



April 23, 2025

VIA ELECTRONIC SUBMISSION

The Honorable Lee Zeldin
Administrator
U.S. Environmental Protection Agency
Washington, DC 20460

Ms. Robyn S. Colosimo
Senior Official Performing the Duties of The Assistant Secretary of the Army for Civil Works
Office of the Assistant Secretary of the Army (Civil Works)
Department of the Army
108 Army Pentagon
Washington, DC 20310-0108

**Re: WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket;
Request for Recommendations, Docket No. EPA-HQ-OW-2025-0093**

Dear Administrator Zeldin and Ms. Colosimo:

On March 24, 2025, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) published a notice soliciting stakeholder feedback on the “WOTUS Notice: The Final Response to SCOTUS” (WOTUS Notice).¹ This letter constitutes the Office of Advocacy’s (Advocacy) public comments on the agencies’ solicitation.

Advocacy supports the agencies’ reexamination of regulations defining the “waters of the United States” (WOTUS). This current effort represents the fourth time the EPA and the Corps have broached the issue of federal jurisdiction under the Clean Water Act (CWA). During the development of each of the prior WOTUS regulations, the agencies did not fully comply with the Regulatory Flexibility Act (RFA)² nor properly evaluate the impacts on small entities. Advocacy strongly recommends the agencies reverse this trend and ensure the current discussion complies with the RFA by thoroughly considering the concerns of small entities.

Since 2014, Advocacy has discussed WOTUS with small entities in multiple sectors of the economy. The primary issue that has permeated these discussions is the need for clarity. Small businesses want WOTUS regulations that do not require them to hire attorneys or consultants to understand.

¹ 90 Fed. Reg. 13428 (Mar. 24, 2025).

² Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

Additionally, any future WOTUS definition should specify that whenever there is doubt as to whether a waterbody is under federal jurisdiction, the burden should be on the federal government to prove jurisdiction exists as opposed to the burden being on the small business to show it does not. Small businesses are also concerned with possible impacts to the existing regulatory exclusions they have grown to depend on for operational confidence through multiple WOTUS rules.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy in 1976 under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA) that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.⁴ Additionally, Section 609 of the RFA requires the Consumer Financial Protection Bureau, the Occupational Safety and Health Administration, and the EPA to conduct special outreach efforts through a review panel.⁵ The panel must carefully consider the views of the impacted small entities, assess the impact of the proposed rule on small entities, and consider less burdensome alternatives for small entities.⁶ If a rule is not expected to have a significant economic impact on a substantial number of small entities, agencies may certify it as such and submit a statement of the factual basis for such a determination that adequately supports its certification.⁷

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁸ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.⁹

³ Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).

⁴ 5 U.S.C. § 603.

⁵ *Id.* § 609.

⁶ *Id.*

⁷ *Id.* § 605(b).

⁸ Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).

⁹ *Id.*

Advocacy’s comments are consistent with Congressional intent underlying the RFA, that “[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public.”¹⁰

B. The WOTUS Notice

The WOTUS Notice solicits comments from the regulated public on “certain key topics related to the implementation of the definition of ‘waters of the United States’ in light of the Supreme Court’s decision in *Sackett v. Environmental Protection Agency*.”¹¹ This information is being gathered “before taking any further administrative action to provide any additional clarification to agency staff, co-regulators, and the public on specific aspects of the definition of ‘waters of the United States.’”¹²

This is not the agencies’ first attempt to define WOTUS. Prior WOTUS rules were promulgated in 2015,¹³ 2020,¹⁴ and 2023.¹⁵ Less than a year after the 2023 WOTUS definition was finalized, *Sackett* struck down the “significant nexus” test upon which much of that rule was based.¹⁶ Later in 2023, the agencies issued a “conforming rule”¹⁷ without notice and comment, which attempted to comply with *Sackett*. As a result of ongoing litigation over the 2023 WOTUS definition, 24 states are complying with the “conforming rule” while 26 states are operating under the agencies’ pre-2015 regulatory regime for determining CWA jurisdiction.¹⁸

With the WOTUS Notice, the agencies are gathering information to help in the development of a uniform definition of WOTUS that properly implements the *Sackett* decision. Specifically, the WOTUS Notice asks for comment on the following areas:

- The scope of “relatively permanent” waters and to what features this phrase applies.
- The scope of “continuous surface connection” and to which features this phrase applies.
- The scope of jurisdictional ditches.¹⁹

In addition, the agencies are also holding a series of public hearings to gather feedback from the regulated community, including small entities.²⁰

¹⁰ Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

¹¹ 598 U.S. 651 (2023); 90 Fed. Reg. 13248 (March 24, 2025).

