"WATERS OF THE UNITED STATES" ONCE AGAIN IN FLUX

Date: 8 December 2025

US Environment, Land, and Natural Resources Alert

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The ephemeral meaning of what bodies of water qualify as “Waters of the United States” (WOTUS) is once again changing, spurring a renewed focus on state programs. On 17 November 2025, the Environmental Protection Agency (EPA) and the US Army Corps of Engineers (USACE) announced a proposed rule redefining WOTUS under the federal Clean Water Act (CWA) in the newest campaign in the prolonged legal war over the term's definition.[1]

WOTUS is a crucial concept that defines the bodies of water subject to regulation under the CWA. Among other things, it determines when developers or landowners must obtain federal CWA permits for actions that affect wetlands and waters. The inclusion (or not) of an area as WOTUS determines when American industry, farmers, states, and landowners are required to seek CWA permits for activities such as dredging, filling, or discharging that may impact such waters. Changes to WOTUS that may reduce the scope of federal coverage will place greater emphasis on corresponding state regulations, which vary significantly concerning how closely they follow the federal regulations and, in some cases, provide distinct grounds for state water regulation.

The *Sackett* decision cemented a narrow interpretation of WOTUS, and the final rule must conform with that framework. Still, ambiguities will remain, particularly in the definition and application of “relatively permanent” waters and wetlands with a “continuous surface connection” to such waters. Public comments on the proposed rule close on 5 January 2026.

PROPOSED RULE HIGHLIGHTS

The proposed rule is the agencies' latest attempt to align the definition of WOTUS with the US Supreme Court's 2023 decision in *Sackett v. EPA*.[2] The *Sackett* decision significantly narrowed the scope WOTUS, holding that federal CWA jurisdiction reaches only “relatively permanent waters” (e.g., streams, river, lakes) connected to traditional navigable waters and wetlands with a “continuous surface connection” to such waters.[3]

A key feature of the proposed rule is a new limiting concept of “wet season,” applicable to the proposed rule's definitions of “relatively permanent” and “continuous surface connection.”[4] The proposed rule requires that during the “wet season” surface hydrology must “be continuous,” otherwise the CWA does not apply.[5] The preamble to the proposed rule describes the agencies' interpretation of “wet season,” but the proposed rule itself does not define the term.

The rule also removes “interstate waters” as an independent basis for CWA jurisdiction. Interstate waters must fall within the enumerated list of WOTUS (e.g., “relatively permanent, standing or continuously flowing bodies of

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water" (such as streams, oceans, rivers, and lakes) and wetlands that are connected and indistinguishable from such water bodies) to be covered under the CWA.

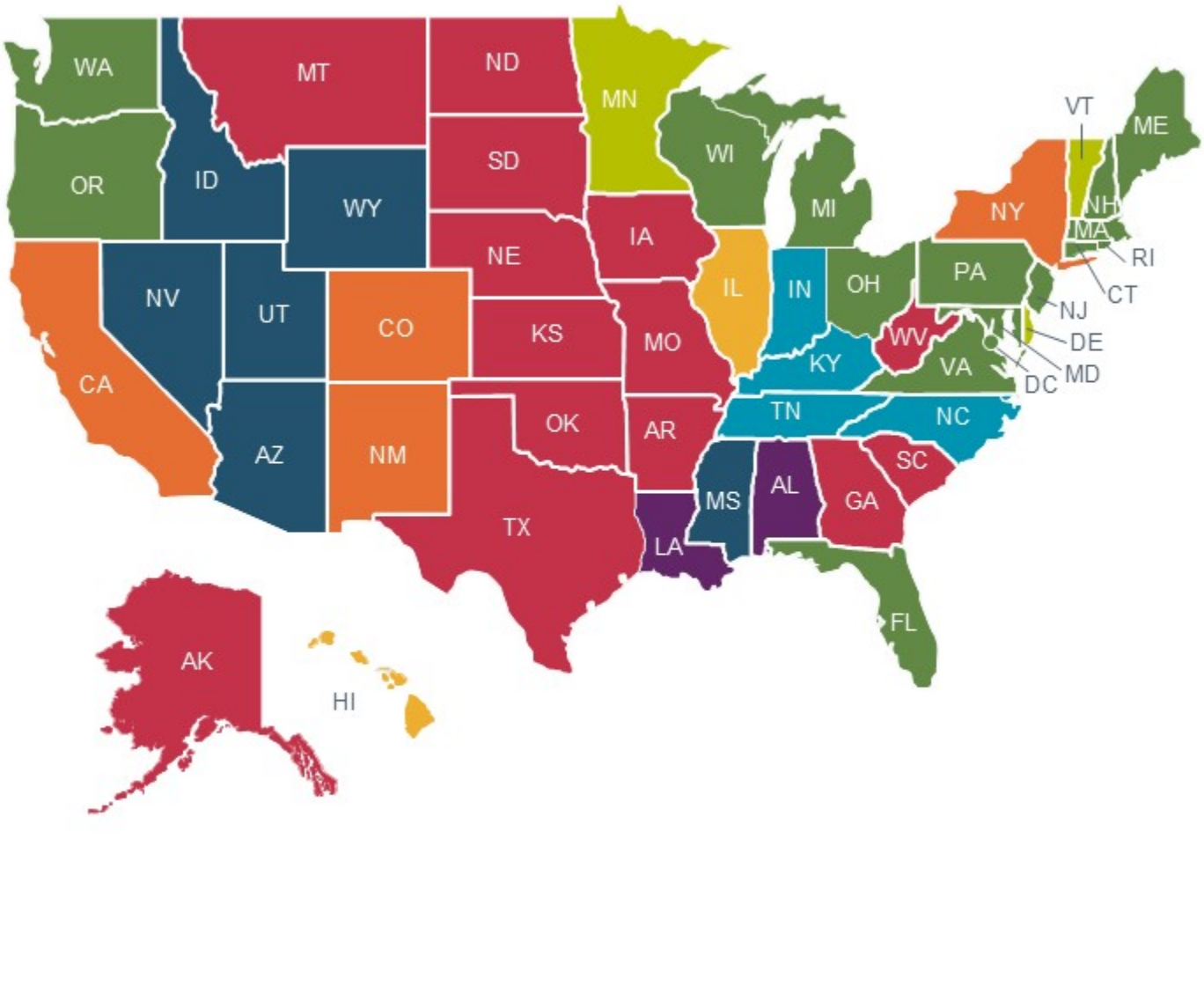
It also defines numerous terms such as "relatively permanent,"[6] "tributary,"[7] "continuous surface connection,"[8] "excluded ditches,"[9] excluded "prior converted cropland,"[10] and excluded "waste treatment systems."[11]

