U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

January 5, 2026

VIA ELECTRONIC SUBMISSION

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

Mr. Adam Telle
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: Updated Definition of "Waters of the United States," Docket No. EPA-HQ-OW-2025-0322.

Dear Administrator Zeldin and Assistant Secretary Telle:

On November 20, 2025, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (collectively the Agencies) published a proposed rule updating the definition of "waters of the United States" (WOTUS).[1] This letter constitutes the Office of Advocacy's (Advocacy) public comments on the agencies' proposal.

Advocacy supports the Agencies' reexamination of the WOTUS definition. Their proposed rule takes meaningful steps towards reducing both the regulatory confusion and unnecessary costs that overbroad Clean Water Act (CWA) regulations can impose on small entities.

However, there are areas of the proposed rule Advocacy believes must be improved to achieve the clarity and predictability small entities are seeking. Specifically, the Agencies should issue a small entity compliance guide (SECG) to help small entities understand their CWA regulatory obligations. The Agencies must also add specificity to the proposed rule's "wet season" concept. Clarity is also needed on how the Agencies' approach to burden of proof would work in practice.

[1] 90 Fed. Reg. 52498 (Nov. 20, 2025).

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 voice within the executive branch 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 Small Business Administration (SBA) or the Administration.

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[2] 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.[3] 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.[4]

Additionally, Section 609 of the RFA requires the EPA to conduct special outreach efforts through a small business advocacy review (SBAR) 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] A SBAR Panel was not convened for any of the prior WOTUS definition proposed rules nor has one been convened for this proposed rule.

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."[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]

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[2] Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).
[3] 5 U.S.C. § 603.
[4] *Id.* § 605(b).
[5] *Id.* § 609.
[6] *Id.*
[7] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).
[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.*

B. The Office of Advocacy Has Worked to Ensure Small Entities Have a Voice in the WOTUS Discussion for More Than a Decade.

This current effort represents the fourth time the Agencies have broached the issue of the reach of the CWA's federal jurisdiction. Since 2014, Advocacy has discussed WOTUS with small entities in multiple sectors of the economy. The primary issues that have permeated these discussions are the need for clarity, predictability, and stability. Small entities want WOTUS regulations that do not require them to hire attorneys or consultants to understand. They also want a WOTUS definition that will not change again in four years. To this end, some small entities have started using the term "WOTUS fatigue" to explain their frustration with the seemingly constant changes to CWA jurisdiction.

Prior WOTUS rules were promulgated in 2015,[10] 2020,[11] and 2023.[12] Advocacy has been involved in each of these regulatory discussions through submitting multiple sets of comments,[13] holding small entity roundtables,[14] and discussing WOTUS in congressional testimony.[15] In 2019, WOTUS was discussed at different locations as Advocacy toured the country talking with small businesses about deregulatory issues.[16] Most recently, in March 2025, small businesses in Bozeman, MT shared WOTUS concerns with Advocacy during the SBA's "Made in America Manufacturing Initiative" tour.

Less than a year after the 2023 WOTUS definition was finalized, the Supreme Court's decision in *Sackett v. Environmental Protection Agency* struck down the "significant nexus" test upon which much of that rule was based.[17] Later in 2023, the Agencies issued a "conforming rule"[18] without notice and comment, which attempted to comply with *Sackett*. Currently, as a result of ongoing litigation over the 2023 WOTUS definition, 24 states are complying with the

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[10] 80 Fed. Reg. 37054 (June 29, 2015).
[11] 85 Fed. Reg. 22250 (Apr. 21, 2020).
[12] 88 Fed. Reg. 3004 (Jan. 18, 2023).
[13] *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, (Feb. 7, 2022), https://advocacy.sba.gov/wp-content/uploads/2022/02/Comment-Letter-Proposed-WOTUS-Definition-2022.pdf.
[14] *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/.
[15] *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/.
[16] *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/.
[17] *Sackett v. EPA*, 598 U.S. 651, 680 (2023).
[18] 88 Fed. Reg. 61964 (Sept. 8, 2023).