¹² 90 Fed. Reg. 13248.

¹³ 80 Fed. Reg. 37054 (June 29, 2015).

¹⁴ 85 Fed. Reg. 22250 (Apr. 21, 2020).

¹⁵ 88 Fed. Reg. 3004 (Jan. 18, 2023).

¹⁶ *Sackett v. EPA*, 598 U.S. 651, 680 (2023).

¹⁷ 88 Fed. Reg. 61964 (Sept. 8, 2023).

¹⁸ See U.S. Env’t Prot. Agency, *Definition of “Waters of the United States”: Rule Status and Litigation Update*, <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update> (last updated Oct. 21, 2024).

¹⁹ 90 Fed. Reg. 13248, 13430-31 (Mar. 24, 2025).

²⁰ See U.S. Env’t Prot. Agency, *Public Outreach and Stakeholder Engagement Activities*, <https://www.epa.gov/wotus/public-outreach-and-stakeholder-engagement-activities> (last updated Apr. 16, 2025).

II. Advocacy's Small Business Concerns

There are almost 35 million small businesses in the United States, and they employ roughly 59 million people.²¹ The definition of WOTUS impacts all of these businesses that are regulated by the CWA. As such, Advocacy has been involved in regulations defining WOTUS since 2015. Over the years, Advocacy has submitted multiple sets of comments,²² held roundtables,²³ and discussed WOTUS in congressional testimony.²⁴ In 2019, WOTUS was discussed at different locations as Advocacy toured the country talking with small businesses about deregulatory issues.²⁵ In March 2025, small businesses in Bozeman, MT shared WOTUS concerns with Advocacy during SBA's "Made in America Manufacturing Initiative" tour.

Advocacy will continue to be involved in the WOTUS regulatory process to help ensure the voices of small entities are heard throughout this important discussion. Drawing on our years of involvement with small businesses on this issue, Advocacy has identified three key elements that ought to be addressed by the agencies in a future rulemaking. First, clarity is paramount. Small entities need a definition of WOTUS they can understand without having to hire additional consultants or attorneys. Second, future WOTUS regulations should be implemented in such a way that reflects the burden of proof is on the federal government to prove an area needs to be regulated, as opposed to being on small businesses to show that regulation is not necessary. Third, a future rule ought to maintain the regulatory exemptions to WOTUS which have been developed over the years and strive to preserve the certainty that they give the regulated public.

A. The EPA and the Corps Should Fully Consider How the Next WOTUS Rule Will Impact Small Entities

Though many discussions about WOTUS focus on the presence of waterbodies on private land, a variety of other permitting programs are also within the scope of the WOTUS discussion. According to the EPA, the federal reach of the following CWA programs is determined by WOTUS:

²¹ See, U.S. Small Bus. Admin, Off. Of Advoc., Frequently Asked Questions About Small Businesses, 2024 (July 2024), <https://advocacy.sba.gov/wp-content/uploads/2024/12/Frequently-Asked-Questions-About-Small-Business-2024-508.pdf>.

²² See e.g., U.S. Small Bus. Admin, Off. of Advoc., Comments on EPA and Army's Proposed Rule Defining "the Waters of the United States" Under the Clean Water Act (EPA Docket EPA-HQ-OW-2021-0602 and Army Docket COE-2021-0001-0016) (Feb. 7, 2022), <https://advocacy.sba.gov/wp-content/uploads/2022/02/Comment-Letter-Proposed-WOTUS-Definition-2022.pdf>.