Although the rule attempts to add clarity about what kind of wetlands will be covered, the undefined term "wet season" will likely lead to more questions, challenges, and disparity in application between states. Ultimately, as federal coverage ebbs and flows, it will likely fall to the states to determine the level of protection granted to their waters.

SOME STATES FILL THE GAP, OTHERS ROLL BACK REGULATIONS

Many states rely on the CWA and its regulations as their only form of wetland protection for state waters. Others, such as California, Pennsylvania, Washington, and Virginia already have comprehensive regulatory programs. States have also responded to *Sackett* and the instability of the WOTUS rule by changing their laws: New Mexico and Colorado have responded by expanding protections and programs, while states such as Tennessee have rolled back their laws.

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STATES ALREADY PROTECTING WATERS BEYOND THE SCOPE OF CWA JURISDICTION

Many states already have comprehensive water protection and permitting schemes that apply to all waters within the state, including and beyond those covered by federal definitions.[12] For instance, Pennsylvania's "Clean Streams Law" extends protections to all "waters of the Commonwealth,"[13] and its Dam Safety and Encroachments

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Act[14] continues current wetland protection standards and permitting requirements without regard to whether wetlands qualify as WOTUS.

In Virginia, the State Water Control Law has implemented requirements beyond the CWA since 2000 with the goal of protecting and restoring the quality of Virginia's waters. The law requires permits for actions affecting state waters and covers pollution control, water conservation, and management, with penalties for violations.[15] Virginia defines “state waters” as “all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands.”[16] Where wetlands are defined as “those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”[17]

Similarly, in California, “waters of the state” are defined broadly as “any surface water or groundwater, including saline waters, within the boundaries of the state.”[18] Both waters of the state and wetlands are protected and regulated under the Porter-Cologne Water Quality Control Act by the State Water Resources Control Board and Regional Water Quality Control Boards, responsible for water quality protection and permitting activities that can affect water quality. The California Department of Fish and Wildlife is responsible for permitting streambed alterations of state waters.

STATES EXPANDING PROTECTIONS

Southwestern states were some of the most severely affected by *Sackett*; according to the New Mexico Legislature, approximately 90–95% of “waters” in the state lost protections, prompting the legislature to pass Senate Bills 21 and 22.[19] The bills expand the New Mexico Water Quality Act to protect surface waters no longer covered by federal law. They also give New Mexico authority to seek the EPA's approval to become the 48th state to gain authorization for surface water permitting,[20] and address polluted groundwater that falls outside federal Superfund program jurisdiction.

Similarly affected, Colorado is also expanding state regulations to address gaps left by *Sackett*. The state legislature directed the Water Quality Control Commission to establish dredge-and-fill permitting and mitigation rules by 31 December 2025 to protect state waters not otherwise protected by federal law. The outcome will be Regulation No. 87, which is expected to be finalized by 31 December 2025.

