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Biden Water Rule Restarts WOTUS Controversy Machinery

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Shawn J. Zovod

Shawn Zovod, a partner in Troutman Pepper's Environmental + Natural Resources Practice Group, was quoted in the August 30, 2023 *Law360* article, "Biden Water Rule Restarts WOTUS Controversy Machinery."

Although the agencies applied the Sackett decision to their rule, they allowed themselves some leeway in further implementation, said Shawn Zovod, a partner at Troutman Pepper. She said that because the agencies are promulgating the rule under the "good cause" provision of the Administrative Procedure Act and aren't taking public comment, they are avoiding having to craft language around certain elements of the rule where the Sackett decision may apply.

"They did that to be able to retain as much of the [January] rule as they possibly could," Zovod said. "It gave them the opportunity to say, 'We don't have any discretionary authority here, and anything that was vague within the Sackett decision, or that we could interpret as being vague, we're not going to address, or we don't have to address through a rule revision or through a new rule.'"

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Zovod said the agencies' treatment of tributaries in the rule stands out as an example of a topic that could have been amended under the Sackett opinion, but wasn't. She said she sees an issue with the agencies' decision to retain the idea that wetlands that have a continuous surface connection to a tributary are jurisdictional.

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For businesses that have been seeking certainty about WOTUS issues, Zovod said they're not there yet, but added that a couple of options are available to policymakers.

"Congress can step in and amend the Clean Water Act to provide a higher level of clarity about waters of the U.S., or, what I think is probably far more likely, is that states are going to step in — and they already have — to fill this void and provide some level of certainty within their borders," she said.

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