²³ See e.g., U.S. Small Bus. Admin, Off. of Advoc., *SBA Office of Advocacy National Waters of the U.S. Roundtable, April 4, 2019* (Mar. 11, 2019), <https://advocacy.sba.gov/2019/03/11/sba-office-of-advocacy-national-waters-of-the-u-s-roundtable-april-4-2019/>.

²⁴ See e.g., U.S. Small Bus. Admin, Off. of Advoc., *Testimony: An Examination of Proposed Environmental Regulation's Impacts on America's Small Businesses* (May 19, 2015), <https://advocacy.sba.gov/2015/05/19/an-examination-of-proposed-environmental-regulations-impacts-on-americas-small-businesses/>.

²⁵ See e.g., U.S. Small Bus. Admin, Off. of Advoc., *Advocacy Holds Small Business Forum in Kansas City on WOTUS* (Feb. 28, 2019), <https://advocacy.sba.gov/2019/02/28/advocacy-holds-small-business-forum-in-kansas-city-on-wotus/>; U.S. Small Bus. Admin, Off. of Advoc., *Advocacy Discusses WOTUS Woes with Small Businesses in the Mile-High City* (Apr. 10, 2019), <https://advocacy.sba.gov/2019/04/10/advocacy-discusses-wotus-woes-with-small-businesses-in-the-mile-high-city/>; U.S. Small Bus. Admin, Off. of Advoc., *Small Businesses in Tampa Bay Had a Lot to Say About WOTUS* (April 17, 2019), <https://advocacy.sba.gov/2019/04/17/small-businesses-in-tampa-bay-had-a-lot-to-say-about-wotus/>.

- Water Quality Standards
- Impaired Waters and Total Maximum Daily Loads
- Hazardous Substance Facility Response Plans
- Oil Spill Preparedness and Prevention Programs
- Water Quality Certification
- National Pollutant Discharge Elimination System
- Permitting Discharges of Dredged or Fill Material²⁶

The variety of CWA programs relying on WOTUS demonstrates that small entities in several sectors of the economy are directly impacted by WOTUS regulations.

During each of the past WOTUS rulemakings, the agencies have determined as part of their RFA analyses that their actions would not have a significant impact on a substantial number of small entities. In 2015, despite the agencies noting “substantial interest” which was “particularly within the small business community,” because of the permits needed to discharge into a WOTUS, they felt the rule did “not affect small entities to a greater degree than the existing regulations.”²⁷ Despite this, the agencies estimated that the 2015 rule would increase permit costs between \$19.8 and \$52 million annually and increase mitigation costs between \$59.7 and \$113.5 million annually.²⁸ A portion of these costs would be borne by small businesses who must meet mitigation requirements and obtain permits, but the agencies analysis did not include this information.

In 2020, the agencies determined small entities “are unlikely to suffer adverse impacts as a result of regulatory compliance”²⁹ with their revised WOTUS definition. However, the RFA is “designed not only to avoid harm to small entities but also promote the growth and well-being of such entities.”³⁰ By not considering all impacts to small entities (as opposed to only the presence of adverse impacts) the agencies undermined an RFA process that would have helped identify the extent of the rule’s benefits to small entities.

In 2023, the agencies confusingly declared that the WOTUS definition does “not directly apply to specific entities and therefore it does not ‘subject’ any entities of any size to any specific regulatory burden.”³¹ This finding was made in spite of an economic analysis by the agencies showing the rule resulted in permit costs between \$23 and \$74.8 million annually and mitigation

²⁶ U.S. Env’t Prot. Agency, *Clean Water Act Programs Utilizing the Definition of WOTUS*, <https://www.epa.gov/wotus/clean-water-act-programs-utilizing-definition-wotus> (last updated Aug. 21, 2024).

²⁷ 80 Fed. Reg. 37054, 37102 (June 29, 2015).

²⁸ U.S. ENV’T PROT. AGENCY & U.S. ARMY CORPS OF ENG’R, ECONOMIC ANALYSIS OF PROPOSED REVISED DEFINITION OF WATERS OF THE UNITED STATES 16-18 (March 2014), <https://www.regulations.gov/document/EPA-HQ-OW-2011-0880-0003>.

²⁹ 85 Fed. Reg. 22250, 22335 (Apr. 21, 2020).

