

Trump Admin May Be Overpromising WOTUS Clarity

By Juan-Carlos Rodriguez

Law360 (November 18, 2025, 9:10 PM EST) -- The Trump administration says its proposal to shrink the Clean Water Act's reach would reduce regulatory burdens and provide clarity to farmers, homebuilders and other businesses, but it could face court challenges and potential reworking by future administrations.

Under a proposed U.S. Environmental Protection Agency and Army Corps of Engineers rule, the regulatory definition of "waters of the United States" — a key Clean Water Act term that provides the basis for federal regulatory, permitting and enforcement power — would be amended to implement the Trump administration's interpretation of the U.S. Supreme Court's landmark 2023 ruling in *Sackett v. EPA*. That decision significantly reduced the federal government's power to protect certain wetlands and streams.

According to the EPA and Army Corps' Monday proposal, by reducing the number of wetlands and streams protected by the Clean Water Act, fewer permits would have to be obtained by developers of projects such as fossil fuel pipelines. And narrow interpretations of several terms used by the Supreme Court majority in *Sackett* would further aid businesses, the agencies said.

But while the agencies have cast the proposed WOTUS rule as merely implementing the *Sackett* decision, there are aspects of it — like the new regulatory definitions, restrictive interpretations of federal authority and scientific findings — that could invite legal challenges, said Erika Spanton, a principal at Beveridge & Diamond PC and co-leader of the firm's water practice.

And even if those provisions survive in court, she said, the administration's promises of clarity still might not be totally borne out.

"The thematic promise that this rule will bring resounding clarity without the need for attorneys to help interpret specific application of the rule to specific cases sounds wonderful, but I'm skeptical that that is going to be the impact," Spanton said. "I think this is an inherently challenging area of law, even if you try to simplify or clarify it. And I think that it's so site-specific, I'm not sure the promise is going to be fully met here."

Following the *Sackett* decision, the Biden administration updated its WOTUS rule to incorporate the high court's new limits and tests, but just added the exact wording in the opinion, which left the agency some room to maneuver in the future.

This time around, the EPA and Corps have introduced new regulatory definitions for terms like "relatively permanent" waters, "continuous surface connection" and "tributary" that the agencies have interpreted in ways that restrict their power to regulate certain waters.

Duke McCall, a partner at Morgan Lewis & Bockius LLP with Clean Water Act expertise, said that while the changes sought by the proposed rule are not of the same import as the Sackett decision, there are areas that could bring controversy.

He said one that stands out is the agencies' new definition of "relatively permanent" waters to mean "standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season." The concept of the "wet season" as a determining WOTUS factor is new, he said.

"The question becomes: How do you define the wet season?" McCall said. "There is a footnote in the proposed rule that defines the test for the 'wet season.' But there's still some room for interpretation and application."

In the proposed rule, the agencies asked for public input on how they should define the term. They suggested possible definitions, including one "that includes the months when precipitation exceeds evapotranspiration."

McCall said the administration's promise of reducing regulatory burdens is probably accurate to some degree.

"Anytime you remove waters from the scope of the Clean Water Act, you're reducing regulatory burdens," he said. "But it's difficult for me, or I think for anyone, to assess exactly how significant that reduction will be. But that certainly appears to be, in part, the intent."

Spanton and McCall noted the long history of attempts by the Supreme Court, the EPA and the Corps to define WOTUS. There were a few key high court decisions that cleared up some areas of the term since the act was passed, and each administration, beginning with former President Barack Obama, has tried to put its own stamp on it.

The Biden administration's rule is only valid in about half the states after different courts enjoined it. Spanton said that once the Trump administration finalizes its WOTUS rule that will at least bring some uniformity across the nation.

"One of the significant benefits is that, if implemented — and without predicting how it might be challenged in the courts — this would at least bring clarity to what rule applies," she said. "And I think that is a huge improvement from the current state of play."

And the threat of litigation is looming for whatever rule the Trump administration finalizes. Environmental groups and some Democratic politicians have reacted strongly in opposition to the proposal.

The proposal "exploits" the Supreme Court's language and reads it to exclude more features, according to Jon Devine, who leads the Natural Resources Defense Council's federal water policy team.

"It's a running leap backward," Devine said of the proposed rule. "We have regulations on the books

that reflect the Supreme Court's decision, and going farther than that is purely a choice by this administration to make it easier to pollute or destroy water bodies."

Devine said the costs of reducing the number and types of water bodies that are protected under the Clean Water Act are clear.

"We're going to see increased flooding in places that have higher precipitation rates, we're going to have more susceptibility to drought in drier places, and we're going to have increased pollution," he said, noting the new regulations would eliminate protections from the small streams and wetlands that "are really good at processing pollutants and ameliorating them before they get into downstream waters." He added that habitat for species would also be at risk.

Spanton said that whatever happens with the Trump administration's WOTUS rule, it's not likely to be the end of the story.

"I think we're going to continue to see the definition of WOTUS expand and contract with future administrations, I don't think this is going to end that," she said. "But I do think the Sackett decision, for now, has at least provided some guardrails and a fair amount of durability to the definition. So we can still anticipate seeing some expansion and contractions, just smaller oscillations than what we have seen in the past."

--Editing by Alanna Weissman and Michael Watanabe.