



Public Comment on the U.S. Environmental Protection Agency's revised definition of "waters of the United States"

Property and Environment Research Center

Bozeman, Montana

January 5, 2026

Main Points

- Wetlands provide wide-ranging benefits for biodiversity and watershed health, making their conservation a worthwhile investment for both wildlife and nearby communities.
- More federal regulation, however, does not always mean more conservation; effective wetland conservation instead depends on jurisdictional tests that are clear and readily administrable.
- The administration's revised definition of "waters of the United States" (WOTUS) takes substantive steps towards advancing wetlands conservation by:
 - mitigating uncertainty, conflict, and litigation risk;
 - reducing incentives that discourage voluntary conservation and restoration; and
 - clarifying where federal regulation ends and the need for state and private conservation begins.

Introduction

The Property and Environment Research Center (PERC) respectfully submits this comment supporting the U.S. Environmental Protection Agency's (EPA) proposed reforms to the regulation of wetlands under the Clean Water Act. PERC is a nonprofit research institute located in Bozeman, Montana that explores market-based solutions to environmental problems. Through research, law and policy, and innovative field conservation programs, PERC explores how aligning incentives for environmental stewardship produces sustainable outcomes for land, water, and wildlife.

Wetlands play a critical role in healthy watersheds, supporting biodiversity and providing ecosystem functions that benefit wildlife and nearby communities. PERC's research has shown that poorly defined and expansive federal jurisdiction

under the Clean Water Act (CWA) can fuel conflict between landowners and regulators, complicate collaborative restoration, and sideline effective state-led programs.¹ Based on this research, PERC supported the challengers in *Sackett v. EPA* (2023) and the Supreme Court's clarification of the scope of federal authority over wetlands.² Our chief concern in that case was the need for clear standards that could be applied by landowners, and by states and conservation groups looking to pick up wetland conservation where federal regulation left off.

The Environmental Protection Agency's proposed WOTUS definition follows the Supreme Court's unanimous decision in *Sackett* and provides needed clarity for wetland conservation. It draws clearer, more administrable jurisdictional lines that reduce uncertainty and conflict, encourage voluntary landowner stewardship and restoration partnerships, and better enables state-led programs to target their efforts where they are most needed.

Wetland conservation and restoration depends on landowner cooperation, which is undermined by vague and capacious regulatory standards.

Although the biological productivity of wetlands was long overlooked, their value rivals that of rain forests and coral reefs.³ Wetlands support an extraordinary share of the nation's biodiversity: they sustain roughly 31% of U.S. plant species and provide habitat for more than one-third of species listed under the Endangered Species Act.⁴ They also host populations of birds, wildlife, and fish that are important to sportsmen and wildlife watchers. Beyond their role as habitat, wetlands retain and filter water, which reduces flooding and protects water quality.⁵

Broad federal regulation of wetlands may seem good for conservation, but it can just as easily set back conservation when private landowners can only guess what's regulated, and states and conservation groups cannot determine where their efforts are needed.

¹ Henry Holmes, *Protecting Wetlands: Environmental Federalism and Grassroots Conservation in the Prairie Pothole Region*, 10 Ariz. J. of Env'tl. L. & Pol'y 365 (2020); R. David Simpson, *What Went Wrong With WOTUS: Reflections on Economic Valuation and Environmental Regulation*, PERC Policy Series No. 59 (2019).

² Brief of the Property & Environment Research Center as Amicus Curiae in Support of Petitioners, *Sackett v. EPA*, No. 21-454 (U.S. filed Apr. 2022).

³ See T.E. Dahl, U.S. Fish & Wildlife Serv., *Wetlands Losses in the United States 1780s to 1980s* (1990); *Leovy v. United States*, 177 U.S. 621 (1900); EPA, *Functions and Values of Wetlands* (2002).

⁴ Holmes, *supra* note 1, at 367.

⁵ See EPA, *Functions and Values of Wetlands* (2002); EPA, *Economic Benefits of Wetlands* (2006).

While the navigable waters that are the focus of the Clean Water Act are largely public, 75% of wetland acres in the contiguous United States are on private land.⁶ The extent to which the Clean Water Act is successful in its stated goal of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation’s waters,” therefore, depends heavily on the incentives of private landowners.⁷ There are many wetland conservation strategies that seek to reward private landowners for the many public and private benefits their wetlands provide. Partnerships with conservation organizations, such as Ducks Unlimited,⁸ participation in a water quality market, or payment programs administered by local, state, and federal governments are core ways that wetlands are conserved or restored.⁹

An unclear and difficult to apply standard under the Clean Water Act, however, leaves landowners less likely to participate in conservation. Indeed, the high costs associated with federal regulation can alienate landowners, make wetland features a liability for them, and strain relationships between landowners, conservation organizations, and government agencies. Implementation of the Clean Water Act before *Sackett*, for example, left landowners, conservation organizations, and state and local governments to navigate an unclear and litigation-prone environment.¹⁰ This uncertainty imposed especially high costs on private landowners, who often could not determine the regulatory status of their own property by observation alone.