"conforming rule" while 26 states are operating under the Agencies' pre-2015 regulations for determining CWA jurisdiction.[19]

C. The WOTUS Definition Directly Impacts Small Entities.

There are over 36 million small businesses in the United States, and they employ over 62 million people.[20] The WOTUS definition can impact any of these businesses that operate by water or are regulated by the CWA, particularly the millions of small entities in agriculture, mining, oil and gas extraction, utilities, construction, transportation, waste management, marinas, and local governments. Small businesses do not normally have dedicated regulatory affairs staff, yet they will need to comply with CWA regulations to effectively function. Thus, any new WOTUS definition must be easy to understand. In November 2025, Advocacy placed the revised WOTUS definition on its list of small businesses' most wanted reforms.[21] By reducing federal overreach and providing increased clarity, the Agencies can potentially save small businesses over $1 billion in regulatory costs from avoiding unnecessary permits.[22]

While the most immediate impact of WOTUS definition on small entities is how they can use their own 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:

- 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 Material[23]

Each of these regulatory programs covers small entities. Thus, while the WOTUS definition directly impacts small farmers wanting to farm their own land and small businesses looking to expand their operations within the boundaries of their property, it also directly impacts any small entity that discharges a pollutant or is involved in project construction.

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[19] *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).
[20] *See* U.S. SMALL BUS. ADMIN., OFF. OF ADVOC., FREQUENTLY ASKED QUESTIONS ABOUT SMALL BUSINESSES, 2025 (June 2025), https://advocacy.sba.gov/wp-content/uploads/2025/06/United_States_2025-State-Profile.pdf.
[21] U.S. Small Bus. Admin., Off. of Advoc., *Small Businesses' Most Wanted Reform*, https://advocacy.sba.gov/small-businesses-most-wanted-reform/.
[22] Advocacy estimates derived from U.S. ENV'T PROT. AGENCY & DEP'T OF THE ARMY, ECONOMIC ANALYSIS FOR THE NAVIGABLE WATERS PROTECTION RULE: DEFINITION OF "WATERS OF THE UNITED STATES" (Jan. 22, 2020), https://www.regulations.gov/document/EPA-HQ-OW-2025-0322-0111.
[23] 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).

D. The "WOTUS Notice: The Final Response to SCOTUS"

In early 2025, the Agencies published the "WOTUS Notice: The Final Response to SCOTUS" soliciting 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 *Sackett* decision.[24] In response to the "WOTUS Notice," Advocacy identified three key elements that needed to be addressed by the Agencies in a future rulemaking:

- Clarity is paramount. Small entities need a definition of WOTUS they can understand without having to hire additional consultants or attorneys.
- 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.
- 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.[25]

Following the close of the comment period for the "WOTUS Notice," Advocacy and the Agencies held a joint listening session for small business stakeholders on May 19, 2025. Attendees explained the administrative costs and other frustrations they faced in trying to determine whether parts of their land met the current WOTUS definition. Some attendees noted that the current WOTUS definition is so confusing that it was often easier to submit to the Agencies' jurisdiction rather than hire someone with technical expertise to determine whether federal regulation was appropriate.

E. The Agencies' 2025 Proposed Revisions to the WOTUS Definition.

On November 20, 2025, the Agencies proposed a revised WOTUS definition which incorporates feedback received from the "WOTUS Notice" and attempts to comply with the *Sackett* decision.[26] The goal of the proposed rule is to "provide greater regulatory certainty and increase Clean Water Act program predictability and consistency."[27] Key elements of the proposed rule include:

- Defining terms such as "relatively permanent," "continuous surface connection," and "tributary."
- Establishing that jurisdictional tributaries must connect to traditional navigable waters either directly or through other features that provide predictable and consistent flow.

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[24] 598 U.S. 651 (2023); 90 Fed. Reg. 13248 (Mar. 24, 2025).
[25] U.S. Small Bus. Admin., Off. of Advoc., Comments on the "WOTUS Notice: The Final Response to SCOTUS" (Apr. 23, 2025), https://advocacy.sba.gov/wp-content/uploads/2025/04/Comment-Letter-WOTUS-SCOTUS-Notice-EPA-HQ-OW-2025-0093.pdf.
[26] 90 Fed. Reg. 52498 (Nov. 20, 2025).
[27] *Id*.

