

WOTUS Returns

What EPA's New Rule Means for Farmers and Landowners

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Overview

For more than a decade, few federal environmental regulations have generated more uncertainty - and more frustration - for farmers, ranchers and rural landowners than the federal definition of “waters of the United States,” or WOTUS, under the Clean Water Act. The latest development suggests that the federal government may finally be moving toward a definition that is narrower, more predictable and more consistent with the Constitution and the Supreme Court’s decision in *Sackett v. EPA*. But farmers should not mistake the latest announcement for the end of the WOTUS saga.

On September 4, 2026, the Environmental Protection Agency (EPA) and U.S. Army announced a Supplemental Notice of Proposed Rulemaking seeking public comment on a limited number of additional regulatory alternatives before finalizing a new WOTUS definition.¹ The agencies are seeking additional comments on regulatory alternatives involving the definition of perennial waters, the meaning of ‘relatively permanent’ waters, and the requirements for a ‘continuous surface connection’ between wetlands and jurisdictional waters.

Sackett Changed the Game

The Supreme Court's 2023 decision in *Sackett v. EPA*² rejected the expansive “significant nexus” approach that had allowed federal jurisdiction to reach an extraordinarily broad range of wetlands and other water features. Under *Sackett*, federal jurisdiction over adjacent wetlands requires a continuous surface connection to a qualifying water such that it is difficult to determine where the water ends and the wetland begins.

That distinction matters enormously in agriculture. A farm is not a laboratory. Water moves across agricultural landscapes in ways that depend upon rainfall, snowmelt, drainage systems, soil characteristics, topography and irrigation. A depression in a field may contain water after a heavy rain and be completely dry weeks later. A roadside ditch may carry water during a storm. A drainage tile may move groundwater beneath a field.

The question should not be whether some hydrologic connection can theoretically be demonstrated. The question should be whether Congress actually intended the federal government to exercise regulatory jurisdiction over that feature under the Clean Water Act.

Sackett provides a much more defensible statutory and constitutional boundary.

¹ EPA & U.S. Department of the Army, EPA and Army Seek Additional Input on Proposed Waters of the U.S. Definition While Advancing Toward Durable Final Rule (Sept. 4, 2026), announcing a Supplemental Notice of Proposed Rulemaking seeking public input on additional regulatory alternatives to be considered alongside the agencies’ 2025 proposed WOTUS rule.

² 598 U.S. 651 (2023).

The 2025 Proposal Is Significant for Agriculture

The underlying November 2025 proposal³ would narrow and clarify federal jurisdiction in several important ways. For example, the proposed definition of a “relatively permanent” water would generally require standing or continuously flowing surface water year-round or at least during the wet season. Features that flow only following precipitation events are considered ephemeral and excluded.

That distinction is particularly important in the Great Plains and arid West, where intermittent drainage features are commonplace.

The proposal also would require an adjacent wetland to abut - or physically touch - a jurisdictional water - and have surface water at least during the wet season.⁴ That could substantially narrow federal jurisdiction across agricultural landscapes. From a property-rights perspective, that is a significant improvement.

What About Ditches?

Ditches have long been a source of confusion and litigation. Under the proposal, ditches - including roadside ditches - constructed or excavated entirely in dry land would be excluded from WOTUS even if they carry relatively permanent flows.⁵ That approach makes sense. A farmer who constructs a drainage ditch to move water across otherwise dry agricultural land should not automatically transform that man-made feature into a federally regulated “water of the United States.”

Likewise, the proposal expressly excludes groundwater, including groundwater drained through subsurface drainage systems.⁶ The proposal would therefore make clear that groundwater drained through agricultural tile drainage systems is outside federal WOTUS jurisdiction. Again, the distinction is important. Federal environmental regulation should not expand merely because a farmer is efficiently managing water on his own land.

Prior Converted Cropland: A Particularly Important Agricultural Issue

The proposal would continue the exclusion for land converted to agricultural production before December 23, 1985, unless the land is both abandoned and has reverted to wetlands.⁷

The proposed two-part test is particularly noteworthy. A single qualifying agricultural use within the immediately preceding five years - including cropping, grazing, haying, conservation-program enrollment, or another activity supporting agriculture - would generally prevent a finding of abandonment.⁸ The exclusion would be lost only if the land is both abandoned and has reverted to wetland conditions.

That is a far more workable approach than leaving farmers wondering whether enrollment in a conservation program, temporary noncropping, grazing or other agricultural activity has somehow caused their land to become federally regulated.

³ Updated Definition of “Waters of the United States,” 90 Fed. Reg. 52,498 (Nov. 20, 2025) (proposed rule).

