

Wetlands Regulation After Sackett

New Federal Proposals and Continuing Legal Uncertainty

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Overview

For decades federal agencies have repeatedly attempted to expand their regulatory authority beyond the boundaries established by Congress. Few areas demonstrate this tendency more clearly than the Environmental Protection Agency's (EPA) interpretation of the phrase "waters of the United States" (WOTUS) under the Clean Water Act (CWA). For farmers, ranchers, and rural landowners, the consequences have been substantial. Ordinary agricultural activities involving drainage, land clearing, construction, and improvements to farmland have sometimes triggered federal permitting requirements carrying significant compliance costs and potential civil and criminal penalties.

The Supreme Court's 2023 decision in *Sackett v. Environmental Protection Agency*,¹ substantially curtailed this regulatory expansion. But the litigation and regulatory maneuvering have continued. Recent developments in 2026 suggest that federal wetlands regulation may finally be moving toward a more predictable framework grounded in statutory text, the constitutional division of authority between the federal government and the states, and respect for private property rights.

The Supreme Court's Decision in *Sackett*

Michael and Chantell Sackett purchased a residential lot near Priest Lake, Idaho, intending to construct a home. The EPA asserted that their property contained federally regulated wetlands and ordered them to stop construction and restore the property. The agency's position rested on an expansive interpretation of federal jurisdiction that treated wetlands as regulated waters when they possessed a sufficiently significant ecological connection to traditional navigable waters. The Supreme Court rejected that approach.

Writing for the Court, Justice Alito explained that the CWA's reference to waters of the United States encompasses relatively permanent bodies of water, such as streams, rivers, lakes, and oceans. Wetlands fall within federal jurisdiction when they have a continuous surface connection to an otherwise covered water, making the wetland practically indistinguishable from that water. The Court rejected the controversial "significant nexus" test, which had permitted federal regulators to assert jurisdiction based on ecological or hydrological relationships that were not necessarily apparent to a property owner.

¹ 598 U.S. 651 (2023).

The significance of *Sackett* extends beyond wetlands regulation. The decision reaffirmed an important principle of statutory interpretation that administrative agencies cannot enlarge their authority merely because doing so might advance a desirable regulatory objective. Congress writes the law. Administrative agencies implement it. That distinction is essential to the constitutional separation of powers.

The November 2025 Regulatory Proposal

On November 20, 2025, the EPA and the U.S. Army Corps of Engineers published a proposed rule intended to bring the regulatory definition of “waters of the United States” (WOTUS) into closer conformity with *Sackett*.² The proposal represented an effort to establish clearer jurisdictional boundaries and reduce uncertainty concerning the treatment of wetlands, tributaries, and other water features. It also attempts to distinguish federally regulated waters from features that should remain subject primarily to state and local authority. The position of the proposed rule is that the CWA does not establish a general federal land-use regulatory system. Nor does it authorize federal agencies to regulate every location where water occasionally accumulates or flows. Rather, the statute regulates particular categories of waters within the scope of Congress's legislative authority.³

September 2026 Supplemental Notice

An important development occurred in early September when the EPA and the Department of the Army announced a supplemental notice of proposed rulemaking seeking comments on additional alternatives for defining jurisdictional waters and wetlands.⁴

The proposal addresses three particularly important concepts: perennial waters, relatively permanent waters, and continuous surface connections as follows:

- Alternatives for defining "perennial" waters, including a definition requiring standing or continuously flowing water every day of the year under ordinary conditions;
- A consideration of defining "relatively permanent" waters by reference to perennial water bodies, while recognizing limited interruptions resulting from drought or other circumstances. One alternative would permit certain temporary interruptions lasting no more than 30 consecutive days during a year.

²Updated Definition of “Waters of the United States,” 90 Fed. Reg. 52,498 (Nov. 20, 2025) (proposed rule).

³ This distinction is particularly important in agricultural regions where drainage features, intermittent streams, low-lying areas, and seasonal accumulations of water are commonplace. A regulatory definition that treats every such feature as potentially subject to federal jurisdiction creates uncertainty that can discourage investment and ordinary land improvements.

⁴ Updated Definition of Waters of the United States, 91 Fed. Reg. 57284 (Sept. 9, 2026); EPA, Fact Sheet: *2026 Supplemental Proposed Waters of the United States Rule*. The public comment period closed October 9, 2026. The September 2026 supplemental proposal is not a final rule. The agencies are considering these alternatives alongside the November 2025 proposal. Accordingly, landowners should not assume that the proposed definitions presently govern their property.

- A more specific interpretation of the continuous surface connection necessary for wetlands to qualify as federally jurisdictional. Under one alternative, the connection generally would require perennial surface water linking the wetland to an otherwise jurisdictional water, subject to limited exceptions for temporary interruptions. Another alternative would confine jurisdiction over adjacent wetlands to those that are practically indistinguishable from a jurisdictional water.

These proposals are significant because they attempt to translate *Sackett*'s judicial standards into administrable regulatory criteria.

Observation: From a rule-of-law perspective, the effort is overdue. Landowners should not have to retain environmental consultants and attorneys simply to determine whether an ordinary drainage feature on their property falls within federal jurisdiction.