- Reaffirming that wetlands must be indistinguishable from jurisdictional waters through a continuous surface connection, which means that they must touch a jurisdictional water and hold surface water for a requisite duration year after year.
- Preserving and clarifying exclusions for certain ditches, prior converted cropland, and waste treatment systems.
- Adding a new exclusion for groundwater.
- Incorporating locally familiar terminology, such as "wet season," to help determine whether a water body qualifies as WOTUS.

Advocacy held a small entity roundtable with the Agencies to discuss the proposed rule on December 18, 2025. Attendees expressed general support for the Agencies' revised WOTUS definition while also seeking clarity on different elements of the proposal.

II. Small Business Issues with the Agencies' Proposed Rule

The Agencies' proposed revisions to the WOTUS definition will help to reduce regulatory burdens on small entities. There are elements of the proposal, however, that could be improved to provide small businesses with greater clarity and predictability as they comply with the CWA.

A. Small Businesses Share the Goal of Shifting Burden of Proof from Private Parties to the Agencies, but Practical Challenges Remain with the NPRM's Implementation.

While the goal of the Agencies' proposed rule is clarity, 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.

The Agencies attempt to alleviate this burden by specifying that "the agencies bear the burden of proof in demonstrating that an aquatic resource meets the requirements under the proposed rule to be jurisdictional or excluded."[28] The proposal further specifies "if the agencies do not have adequate information to demonstrate that a water meets the jurisdictional standards to be a 'water of the United States,' the agencies would find such a water to be non-jurisdictional."[29]

During the small entity roundtable held on December 18, 2025, a participant expressed support for clarifying that the burden to prove CWA jurisdiction rests with the Agencies but noted that this language is in the preamble of the proposed rule and not incorporated into the text of CWA regulations.

[28] 90 Fed. Reg. 52498, 52515 (Nov. 20, 2025).
[29] *Id*.

A rule's preamble is not legally enforceable, but is meant to "inform the reader, who is not an expert in the subject area, of the basis and purpose for the rule or proposal."[30] In order to ensure the proposed rule's goal of ensuring the burden of proving CWA jurisdiction stays with the government, language to this effect should be written into its regulatory text.

Additionally, the Agencies should clarify how jurisdictional issues will be resolved when there is confusion. Will there be a time limit on how long an agency has to present proof regarding a specific land feature or wet area? If the jurisdictional confusion occurs as part of a permitting process for an infrastructure or other public works project, will the documentation and/or resolution of the Agencies' jurisdictional question be documented in any way and become a part of the already existing CWA permitting process?

All of the small entities Advocacy spoke with about the proposed rule support the acknowledgement of the jurisdictional burden resting with the Agencies. However, they also want clarity about how exactly this burden shift will work in practice and what effect it will have on their ability to run their businesses and complete projects they are working on. These issues could be addressed as part of a small entity compliance guide, which Advocacy describes in Section II C.

B. The Agencies' Proposal Will Reduce Regulatory Burdens on Small Entities by Codifying Long-Standing Regulatory Exclusions and Clarifying Multiple Aspects of the WOTUS Definition.

During their conversations with Advocacy, small entities have raised concerns with the confusing nature of past WOTUS definitions and the vague nature of multiple CWA regulatory terms. The Agencies first propose to clarify the WOTUS definition by stating that a wet area will not be put under federal jurisdiction simply because it crosses state lines.[31] This will help reduce regulatory confusion by not requiring a permit simply because a water is "interstate."

Ditches have been another constant source of confusion for small entities. 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 entities to look at a ditch on their property or worksite and determine if they needed a federal permit. Small entities have told Advocacy that they would like a WOTUS definition that allows them to 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 expenses would be needed.