⁴ See Updated Definition of “Waters of the United States,” 90 Fed. Reg. 52,498, 52,531, 52,535 (Nov. 20, 2025) (proposed rule).

⁵ Updated Definition of “Waters of the United States,” 90 Fed. Reg. 52,498, 52,541–42 (Nov. 20, 2025) (proposed rule).

⁶ See Updated Definition of “Waters of the United States,” 90 Fed. Reg. 52,498, 52,534–35, 52,545 (Nov. 20, 2025) (proposed rule).

⁷ Updated Definition of “Waters of the United States,” 90 Fed. Reg. 52,498, 52,545 (Nov. 20, 2025) (proposed rule).

⁸ See Updated Definition of “Waters of the United States,” 90 Fed. Reg. 52,498, 52,536–38 (Nov. 20, 2025) (proposed rule).



But There Is Still a Problem: “Wet Season”

The devil, as usual, will be in the details. The 2025 proposal's “wet season” concept could become particularly important. The agencies are considering alternatives ranging from jurisdiction limited to perennial waters to a more traditional seasonal standard. The choice could have substantial consequences in the Plains and arid West, where drainage patterns differ dramatically from those found in wetter regions.

This is precisely why another round of comments is important. A definition that looks reasonable in Washington, D.C., or the Pacific Northwest may produce very different results when applied to a Kansas pasture, a Nebraska crop field, a Texas ranch or a Wyoming drainage. One-size-fits-all federal regulation does not work particularly well when the resource being regulated is water.

The Current Regulatory Patchwork Is Itself a Problem

There is another reason the agencies need to get this right: farmers have already endured years of uncertainty over what constitutes a “water of the United States.” The current situation is the product of repeated rulemakings, court decisions, and ongoing litigation. The agencies’ November 2025 proposal explains that, because of litigation surrounding the amended 2023 WOTUS rule, different regulatory frameworks currently apply across the country. In 24 states, the District of Columbia, and U.S. territories, the 2023 framework remains in effect. In the other 26 states, the agencies are operating under the pre-2015 regulatory framework, as interpreted in light of the Supreme Court’s decision in *Sackett*.

That is hardly regulatory certainty. A farmer should not have to determine which version of federal water law applies based simply on the state in which the farm happens to be located. And even if the federal government ultimately excludes a particular water feature from WOTUS, that does not necessarily mean the feature is free from regulation. States, Tribes, and local governments retain authority over waters outside federal jurisdiction. As a result, state and local requirements may continue to vary considerably.

Regulatory Certainty Is a Property Right Issue

From the perspective of agricultural law, the WOTUS debate is about more than environmental regulation. It is fundamentally about property rights and the rule of law. A landowner needs to know what he can do with his land. He needs to know whether he can build a fence, install drainage, move dirt, repair a road, construct a stock pond or continue farming a particular parcel without first obtaining federal permission.

That does not mean environmental laws should disappear. Clean water is valuable, and state and federal governments have legitimate interests in protecting waterways. But legitimate environmental objectives do not justify unlimited federal jurisdiction.

The proper starting point should be the statute Congress enacted, the constitutional limits on federal power and the Supreme Court's interpretation of those limits - not an administrative theory that effectively allows federal regulators to reach virtually any wet area that can be connected, directly or indirectly, to navigable waters.

The September 4 supplemental action does not appear to fundamentally change the direction of the 2025 proposal, but it gives the agencies an opportunity to consider additional alternatives before issuing a final rule.



Conclusion - The Bottom Line for Farmers and Ranchers

The latest development is not a final WOTUS rule. It is another step toward one. But the direction appears promising on numerous fronts:

- the definition of “relatively permanent” waters;
- the meaning and application of the “wet season” standard;
- the requirement for a continuous surface connection;
- treatment of tributaries and artificial conveyances;
- exclusions for farm and roadside ditches;
- exclusion of groundwater and tile drainage; and
- the treatment of prior converted cropland.

The EPA estimates that approximately 19 percent of wetlands mapped in the National Wetlands Inventory would qualify as WOTUS under the November 2025 proposal.⁹ That would represent a substantial departure from the expansive regulatory philosophy that has characterized WOTUS for years. Farmers do not need another vague promise of regulatory certainty. They need a clear line.

The Supreme Court has now supplied an important constitutional and statutory boundary. The task for EPA and the Army is to write a rule that respects that boundary, applies it consistently across the country, and gives landowners something that has been missing for far too long: the ability to know where federal jurisdiction ends and private property begins.

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⁹ See U.S. EPA & U.S. Dep't of the Army, Regulatory Impact Analysis for the Proposed Rule: Updated Definition of “Waters of the United States,” EPA-HQ-OW-2025-0322, at 3-8 to 3-9, tbl. 3-1 (Nov. 2025).