³⁰ 126 Cong. Rec. H8,468 (daily ed. Sept. 8, 1980) (Legislative History of H.R. 4660 of the House Small Business Committee); *see also* U.S. SMALL BUS. ADMIN., OFF. OF ADVOC., A GUIDE FOR GOVERNMENT AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT (Aug. 2017), <https://advocacy.sba.gov/resources/regulatory-flexibility-act/rfa-basics/a-guide-for-government-agencies-how-to-comply-with-the-regulatory-flexibility-act/>.

³¹ 88 Fed. Reg. 3004, 3139 (Jan. 18, 2023).

costs between \$85.3 and \$190 million annually.³² During an April 1, 2025, hearing before the U.S. House of Representatives Small Business Committee, a small business owner stated that the decision to not require a full RFA analysis for the 2023 WOTUS rule “defies all common sense.”³³

While the current WOTUS Notice is not a proposed rule, it signals the agencies’ attempt to gather information to use as the basis for future regulatory action. As the agencies move forward with their efforts to clarify the WOTUS definition and comply with *Sackett*, Advocacy urges the maximum possible involvement for small entities. The sheer volume of CWA programs impacted by WOTUS is indicative that a significant number of small entities will be impacted by whatever course the agencies take.

If the WOTUS Notice leads to additional rulemaking, Advocacy strongly recommends a SBREFA panel of impacted small entities be convened. None of the previous WOTUS rules have used SBREFA panels. As a result, the agencies have yet to promulgate a rule clear enough for small businesses to understand or a rule that can withstand legal challenge. A SBREFA panel allows the agencies to comply with the RFA and gather small entity input early in the rule making process. It also helps to ensure that once a rule is proposed, small entity concerns are addressed and a rule that will, in the words of the EPA, “stand the test of time.”³⁴

B. The Agencies Should Prioritize Clarity in the Next WOTUS Definition

Advocacy supports the agencies’ efforts to focus the next WOTUS definition on “clarity” and “simplicity.”³⁵ In prior WOTUS discussions, small entities have stressed the need for regulations they can understand without incurring the additional cost of having to rely on outside consultants or attorneys. Small businesses do not normally have dedicated regulatory affairs staff, yet they will need to comply with CWA regulations to effectively function. Thus, any changes to the WOTUS definition must be easy to understand.

Specifically, the agencies have asked for input on the issue of ditches. Ditches have been a constant source of confusion for small businesses. Past WOTUS definitions have set forth multiple and different classifications and conditions which needed to be met before determining whether federal jurisdiction exists over a ditch. The level of complexity made it extremely difficult for small business owners to look at a ditch on their property or worksite and determine if they needed a federal permit.

³² U.S. ENV’T PROT. AGENCY & U.S. ARMY CORPS OF ENG’R, ECONOMIC ANALYSIS OF THE PROPOSED “REVISED DEFINITION OF THE WATERS OF THE UNITED STATES” RULE (Nov. 17, 2021), <https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0083>.

³³ Nat’l Ass’n of Home Builders, *Testimony of Buddy Hughes on Behalf of the National Association of Home Builders Before the House Small Business Committee Hearing on “The Golden Age: Unleashing Main Street Through Deregulation,”* 3 (Apr. 1, 2025), <https://docs.house.gov/meetings/SM/SM00/20250401/118074/HHRG-119-SM00-Wstate-HughesB-20250401.pdf>.

³⁴ U.S. Env’t Prot. Agency, *Administrator Zeldin Announces EPA Will Revise Waters of the United States Rule* (Mar. 12, 2025), <https://www.epa.gov/newsreleases/administrator-zeldin-announces-epa-will-revise-waters-united-states-rule>.

³⁵ *Id.*

Where possible, the agencies should use straightforward rules to assess whether ditches are jurisdictional. For example, if the agencies were to decide irrigation ditches and roadside ditches should be automatically classified as non-jurisdictional, this would be easy for small businesses to understand. A small business owner could look at a ditch, identify it as a roadside or irrigation ditch, and know they are in compliance with the CWA. No outside help, expertise or expense would be needed.