The Agencies properly acknowledge this confusion, noting that "the regulatory status of ditches has long created confusion for farmers, ranchers, irrigation districts, municipalities, water supply and stormwater management agencies, and the transportation sector, among others."[32] To

[30] 1 C.F.R. § 18.12.
[31] 90 Fed. Reg. 52498, 52516 (Nov. 20, 2025).
[32] *Id*. at 52,538.

alleviate this confusion, the Agencies state "[u]nder the proposed rule, ditches (including roadside ditches) that are constructed or excavated entirely in dry land are not ''waters of the United States.'"[33]

Advocacy has specifically spoken with small entities in the transportation construction industry about the proposed WOTUS rule and appreciates the Agencies specifically highlighting roadside ditches. This will reduce confusion and delays for infrastructure projects that small entities both work on and benefit from. Advocacy recommends the Agencies consider further clarification of the phrase "constructed or excavated entirely in dry land." One approach small entities have raised with Advocacy is to consider the intent and function of the ditch. If a ditch was built for agricultural, irrigation, transportation, or drainage purposes, it should not be subject to federal jurisdiction.

Another concept that has caused confusion for small entities is the coverage of groundwater. The Agencies note "there is a need for a regulatory exclusion to provide clarity on this matter."[34] To provide this clarity, the proposed rule states "groundwater is not surface water and therefore does not fall within the possible scope of 'navigable waters.'"[35]

Many small entities do not have the capability to determine where groundwater begins or ends on their property. Using groundwater as a basis for federal jurisdiction makes it extremely difficult for small entities to comply with the CWA. Advocacy supports the exclusion of groundwater from the WOTUS definition.

As the definition of WOTUS has changed since 2015, exclusions for certain features including prior converted croplands and waste treatment systems have existed both in the text of the CWA and in the regulations themselves. Not preserving these existing exemptions would result in added regulatory costs for small entities, which would need to be accounted for. The proposed rule continues and solidifies both exclusions. Small entities have grown to rely on these exemptions, and their preservation will go a long way toward providing regulatory certainty.

For prior converted croplands, the proposed rule specifies that they will not become WOTUS unless the land has been abandoned for more than five years and reverts to a jurisdictional wetland.[36] Additionally, prior converted croplands would maintain their exemption from the WOTUS definition if they are "left idle or fallow for conservation or agricultural purposes for any period or duration of time remains in agricultural use."[37] Advocacy supports this clarification as it will avoid punishing small farmers who leave their land idle for conservation purposes.

[33] *Id*.
[34] *Id*. at 52,541.
[35] *Id*.
[36] *Id*. at 52,536.
[37] *Id*.

C. Small Entities Will Need Compliance Assistance in Order to Comply with the Proposed Rule.

One method of helping small entities with their compliance obligations is publication of a small entity compliance guide (SECG) pursuant to Section 212 of SBREFA.[38] SECGs "explain the actions a small entity is required to take to comply with a rule."[39] EPA's current policy is that the agency "prepares a SECG unless the agency can certify that the final rule will not have a significant economic impact on a substantial number of small entities."[40]

Many of the tools utilized in the proposed rule to help the Agencies determine whether a wet area falls under CWA jurisdiction will need to be explained to small entities. These include:

- Corps' Antecedent Precipitation Tool.[41]
- Reports from the National Oceanic and Atmospheric Administration.[42]
- Natural Resources Conservation Service soil maps.[43]
- Web-Based, Water-Budget, Interactive, Modeling Program (WebWIMP).[44]
- Streamflow duration assessment methods.[45]
- United States Geological Service stream gage data, topographic maps, "high resolution elevation data and associated derivatives," and hydrography assets.[46]
- Frequent Rainfall Observations on GridS.[47]
- National Wetlands Inventory data.[48]
- Federal Emergency Management Agency flood zone maps.[49]
- Geospatial datasets from state, tribal or local governments.[50]
- Satellite imagery.[51]

Each one of these tools will be used by the Agencies to make decisions impacting small entities and their property. However, most small entities are not familiar with any of these tools, nor do they have geologists or hydrologists on staff that can aid them in understanding how these tools work. A SECG can be used to explain these tools to small entities and help them to better understand how the Agencies will be making WOTUS decisions that will directly impact their business and/or property.

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[38] Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996).
[39] *Id*.
[40] U.S. Env't Prot. Agency, *Small Entity Compliance Guides*, https://www.epa.gov/reg-flex/small-entity-compliance-guides. (last updated Dec. 19, 2025).
[41] 90 Fed. Reg. 52948, 52518 (Nov. 20, 2025).
[42] *Id*. at 52,524.
[43] *Id*. at 52,525.
[44] *Id*. at 52,519.
[45] *Id*. at 52,514.
[46] *Id*. at 52,525.
[47] *Id*. at 52,524.
[48] *Id*. at 52,525.
[49] *Id*.
[50] *Id*.
[51] *Id*.

