal interpretations (nixing significant nexus) and policy preferences (costs, jobs, states' rights, etc.)," the attorney says.

Executive Order
Trump's EO directs EPA and the Corps to reconsider the CWA rule with an eye toward replacing it with a standard based on the late Justice Antonin Scalia's concurring opinion in the 2006 case *Rapanos v. United States*. The Obama-era rule is based on the more expansive test set by Justice Anthony Kennedy in his *Rapanos* opinion.

Kennedy's test holds that any waters that share a "significant nexus" with navigable waters are jurisdictional, while Scalia's requires a "continuous surface connection" between "relatively permanent" waters -- a much narrower standard.

That position is sure to be tested in court, as a group of state attorneys general have already vowed to sue the Trump administration over any rule withdrawing or weakening the WOTUS policy, and environmental groups are sure to follow suit.

But the attorney says arguments based on the strength of the Obama EPA's factual record showing the need for an expansive rule to protect water quality have a slim chance of success, especially if the Senate confirms Trump's nominee to the high court, 10th Circuit judge Neil Gorsuch.

EPA Administrator Scott Pruitt "would certainly have to go through a rulemaking in which he explains policy preferences and legal interpretations robustly and responds to all comments, etc., but as long as he crosses his T's and dots his I's carefully, he should be OK on judicial review (especially with the Supreme Court with Gorsuch)," the attorney says. -- *David LaRoss* (*dlaross@iwpnews.com*)