The *Inland Empire* Case

On September 3, 2026, the U.S. Court of Appeals for the Ninth Circuit issued an amended opinion in *Inland Empire Waterkeeper v. Corona Clay Co.*⁵ The litigation involved alleged Clean Water Act violations associated with discharges into Temescal Creek in California. Following the Supreme Court's decision in *Sackett*, the defendant challenged whether the creek qualified as a water of the United States.

The Ninth Circuit addressed whether the question of whether a waterbody qualifies as WOTUS under the CWA concerns the merits of a claim or the federal court's subject-matter jurisdiction.⁶ The court treated the issue as one of the merits rather than jurisdiction. It also recognized that *Sackett* materially changed the governing legal framework. Accordingly, the court concluded that a new trial was necessary to determine whether Temescal Creek qualified as a jurisdictional water under the standards established in *Sackett*. The court did not, however, decide whether Temescal Creek is subject to federal regulation.

The decision illustrates the continuing impact of *Sackett* on previously litigated disputes. It also highlights the difficulties associated with applying older judicial precedents concerning intermittent and seasonal streams after the Supreme Court's rejection of expansive jurisdictional theories.

Note: For farmers and ranchers (and rural landowners), the lesson is important: earlier agency determinations and judicial assumptions about federal jurisdiction may require reconsideration under current law.

⁵ No. 24-6199, 2026 U.S. App. LEXIS 27490 (9th Cir. Sept. 3, 2026).

⁶ This distinction is procedurally important. Whether a waterbody falls within the CWA's coverage is a question about the merits of the claim; it does not necessarily affect the federal court's authority to hear the case.

Federalism and the Proper Role of the States

One persistent misconception in the wetlands debate is that limiting federal jurisdiction necessarily eliminates environmental protection. That proposition misunderstands our constitutional structure. The United States operates under a system of dual sovereignty. The federal government possesses enumerated powers, while states retain substantial authority over land use, water resources, and environmental protection.

The Clean Water Act itself recognizes this arrangement. 33 U.S.C. §1251(b), expressly acknowledges the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution and to plan the development and use of land and water resources. Consequently, a wetland that falls outside federal jurisdiction is not necessarily beyond regulation. State wetlands statutes, drainage laws, water-quality requirements, and local land-use restrictions may continue to apply. The distinction is not between environmental protection and environmental destruction. It is between regulation authorized by Congress and regulation imposed without sufficient statutory authority. From a constitutional perspective, that distinction is indispensable.

What Farmers and Ranchers Need to Know

The practical consequences of these developments deserve particular attention.

- **The presence of wetlands does not automatically establish federal jurisdiction.** The analysis must consider whether the feature satisfies the governing legal standards for waters of the United States.
- **Ordinary agricultural exemptions remain important.** Section 404(f) of the CWA,⁷ contains exemptions for specified normal farming, ranching, and silvicultural activities. However, these exemptions are subject to statutory limitations, including the recapture provision in §404(f)(2).
- **Landowners should carefully document drainage patterns and surface-water connections.** Photographs, historical aerial imagery, topographic information, and hydrological evidence may become important when jurisdiction is disputed.
- **Jurisdictional determinations remain valuable.** When substantial construction, drainage, or land improvement is contemplated, obtaining an appropriate determination from the Corps may reduce regulatory uncertainty.
- **State law cannot be ignored.** A successful argument against federal jurisdiction does not necessarily eliminate permitting requirements imposed by state or local law.
- **Landowners must recognize that the applicable federal regulatory framework remains unsettled.**

⁷ 33 U.S.C. §1344(f).

Because of ongoing litigation, the EPA continues to apply different regulatory frameworks in different states, subject to the Supreme Court's decision in *Sackett*. Currently, the amended 2023 rule applies in 24 states, the District of Columbia, and U.S. territories, while the remaining 26 states operate under the pre-2015 regulatory framework as constrained by *Sackett*.⁸

Conclusion

The recent developments in wetlands regulation represent an important test of whether federal administrative agencies will adhere to the limits imposed by Congress and the Supreme Court.

The September 2026 supplemental proposal offers the possibility of greater regulatory clarity. The Ninth Circuit's decision in *Inland Empire* demonstrates that courts are continuing to grapple with the consequences of *Sackett*.

But regulatory certainty requires more than replacing one administration's interpretation with another's. It requires fidelity to statutory text, respect for private property rights, and recognition that the federal government does not possess unlimited authority over land and water merely because environmental concerns are involved. Farmers and ranchers should be able to understand the legal restrictions applicable to their property without confronting an unpredictable federal permitting system.

The Supreme Court established important boundaries in *Sackett*. The challenge now is ensuring that federal regulators respect them. In addition, farmers, ranchers and rural landowners (and their legal counsel) should remain alert to legal theories that elevate concepts such as “dignity,” “climate justice,” and “environmental equity” over traditional property rights and statutory limits on government power. Whatever their packaging, such theories can provide cover for expanding government control over privately owned land without clear legislative authorization and threaten the independence of agricultural producers and the constitutional protections upon which private property ownership rests.

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⁸ EPA, *Definition of Waters of the United States: Rule Status and Litigation Update* (updated September 9, 2026).