EO 12866 directs agencies to draft "regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty."[52] This helps small entities with limited staff and resources who often do not employ dedicated regulatory professionals better understand their compliance obligations. Advocacy strongly recommends the Agencies publish a SECG for this rule. Doing so will help to achieve the goals of EO 12866 and provide the "greater regulatory clarity"[53] the Agencies are seeking to provide to the CWA.

Advocacy stands ready to help the Agencies prepare a SECG and help small entities better understand the proposed rule.

D. The NPRM's Certification under the Regulatory Flexibility Act lacks an Adequate Factual Basis.

As part of the RFA analysis in their NPRM, the Agencies "certify that this proposed action would not have a significant economic impact on a substantial number of small entities under the RFA." The most that the RFA section has to offer in terms of factual basis – required by law – is that the proposed rule either merely "definitional" or is expected to be deregulatory overall because it would reduce the scope of jurisdiction, or both.

Advocacy does not see how to reconcile the definitional part the factual basis with the Agencies' conclusion that the "proposed action is a significant regulatory action."[54] An action could theoretically be insignificant economically and significant in other ways, but that is not the case with WOTUS where so much of the meaningful activity involves farmers, construction companies, and other commercial activities involving land use. A rule could be "definitional" for small entities and significant for everyone else, but that theory does not apply here either. The Agencies' "definitional" support for its certification appears opposed to other parts of the preamble that acknowledge the significance of changes in WOTUS definitions.

Advocacy believes that the best-case factual basis for the Agencies' certification would focus on its claim that the proposed action would not impose significant costs on a substantial number of small entities. Advocacy recommends that the Agencies support such a conclusion with estimates of the number of small entities that would incur costs due to the rule, or of the cost amounts typical of those incurring costs.

Much more is at stake than technical compliance with procedures. Regulatory flexibility analyses published in the Federal Register are essential for achieving the goals set forth by the RFA and SBREFA. Accurate analyses would help the White House and Congress stay apprised of the costs of new federal regulations for small entities and thereby assess obstacles to competition and innovation in the U.S. economy. They also facilitate the regulatory review framework in 5 U.S.C. § 610, because § 605(b) certifications can effectively remove rules from

[52] 58 Fed. Reg. 51735, 51736 (Oct. 4, 1993).
[53] 90 Fed. Reg. 52948 (Nov. 20, 2025).
[54] *Id*. at 52,543.

the universe of rules that are treated as significant for small entities and therefore prioritized for 5 U.S.C. § 610 review.

Regulatory flexibility analyses are also a mechanism for, as Executive Order 12866 puts it, drafting "regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty," particularly for small entities. Especially, a § 605(b) certified final rule is not required to publish a final regulatory flexibility analysis and therefore is not required to publish a small entity compliance guide that would "explain the actions a small entity is required to take to comply with a rule or group of rules."[55]

Certifications also bypass opportunities for small-entity feedback that improves rules. Especially, the Agencies certified its NPRM rather than convening a SBAR panel. A SBAR panel allows the Agencies to comply with the RFA and gather small entity input early in the rulemaking 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."[56]

Advocacy appreciates that the Agencies held the May 19, 2025, listening session for small entities. However, this was not a substitute for a SBAR panel. Whereas the participants in the May 19 session were given an overview of what would be considered in the proposed rule, a SBAR panel would have provided small entities with a more detailed analysis of what type of regulatory options the Agencies were pursuing. Additionally, a SBAR panel would have offered multiple opportunities for small entities to offer both written and verbal input, both during the pre-panel session as well as during the panel itself.

Because their NPRM did not benefit from a SBAR panel, the Agencies should (i) promulgate a final rule that is more informed by small-entity concerns, and (ii) take additional measures to ensure small entities understand and can comply with their revised WOTUS definition.

