



## Federal Judge Limits the Reach of the WOTUS Rule

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### Introduction

During the Obama Administration, the Environmental Protection Agency (“EPA”) and the United States Army Corps of Engineers (collectively, “the Agencies”) adopted a rule amending the regulatory definition of “waters of the United States” (the “WOTUS Rule” or “Rule”). As explained in a previous [alert](#), the WOTUS Rule has far-reaching implications for project development and landowners across the energy, water, agricultural, construction, and transportation sectors, and it has been the subject of extensive litigation, as well as rulemaking by the Trump Administration.

On Wednesday, August 21, 2019, the United States District Court for the Southern District of Georgia ruled in *Georgia v. Wheeler* that the WOTUS Rule impermissibly extended the Agencies’ authority beyond the scope of the Clean Water Act (“CWA”) and failed to comply with the Administrative Procedure Act (“APA”). The Court remanded the WOTUS Rule back to the Agencies and extended its preliminary injunction of the Rule.

### Background

Since its enactment, the WOTUS Rule has been the subject of many legal challenges, and it was enjoined in numerous states. Additionally, under the Trump Administration, the Agencies proposed a new rule that would have delayed the effectiveness date of the WOTUS Rule for two years (the “Suspension Rule”). As [previously discussed](#), the Suspension Rule was the subject of a nationwide injunction in *South Carolina Coastal Conservation League v. Pruitt*. A federal judge in the Western District of Washington then vacated the Suspension Rule in *Puget Soundkeeper Alliance v. Wheeler*.

After the vacatur of the Suspension Rule, the WOTUS Rule continued to provide fodder for litigation. To date, the WOTUS rule is enjoined in 27 states: Alaska, Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, Oregon, South Dakota, Texas, Utah, West Virginia, Wyoming, and Wisconsin. The Rule remains effective in 22 other states and the District of Columbia.

### The Opinion

In *Georgia v. Wheeler*, the Court—relying primarily on Justice Kennedy’s concurrence in *Rapanos v. United States*—held that the WOTUS Rule impermissibly extended the Agencies’ jurisdiction beyond their delegated authority under the CWA.

The Court also held that the Agencies’ definitions of interstate waters, tributaries, adjacent waters, and case-by-case waters violated the CWA, and that the Rule significantly interfered with lands and waters that were traditionally under state authority without clear congressional intent.

Additionally, the Court determined that the Rule failed to comply with the APA both procedurally and substantively. These topics are further discussed below.

#### *Definition of Interstate Waters*

The Court found that the definition of interstate waters, which considers all interstate waters to be a “water of the United States” irrespective of navigability, disregarded the Supreme Court’s ruling in *Rapanos*. In particular, the Court found that WOTUS reads the term “navigability” out of the CWA. As such, under the WOTUS Rule, a non-navigable interstate water with no significant nexus to a “water of the United States” would still be regulated. According to the Court, that result extends beyond the Agencies’ authority under the CWA.

#### *Definition of Tributaries*

The Court also concluded that the Rule's definition of "tributaries" was over-inclusive because it used the presence of an ordinary high water mark ("OHWM") and bed and banks as physical indicators of volume sufficient to create a regulated "tributary." The Court took particular issue with provisions in the WOTUS Rule discussing situations in which these physical indicators are "absent in the field," but are nevertheless determined to be present by "other appropriate means," such as "lake and stream gage data, elevation data, spillway height, historic water flow records, flood predictions, statistical evidence, the use of reference conditions, or through . . . remote sensing and desktop tools." The Court found this approach inconsistent with Justice Kennedy's concurrence, noting that "the physical indicators that the Agencies assert provide evidence of sufficient volume and flow to adhere to Justice Kennedy's significant-nexus test need not actually be physically present in a geographic area so long as computer programs can decipher that they exist and need not presently exist so long as those programs can conclude that they have existed at sometime in the past."

The Court was also troubled by the application of the "tributaries" definition in the Arid West, citing evidence that the physical indicators of a tributary often appear around water bodies in the Arid West, even when they are wholly isolated from navigable waters. The Court found that the definition of tributaries could inadvertently regulate dry areas that may contain attributes of an OHWM and a bed and bank due to an extreme weather event—a result that Justice Kennedy's concurrence in *Rapanos* sought to avoid. Accordingly, Court concluded that the "tributaries" definition extended too far.