In the absence of clear, administrable rules, landowners must hire technical experts or seek agency determinations to assess whether federal jurisdiction applies to their own property.¹¹ Even then, jurisdictional outcomes often remained uncertain because they turned on discretionary or subjective judgments rather than readily observable physical characteristics. The prospect of costly consultations followed by a potentially lengthy and expensive federal permitting process creates strong incentives for landowners to avoid engagement altogether. Individual Clean Water

⁶ EPA, *Threats to Wetlands* (2001).

⁷ 33 U.S.C. § 1251(a).

⁸ See Ducks Unlimited, *Preserve Our Prairies: Progress Report* (2018).

⁹ See New York City Dept. of Env’tl. Prot., *Wetlands in the Watersheds of the New York City Water Supply System* (2009); EPA, *Water Quality Trading Scenario: Nonpoint Source Credit Exchange in Water Quality Trading Toolkit for Permit Writers* (2007); EPA, *EPA and Other Federal Grants That Include Wetlands Restoration*.

¹⁰ *Sackett v. EPA*, 8 F.4th 1075 (9th Cir. 2021).

¹¹ *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 594—95 (2016).

Act Section 404 permits have imposed average costs exceeding \$270,000 and delays of more than two years, further amplifying these negative incentives.¹²

Regulatory uncertainty can also generate perverse incentives. Fearing that restoring wetlands—or even allowing wetland features to persist—could expose their property to future federal control, landowners may be disinclined to invest in restoration and stewardship. In some cases, for example, federal enforcement actions have been brought against landowners for modifying wetland features they themselves established.¹³ Where landowners are uncertain whether their own restoration efforts will subject their property to federal regulation, they may be reluctant to undertake such efforts.¹⁴ Such dynamics undermine conservation by making wetlands liabilities rather than assets.

This reality should shape how the agencies evaluate regulatory tradeoffs. A workable jurisdictional definition should reinforce landowners' willingness to participate in conservation and restoration efforts rather than turning wetlands into perceived legal risks.¹⁵ By providing clearer, more administrable boundaries for federal jurisdiction, the proposed rule moves in that direction, helping align regulatory incentives with the cooperative, incentive-based approaches that are essential to effective wetland conservation on private lands.

Uncertain federal regulations can crowd out state intervention.

Additionally, clarifying the scope of federal jurisdiction allows states to take the lead on wetlands conservation by more clearly dividing regulatory responsibility between federal and state governments. The proposed WOTUS rule can, therefore, help state and local conservation actors more efficiently target their efforts, strengthen state accountability for wetlands outcomes, encourage policy experimentation tailored to local conditions, and promote greater stability and predictability than a system in which jurisdiction and regulatory expectations fluctuate over time.

Without clear federal jurisdictional boundaries, conservation groups and state and local officials cannot reliably determine which wetlands require supplemental protection and investment. Uncertainty can also suppress state initiatives that would otherwise be more comprehensive, more focused, and more reflective of local

¹² *Id.*

¹³ See Jonathan H. Adler, *Money or Nothing: The Adverse Consequences of Uncompensated Land Use Controls*, 49 Boston College L. Rev. 301 (2008); *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990).

¹⁴ Holmes, *supra* note 1, at 373.

¹⁵ *Id.*

knowledge because expansive or unclear federal oversight can crowd them out.¹⁶ Compounding the problem, overlapping jurisdictions can dampen political incentives by reducing the likelihood that a state or local policymaker will get credit for the benefits their programs create.¹⁷ By sharpening federal boundaries, the proposed rule can make it easier for states to identify their lane, invest in wetland strategies suited to local conditions, and credibly claim responsibility for results. At the same time, decentralization helps guard against systemic failure: if a state adopts a flawed approach, the resulting harms are geographically contained rather than imposed nationwide, so mistakes are easier to correct. Clearer federal jurisdiction under the proposed rule, in this way, can incentivize constructive state-led experimentation while mitigating the risk that any single regulatory misstep cascades across the country.

Colorado's timely response to the *Sackett* decision strengthens the argument that states are able to take wetlands conservation into their own hands. The state moved to build a comprehensive framework tailored to its own hydrology and economic realities. It convened a broad, cross-sector task force and translated that process into bipartisan legislation—complete with targeted exemptions, a general-permitting system, and provisions supporting voluntary restoration projects developed with input from groups like Ducks Unlimited. Now that the law is enacted, Colorado agencies are moving into detailed implementation and mitigation planning, demonstrating both the capacity and political will for states to lead wetland and stream protection when federal lines are clarified.¹⁸

Conclusion

The administration's proposed WOTUS definition provides a clearer, more workable CWA framework. By grounding federal jurisdiction in readily observable features, the proposal promises to reduce uncertainty which, in the past, has alienated landowners from voluntary conservation efforts. Additionally, sharper federal boundaries will help states and local partners identify where additional effort is needed.

¹⁶ See Jonathan H. Adler, *When is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 Harv. Envtl. L. Rev. 67, 94—106 (2007).

¹⁷ See Jonathan H. Adler, *Redefining the Waters of the United States*, 34 PERC Reports 38 (2015); Holmes, *supra* note 1, at 367.

¹⁸ Property & Env't Research Ctr. & Ducks Unlimited, *Pulling Wetlands Conservation Out of the Political Muck: Ideas for Policy and Market Innovations That Can Improve Wetland Conservation* (Nov. 20, 2025).