

Court rules Obama EPA violated law on Waters of the United States Rule

By Wes Wolfe, Tribune News Service | August 23, 2019



More than nine months after the last hearing in the case, and nearly nine months to the day of the briefing deadline for that hearing, U.S. District Judge Lisa Godbey Wood handed a victory to the state of Georgia and nine other states that sued the federal government over the Obama administration's 2015 Waters of the United States Rule.

Wood stated that the rule, which was intended to provide better protection of the nation's water, violated the Clean Water Act and the Administrative Procedure Act, and she remanded it back to the Environmental Protection Agency and the Army Corps of Engineers for further work.

She wrote that while the agencies have authority to interpret the phrase "waters of the United States," that authority isn't limitless, and therefore their decisions in doing so do not fall under what's called Chevron deference, a matter of case law in which — for lack of a better phrase — the tie goes to the agency.

Wood states that Justice Anthony Kennedy's opinion in the *Rapanos* case is the controlling opinion in the 11th Circuit, of which the Southern District of Georgia is a part. Using that standard, she wrote, "this court must review the WOTUS rule's interpretation of 'waters of the United States' in light of those limits to the CWA. In doing so, the court determines that the WOTUS rule extends jurisdiction over 'remote and insubstantial' waters, which under Justice Kennedy's opinion in *Rapanos*, is not a 'permissible construction of the statute.'"

She goes on to state the rule's inclusion of all interstate waters under the WOTUS definition was an illegal extension of authority, and further assertion of jurisdiction over all tributaries as defined in the 2015 rule also went beyond the bounds of the Clean Water Act, and as such, the definition of adjacent waters was also illegal.

"The court finds that both because of its combination with tributaries and the selection of over-broad geographic limits without showing a significant nexus, the adjacent waters definition in the WOTUS rule is unlawful under Justice Kennedy's *Rapanos* opinion," Wood wrote.

She also agreed with the states' arguments that the rule was a violation of state sovereignty over those states' own land and water.

"Most importantly, that significant increase in jurisdiction takes land and water falling traditionally under the states' authority and transfers them to federal authority," Wood wrote. "In light of this significant intrusion on traditional state authority, the CWA still contains the

policy language of recognizing traditional state power in this area, and Congress has not made any clear or manifest statement to authorize intrusion into that traditional state power since Rapanos.

“Therefore, like the majority in (*Solid Waste Agency of Northern Cook County v. Army Corps*) and the plurality in *Rapanos* concluded, the WOTUS rule’s vast expansion of jurisdiction over waters and land traditionally within the states’ regulatory authority cannot stand absent a clear statement from Congress in the CWA. Since no such statement has been made, the WOTUS rule is unlawful under the CWA.”

Wood ruled the Obama EPA issued a rule that was not the logical outgrowth of the proposed rule, and that in some parts it’s arbitrary and capricious. The APA sets down a number of rules and processes that are supposed to ensure necessary public notice and public comment.

“Had the proposed rule given adequate notice, the agencies could have expected to receive numerous comments with data, graphs, etc. articulating why certain distance-based limits should be chosen over others, but interested parties had no occasion to do that in this case based on the language of the proposed rule,” Wood wrote.

The ruling only affects the states that are parties to the case, where an injunction was already in effect — Georgia, Alabama, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah and West Virginia. Wisconsin was a party to the suit but dropped out in April.