Small entities have raised concerns with other terms used to define WOTUS, including “relatively permanent” and “continuous surface connection,” which are covered in the WOTUS Notice. Advocacy has also learned from small businesses that terms like “certain times,” “typical year,” “intermittent,” “intermittent flow,” “similarly situated,” and “typical year” were sources of confusion. As the agencies gather input and reassess each of these terms, they should prioritize clarity while considering geographical differences that impact how these terms are defined in different areas of the country. In other words, the fact that waterbodies in the southwestern United States differ from those in the northeast should be taken into account. Small businesses can help attain this balance because they are intimately familiar with the waterbodies and geographic features on the properties where they live and work.

As the agencies move forward with the WOTUS Notice, Advocacy recommends they emphasize the perspectives of small entities who will be on the front lines of implementing any new WOTUS related rules. Advocacy is ready to help the agencies bring small entities into this important regulatory process.

C. The Next WOTUS Rule Ought to Specify that the Burden of Proving CWA Jurisdiction Falls on the Federal Government, not Small Entities

While the goal of the WOTUS Notice and any subsequent regulatory action should include a clear definition of WOTUS understandable by small entities, there will always be instances where federal CWA jurisdiction cannot be easily determined. In such cases, the agencies should specify that the burden to prove a waterbody is under federal jurisdiction should fall on the federal government.

Past WOTUS definitions have been so complex that small entities sometimes found it easier to assume that federal jurisdiction existed over waterbodies on their property instead of incurring the costs of an external consultant or attorney who might be able to provide a definitive answer. This is the epitome of an unnecessary regulatory burden.

Small entities should not be put in the position of having to disprove CWA jurisdiction on their property. When the issue of federal jurisdiction is not readily apparent, Advocacy recommends that the agencies specify jurisdiction does not exist unless the federal government can prove otherwise.

D. Current Exemptions Should be Preserved in Future WOTUS Definitions

As the definition of WOTUS has changed since 2015, exemptions for certain features (such as prior converted croplands and waste treatment systems) have existed both in the text of the CWA and in the regulations themselves. Small entities have grown to rely on these exemptions, and

their preservation in future WOTUS definitions will go a long way toward providing regulatory certainty. Further, not preserving these existing exemptions will result in added regulatory burden costs on small entities, which would need to be accounted for.

As the agencies move forward with clarifying the WOTUS definition, they should focus on doing so in a way that makes exemptions unnecessary. Instead of regulating to the point where exemptions are needed, Advocacy recommends the agencies seek to define WOTUS in a manner which necessitates minimal federal control to accomplish environmental goals. If, at a later date, the agencies can definitively show additional waterbodies which require federal regulation, the WOTUS definition can be amended accordingly.

III. Conclusion

Advocacy thanks the EPA and the Corps for gathering information from the regulated community, including small entities, prior to updating the WOTUS definition. Over 99% of all businesses are small³⁶ and the WOTUS definition impacts every one of these businesses regulated by the CWA. As the agencies move forward with their efforts to clarify WOTUS, small entities should be involved to the maximum extent possible, including a SBREFA panel if a new rule is proposed.

Advocacy agrees with the agencies' focus on ensuring clarity in new WOTUS definitions. Small entities should be able to understand the terms involved in WOTUS without having to seek help from outside consultants or other professionals. Additionally, the agencies should specify that the burden is on federal agencies to show federal CWA jurisdiction exists, not on small entities to prove it does not. Finally, Advocacy recommends the agencies preserve existing CWA regulatory exemptions or remove the need for the exemptions altogether, with an overall goal of regulating in a manner where additional exemptions will not be necessary.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Nick Goldstein at (202) 772-6948 or nick.goldstein@sba.gov.

Sincerely,

/s/

Chip Bishop
Deputy Chief Counsel
Office of Advocacy
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³⁶ See, U.S. Small Bus. Admin, Off. Of Advoc., Frequently Asked Questions About Small Businesses, 2024 (July 2024), https://advocacy.sba.gov/wp-content/uploads/2024/12/Frequently-Asked-Questions-About-Small-Business_2024-508.pdf.

/s/

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Copy to: Mr. Jeffrey B. Clark, Sr. Acting Administrator
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