E. The Agencies Should Better Illustrate the Proposed Rule's Benefits.

The proposed WOTUS definition is expected to have far reaching impacts on small entities and the United States economy more generally, yet the Agencies do not quantify these impacts in the Regulatory Impact Analysis (RIA) that accompanies the proposed rule. While an SBAR panel would have provided a forum to help describe the proposed rule's benefits to small entities, the Agencies have certified their revised WOTUS definition.

A better description of the proposed rule's benefits to small entities will help them understand why WOTUS-related regulatory changes are occurring for the fourth time. Additionally, incorporating a quantified cost-benefit analysis into the final rule's RIA will strengthen the proposed rule's administrative record and make it a more durable regulatory change.

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[55] Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121 § 212, 110 Stat. 857, 858 (1996) (codified at 5 U.S.C. § 601 note).

[56] 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.

Some impacts the Agencies should consider in their cost-benefit analysis include:

- The decreased number of permits issued will save small entities filling costs and associated delays in project starts.
- The decreased requests by the public for jurisdictional determinations from the Corps will allow small entities to put their land to productive uses more quickly.
- There will be decreased environmental mitigation costs for larger projects.
- There will be increased economic activity from reduced regulatory red tape.

While quantifying the impacts of a nuanced rule, such as this update to the WOTUS definition, is challenging, the Agencies were able to do so for the 2020 Rule. In 2020, the Agencies estimated annual cost savings of between $109.2 and $512.7 million dollars for the Navigable Waters Protection Rule.[57] These estimates were produced by conducting case studies for three river basins (the Ohio River Basin, the Lower Missouri River Basin, and the Rio Grande River Basin) and then extrapolating the results out to the entire nation.[58]

As referenced earlier, based on the economic analysis of the 2020 rule, Advocacy estimates that the current rule may save small entities over $1 billion over the next 10 years and multiple billions for the nation as a whole. However, this estimate is based on the Agencies' analysis for the 2020 rule which is similar but not identical to the proposed rule.[59] Advocacy stands ready to help the Agencies better illustrate the proposed rule's benefits to small entities.

F. The Agencies' Use of the "Wet Season" Concept Does Not Comply with *Sackett* and Will Cause Confusion for Small Entities.

Multiple definitions in the proposed rule utilize the "wet season" concept. Specifically, "relatively permanent" is defined as "standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the ***wet season***."[60] The "relatively permanent" definition serves as the basis for defining a "tributary," which the rule categorizes as "a body of water with ***relatively permanent*** flow, and a bed and bank, that connects to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey ***relatively permanent*** flow."[61] Additionally, "continuous surface connection" under the proposed rule "requires both (1) abutment of a jurisdictional water; and (2) having surface water at least during the ***wet season***."[62]

While the term "wet season" is not explicitly defined in the proposed rule, the phrase "as least during the wet season" is

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[57] 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, xxii tbl.ES-7 (Jan. 22, 2020), https://www.regulations.gov/document/EPA-HQ-OW-2018-0149-11572.
[58] *Id*. at 96.
[59] U.S. Small Bus. Admin., Off. of Advoc., *supra* note 21.
[60] *Id*. at 52,517 (emphasis added).
[61] *Id*. at 52,521 (emphasis added).
[62] *Id*. at 52,527 (emphasis added).

> intended to include extended periods of predictable, continuous surface hydrology occurring in the same geographic feature year after year in response to the wet season, such as when average monthly precipitation exceeds average monthly evapotranspiration. As proposed, surface hydrology would be required to be continuous throughout the entirety of the wet season. The temporal component for wet season is intended to be an extended period where there is continuous surface hydrology resulting from predictable seasonal precipitation patterns year after year. The agencies acknowledge that surface hydrology may not always exactly overlap with the wet season, for example in regions exhibiting a time lag or delay in demonstration of surface hydrology due to various factors. The latter may occur, for example, as a result of snowpack melt occurring several months after repeated snowfall creates a snowpack. In another example, some streams experience delayed (i.e., lagged) surface hydrology during the transition from the dry season to the wet season, as it may take some time for the water table to rise due to seasonal precipitation patterns.[63]