The California Legislature is also considering additional regulations to further protect California state waters to address a perceived rollback in protections due to the *Sackett* decision and Trump administration policies.[21] The proposed regulations would explicitly extend protections to state waters no longer covered under federal law.

STATES ROLLING BACK PROTECTIONS

Tennessee has a robust state program but changed its wetlands protections during its 2025 legislative session in response to *Sackett*.[22] These amendments to the Tennessee Water Quality Control Act establish new categories of wetlands with varying regulatory triggers for each. The thresholds for needing a state permit for altering isolated wetlands have been changed so that some isolated wetlands can be altered with no regulatory oversight as long as there is no water quality impact, and the trigger for needing a state permit for altering isolated wetlands has been limited.

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CONCLUSION

Comments on the proposed WOTUS rule are being accepted until 5 January 2026. The Final Rule will take effect 60 days after it is published in the *Federal Register*. The EPA and USACE will also hold two hybrid public meetings during the comment period. Information on the public meetings can be found here.

FOOTNOTES

[1] Updated Definition of "Waters of the United States," 90 Fed. Reg 52,498 (Nov. 20, 2025); *Revising the Definition of "Waters of the United States"*, ENV'T PROT. AGENCY (Nov. 17, 2025) https://www.epa.gov/wotus/revising-definition-waters-united-states.

[2] *Following Sackett*, *Another New Final WOTUS Rule, K&L GATES* (Sept. 14, 2023), https://www.klgates.com/Following-Sackett-Another-New-Final-WOTUS-Rule-9-14-2023.

[3] *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 680 (2023).

[4] "The phrase 'at least during the wet season' is intended to include extended periods of predictable, continuous surface hydrology occurring in the same geographic feature year after year in response to the wet season, such as when average monthly precipitation exceeds average monthly evapotranspiration. As proposed, surface hydrology would be required to be continuous throughout the entirety of the wet season." 90 Fed. Reg. at 52,518.

[5] EPA and USACE state that they "intend to use the metrics from the Web-based Water-Budget Interactive Modeling Program (WebWIMP)" to identify "wet seasons," but solicit comment on the most appropriate method to identify the "wet season." *Id*. at 52,519.

[6] Defined as "standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season." *Id*. at 52,545.

[7] Defined as "a body of water with relatively permanent flow, and a bed and banks, that connects to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent flow. A tributary does not include a body of water that contributes surface water flow to a downstream jurisdictional water through a feature such as a channelized non-jurisdictional surface water feature, subterranean river, culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, wetland, or similar natural feature, if such feature does not convey relatively permanent flow. When the tributary is part of a water transfer (as that term is applied under 40 CFR 122.3) currently in operation, the tributary would retain jurisdictional status." *Id*.

[8] "Continuous surface connection means having surface water at least during the wet season and abutting (i.e., touching) a jurisdictional water." *Id*. at 52,546.

[9] Defined as "[d]itches (including roadside ditches) that are constructed or excavated entirely in dry land." *Id*. at 52,540.

[10] Defined as "any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered prior converted cropland for purposes of the Clean Water Act when the area is abandoned and has reverted to

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wetlands, as defined in paragraph (c)(1) of this section. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned." *Id*. at 52,545.

[11] Defined as "all components of a waste treatment system designed to meet the requirements of the Clean Water Act, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge)." *Id*. at 52,546.

[12] See, e.g., *Stream and Wetland Regulatory Program*, COMMONWEALTH PENN., https://www.pa.gov/agencies/dep/programs-and-services/water/bureau-of-waterways-engineering-and-wetlands/stream-and-wetland-regulatory-program (last visited Nov. 21, 2025).

[13] 35 P.S. § 691.1 ("'Waters of the Commonwealth' shall be construed to include any and all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs and all other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth.")

[14] Dam Safety and Encroachments Act, P.L. 1375, No. 325 (1978).

[15] State Water Control Law, VA. CODE ANN. § 62.1-44.2.

[16] *Id*. § 62.1-44.3.

[17] *Id.*

[18] Cal. Water Code § 13050(e).

[19] New Mexico Senate Bill 21, available at: https://www.nmlegis.gov/Sessions/25%20Regular/final/SB0021.pdf; *Governor signs Strategic Water Supply and environmental protection bills*, OFFICE OF THE GOVERNOR (Apr. 8, 2025), https://www.governor.state.nm.us/2025/04/08/governor-signs-strategic-water-supply-and-environmental-protection-bills-state-acts-to-protect-all-surface-waterbodies-a-targeted-response-to-the-2023-u-s-supreme-court-ruling-that-narrowed-federa/.

[20] New Mexico was the last Western state, and one of the only remaining states that allowed the federal government to manage surface discharge permitting in the state.

[21] *See* California Senate Bill 601 (2025), available at: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202520260SB601.

[22] 2025 Public Chapter 437 (S.B. 670)

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