#### *Definition of Adjacent Waters*

According to the Court, the definition of "adjacent waters" clearly conflicted with Justice Kennedy's opinion in *Rapanos* by erroneously including waters adjacent to non-navigable tributaries. The Court recognized that, while adjacency is a permissible factor to consider when determining jurisdiction under the CWA, that factor must still be subject to Kennedy's significant-nexus test. The Court reasoned that the definition impermissibly extended jurisdiction over isolated and inconsequential waters.

#### *Case-by-Case Waters*

The Court presumed that the case-by-case category was the Agencies' attempt to implement Justice Kennedy's significant-nexus test. Because the Agencies relied on impermissible definitions of "interstate waters" and "tributaries" in formulating their criteria for the case-by-case category of waters, the criteria were also invalid to the extent they were the logical outgrowth of these definitions. Because the definitions of "interstate waters" and "tributaries" were already overbroad, the Agencies could not base case-by-case category waters of those definitions, as they too would impermissibly expand federal jurisdiction. Notably, the Court concluded that the Agencies' reliance on erroneous definitions of "tributaries" and "interstate waters" was the only error in the WOTUS Rule's case-by-case category under the CWA.

#### *The WOTUS Rule Substantially Interferes with Traditional State Power*

The Court also found that the Rule substantially encroached on traditional state power. Recognizing that the CWA permits the federal government to regulate waters in order to protect the biological and physical integrity of the Nation's waters, the Court also emphasized the Congressional policy in the CWA stating that states should retain primary responsibility over land and water resources. The Court found that the WOTUS Rule as written would result in the federal government regulating immense stretches of intrastate land not contemplated by that CWA. To support this finding, the Court cited statements made by the Agencies under the Trump Administration in a recently-proposed rule to rescind the WOTUS Rule that the WOTUS Rule "may have altered the balance of authorities between the federal and State governments, contrary to the agencies' [prior] statements," and to statistics suggesting the WOTUS rule was estimated to increase the scope of federal jurisdiction over waters by at least two percent — an increase the Court characterized as "a substantial intrusion into lands and waters traditionally left to state authority." According to the Court, this significant increase in jurisdiction improperly stripped states of their traditional authority to regulate these types of lands and waters.

*The Rule failed to comply with APA and was arbitrary and capricious*

The Court found that the rule violated the APA in two ways: (1) the final Rule was not the logical outgrowth of the Agencies' previously-proposed version of the Rule; and, (2) there were parts of the Rule that were arbitrary and capricious. The Rule failed to be the logical outgrowth of the Agencies' proposed rule for three reasons. First, while the proposed Rule did not include distance limitations when defining "neighboring waters," the final Rule did. Second, the proposed Rule similarly did not include distance limitations for adjacent waters in the case-by-case categories, while the final Rule did. Lastly, the proposed Rule did not contain any explicit farming exemption, but the final Rule contained a farming exemption for adjacent waters. The Court agreed with Plaintiffs' argument that, had they known that there was going to be a farming exemption for adjacent waters, they would have also commented that there should be a farming exemption for tributaries.

The Court also determined that portions of the Rule were arbitrary and capricious. The Court found that the Agencies' inclusion of a farming exemption for adjacent waters but not tributaries was arbitrary and capricious because it failed to treat similar cases in a similar manner without justification. The Court also found that the Agencies' decision to use FEMA 100-year floodplain maps to define adjacent and case-by-case waters was arbitrary because of the inaccuracies of outdated flood maps, and because the Agencies failed to sufficiently explain why the 100-year floodplain was the proper limit. Lastly, the Agencies' use of a distance limitation for adjacent waters was arbitrary because the Agencies only gave broad, conclusory reasons why the limit was selected and failed to explain their decision.

### **Practical Implications**

*Georgia v. Wheeler* represents yet another federal court to examine the merits of the WOTUS Rule and to find it exceeding the Agencies' statutory authority under the CWA and violating provisions of the APA. The Court did not vacate the rule, but simply remanded it back to the Agencies, and therefore the Rule remains effective where not enjoined. This case continues the patchwork implementation of the WOTUS Rule, which is now enjoined in 27 states, but is still effective in 22 other states and the District of Columbia.

This patchwork situation may not last long, as appeals will likely be filed challenging the *Georgia v. Wheeler* decision and other decisions enjoining or declining to enjoin the WOTUS Rule. Additionally, the Agencies under the Trump Administration are expected in the near future to publish a final version of their proposed new WOTUS Rule, which is also very likely to face legal challenges.

As a result on the ongoing litigation and rulemaking processes, the regulated community is unlikely to see true certainty on the question of the geographic scope of the CWA until Congress takes action to clarify its scope or the Supreme Court issues a new substantive decision addressing this issue.

### **FOR MORE INFORMATION**

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