This explanation of "wet season," according to the Agencies, "incorporates terms that are easily understood in ordinary parlance and should be implementable by both ordinary citizens and trained professionals."[64] The Agencies are incorrectly assuming that a small entity is not going to be able to understand the concept of "wet season" without help from a trained professional. Indeed, confusion over the "wet season" concept is already reflected in multiple comments to the docket indicating the need for clarity on the meaning of "wet season."[65]

The Agencies view the "wet season" concept as a "bright line test."[66] However, the Agencies then redefine the typical meaning of "bright line test" by noting "[u]nlike typical bright line approaches, however, the Agencies' proposed approach would also allow for regional variation given the range of hydrology and precipitation throughout the country."[67] In other words, the "wet season" may be a bright line in the Agencies' eyes, but that line will be different depending on where in the country it is drawn.

In *Sackett*, the Supreme Court struck down the 2023 WOTUS rule's "significant nexus" test in part because it was "based on a variety of open-ended factors that evolve as scientific

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[63] *Id*. at 52,518.
[64] *Id*.
[65] *See, e.g.,* Bldg. Indus. Ass'n of Central SC, Comments on the Updated Definition of Waters of the United States (Dec. 18, 2025), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0221; 4th Generation Homebuilders, LLC, Comments on the Updated Definition of Waters of the United States (Dec. 9, 2025), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0180; and Napolitano Homes, Comments on the Updated Definition of Waters of the United States (Dec. 1, 2025), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0159.
[66] 90 Fed. Reg. 52948, 52519 (Nov. 20, 2025).
[67] *Id*.

understandings change."[68] The Court further noted that "[t]his freewheeling inquiry provides little notice to landowners of their obligations under the CWA."[69]

Without additional guardrails, the "wet season" concept suffers from some of the same faults as the "significant nexus" test. Like "significant nexus," the "wet season" can differ from place to place. There are no boundaries. There could be multiple "wet seasons," for instance, in a single region, state, or possibly county. As constructed, the "wet season" does not offer small entities clarity. Rather, it continues the WOTUS tradition of confusion.

The Agencies realize the confusion surrounding "wet season" by noting that they "acknowledge there are benefits to setting bright lines as they can provide clarity to stakeholders and may provide additional transparency on the requirements for flow duration of relatively permanent waters without the use of additional tools."[70] Indeed, the Agencies considered alternative approaches to the "wet season" that would provide increased clarity and predictability, including:

> a minimum 90-day flow duration requirement to be consistent with what is generally considered a "season" (i.e., with each of the four 'seasons' lasting three months of the year) or a 270-day flow duration requirement to exclude the driest of seasons. This bright line approach would provide transparency and regulatory certainty for landowners and is easy to understand. This alternative approach would also provide a strict threshold cutoff for establishing jurisdiction.[71]

The Agencies also considered requiring a "flow a minimum of 270 days east of the Mississippi River and a minimum of 30 or 60 days west of the Mississippi."[72] All of these alternatives provide more clarity and predictability than the "wet season" concept.

Without some sort of defined boundary for an area to qualify as a WOTUS, the "wet season" will only sustain the confusion of prior WOTUS rules. Advocacy urges the Agencies to revise the "wet season" concept in a way that provides increased clarity and predictability in the final WOTUS rule. A defined number of days with flowing water, as suggested in the alternatives analyzed by the Agencies, would accomplish this goal.

III. Conclusion

Advocacy appreciates the Agencies' efforts to clarify the decades-old question of how to define WOTUS. Their proposed rule takes meaningful steps towards reducing both the regulatory confusion and unnecessary costs that overbroad CWA regulations can impose on small entities.

[68] Sackett v. EPA, 598 U.S. 651 (2023).
[69] *Id*.
[70] 90 Fed. Reg. at 52,520.
[71] *Id*. at 52,519-20.
[72] *Id.* at 52,519.

However, the Agencies must clarify the proposed rule's "wet season" concept as well as issue a SECG to help small entities understand their CWA compliance obligations to achieve the clarity, predictability, and stability they are seeking.

Additionally, as the Agencies move forward with finalizing their proposed rule, they should focus on doing so in a way that makes future clarification and exemptions unnecessary. To accomplish this goal, the Agencies should 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.

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/

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/s/

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