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DAILY NEWS

House GOP's CWA Jurisdiction Rider May Hint At Scope Of New EPA Rule

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GOP House members, including a former Trump energy adviser from the 2016 campaign, are floating a proposal to sharply narrow the scope of Clean Water Act (CWA) jurisdiction as an amendment to the Farm Bill, a potential hint at EPA's pending proposal to replace the Obama-era CWA policy that is prompting alarm from environmentalists.

The Farm Bill amendment, offered ahead of a House Rules Committee hearing on which amendments to bring for a vote by the chamber when it considers the bill this week, shares elements with the limited CWA test authored by the late Justice Antonin Scalia in a split high court decision from 2006. But it goes beyond that standard by barring regulators from setting any requirements for jurisdiction that require more precision than "the naked eye."

A provision in the five-page rider would exclude from CWA jurisdiction any "water that requires the use of means beyond visual inspection by the naked eye, including aerial photographs, satellite imaging, or hydrological testing, to determine if it meets the definition" of a "water of the United States."

That language is already drawing push-back from environmentalists who favor maintaining or broadening the current scope of the CWA as established in the Obama EPA's 2015 CWA rule that takes a much wider view of the law's scope based on a "significant nexus" between waterbodies.

A source at Public Employees for Environmental Responsibility (PEER), which represents whistleblowers at EPA and other agencies, told *Inside EPA,* "eliminating wetlands that cannot be discerned by the naked eye . . . is ludicrous -- it essentially eliminates science from wetlands delineations."

"So far the EPA people I spoke to were horrified" at the proposal, the source said.

Though it comes from Congress rather than the White House, the PEER source continues that the amendment text could be a trial balloon for the "step 2" CWA jurisdiction rule being developed by EPA and the Army Corps of Engineers, which agency Administrator Scott Pruitt has said is being targeted for release as soon as this month.

"Step 1" of the rulemaking process is repealing the 2015 CWA standard developed by the Obama administration, which the GOP has charged is unlawfully broad.

"If I were a betting woman, I would say this is *the* language (or pretty close to it) that they are planning to use in the Step 2 rule," the source says.

In general, the Farm Bill amendment follows Scalia's opinion from the 4-4-1 case *Rapanos v. United States*, where he said the CWA should be limited to "relatively permanent" bodies of water that share a "continuous surface connection" with navigable waters. It is being proposed by GOP Reps. Jaime Herrera-Beutler (WA), Paul Gosar (AZ), Jason Smith (MO) and Kevin Cramer (ND) -- the latter a former Trump campaign adviser on energy issues who is still seen as close with the White House.

In *Rapanos*, three other conservatives joined Scalia's opinion seeking a limited CWA test. Justice Anthony Kennedy provided the fifth vote for narrowing jurisdiction compared to the rules in place in 2006, but authored a solo concurrence that set out a much broader standard than Scalia's, based on the significant nexus between waterbodies. That opinion formed the basis for the Obama-era jurisdiction rule that the GOP is seeking to roll back.

EPA Administrator Scott Pruitt has already said publicly that the regulatory proposal on CWA jurisdiction will be "inspired" by Scalia's opinion from *Rapanos*, most recently at **April 26 hearings** before two House subcommittees. But there have been few indications of how closely EPA and the Corps plan to follow Scalia, as they offered a wide array of

potential definitions for “relatively permanent” and “continuous surface connection” during meetings with state officials last year.

Jurisdiction Standard

The GOP-authored policy offers strict definitions for both elements of the Scalia test. For a “continuous surface connection,” it says waterbodies must be so closely joined that “an ordinary person would not be able to visually determine by the naked eye, by looking at the water surface, where one body of water ends and the other begins.”

And the test for “relatively permanent” waters requires “standing, or continuously flowing bodies of water that form geographical features commonly known as streams, rivers, or lakes, that flow directly into” navigable interstate waters that have “continuous flow for at least 290 days of the year, except in cases of extreme events, such as a drought.”

“This goes far beyond anything we had contemplated,” the PEER source said, adding that the 290-day requirement “will eliminate many rivers and streams” currently subject to the law.

A second environmentalist says the amendment will fail to protect many waterbodies now considered jurisdictional because they have a significant impact on water resources or water quality in larger downstream waters -- a major element of the significant-nexus test.

“Without any consideration of the likely impacts on drinking water supplies, toxic algae outbreaks, or flooding, it would cut roughly 60 [percent] of the streams in the continental U.S. (and perhaps more, given its unscientific terminology) and the vast majority of wetlands out of the law's protection. It's hard to overstate how reckless that would be,” that source says.

The amendment also sets out new requirements for EPA or Corps regulators to determine when a particular waterbody is jurisdictional -- a process that currently is defined only in regulations and guidance.

Under the House members' proposal, once a property owner files a written request for a jurisdictional determination, EPA or the Corps would have just 60 days to make a final decision on the waterbody in question. Missing that deadline would create a default finding that the waterbody is not jurisdictional.

Moreover, findings of jurisdiction would have to be reviewed at least once every five years, while a finding of no jurisdiction -- even if triggered by a missed deadline rather than a full determination -- would last “for as long as the person has an identifiable and substantial legal interest in the property.”

The determinations would also be open to court challenge in federal district courts under an “expedited” process, though the bill text does not spell out that process. -- *David LaRoss* (**dlaross@iwpnews.com**)

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