October 9, 2026

The Honorable Lee Zeldin
Administrator, U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW, Washington, DC 20460

The Honorable Adam Telle
Assistant Secretary of the Army (Civil Works), Department of the Army
108 Army Pentagon, Washington, DC 20310-0104

Submitted electronically via OW-Docket@epa.gov and *www.regulations.gov, Docket ID No. EPA-HQ-OW-2025-0322*

cc: Stacey Jensen, Office of Wetlands, Oceans, and Watersheds, U.S. EPA
Milton Boyd, Office of the Assistant Secretary of the Army for Civil Works

Re: Comments on the Supplemental Notice of Proposed Rulemaking, "Updated Definition of 'Waters of the United States'" — Docket ID No. EPA-HQ-OW-2025-0322; RIN 2040-AG44

Dear Administrator Zeldin and Assistant Secretary Telle:

California Coastkeeper Alliance ("CCKA") represents watershed-focused California Waterkeepers fighting for drinkable, swimmable, fishable waters for all Californians. CCKA submits these comments on the United States Environmental Protection Agency's and Army Corps of Engineers' (the "agencies") September 2026 supplemental notice of proposed rulemaking (the "Proposal") revising the definition of "waters of the United States." CCKA also joined Waterkeeper Alliance's January 5, 2026 comments on the agencies' original proposed rule, and incorporates those comments by reference here.[1] Our members enforce the Clean Water Act in watersheds across California, take part in major NPDES permit proceedings, and monitor water quality in the very waterways the Proposal would deregulate. The Proposal would define "relatively permanent" to mean perennial, allowing a jurisdictional water no more than a single dry period of 30 days a year, and would define "continuous surface connection" to require perennial surface water in a wetland. It also asks whether to remove "adjacent" and "abutting" from the regulations altogether.

CCKA opposes the supplemental options and urges the agencies to withdraw them. The agencies never address the basic fact that California's hydrology differs from that of the eastern United States. In a Mediterranean climate, most streams are dry for months every year; that is their normal condition, not an exception. A rule that equates "relatively permanent" with "perennial" therefore removes most Clean Water Act jurisdiction in California. And pollutants discharged into a waterway that dries out do not disappear. They build up over the dry season until the first big storms flush them, in a concentrated pulse, into the rivers, bays, and coastal waters that everyone agrees remain jurisdictional. The Proposal would not reduce the pollution reaching waters of the United States; it would remove the permits that control it, and the same load would arrive in a more concentrated pulse. Using the same National Hydrography Dataset and National Wetlands Inventory that the agencies themselves rely on, a geospatial analysis in this docket finds that under a perennial-flow standard only about 66,000 of the roughly 718,000 stream kilometers mapped in California

[1] Comments of Waterkeeper Alliance, Environmental Integrity Project, et al., Updated Definition of "Waters of the United States," Docket ID No. EPA-HQ-OW-2025-0322 (Jan. 5, 2026) (responding to 90 Fed. Reg. 52,498 (Nov. 20, 2025)).

— about nine percent — would remain federally protected, and protected non-tidal wetlands in California would shrink from 1.23 million acres to roughly 52,000.[2] A definition of "waters of the United States" that leaves more than ninety percent of the streams in an entire State outside the Clean Water Act cannot be the best reading of the statute Congress wrote.

California's beaches support the second-largest ocean economy among the coastal states, about $51 billion a year and hundreds of thousands of jobs. Tourism and recreation make up the largest part of that economy. That value depends on water that is safe to swim in. Stormwater is the largest cause of beach closures and advisories in California, and the pollution comes down the same intermittent channels and storm drains the Proposal would deregulate. Bacteria, nutrients, and trash collect in those dry channels through the summer and flush to the surf zone with the first fall and winter storms. Removing Clean Water Act protection from that upstream pathway would not reduce the pollution reaching California's beaches. It would only remove the tools for controlling it, while coastal communities and the tourism economy bear the cost downstream.

The harm would reach every way Californians use their waters. More than 7.3 million Californians drink water from systems that depend on the streams the Proposal would deregulate. The same streams carry the stormwater that closes California's beaches, provide spawning and rearing habitat for the state's closed salmon fisheries, and supply irrigation water to the nation's leading agricultural economy. The comments below explain why California's hydrology cannot be squared with a perennial-only standard and why a 30-day test cannot work in practice (Sections I–II). They explain why pollutants discharged to non-perennial waters still reach jurisdictional waters (Section III), and why the supplemental options conflict with the text of the Clean Water Act and are arbitrary and capricious (Sections IV–V). They also explain why California cannot simply take over where federal protection ends (Section VI), and what the Proposal would cost California's drinking water, coastal economy, fisheries, agriculture, and wetlands (Section VII).

[2] Nat. Res. Def. Council, Comment Letter on Proposed Rule, Updated Definition of "Waters of the United States" (May 21, 2026), Docket No. EPA-HQ-OW-2025-0322, https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-15443.

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I. California's Hydrology Is Structurally Incompatible with a Perennial-Only Jurisdictional Standard.

A. Non-perennial streams are the majority of the stream network in California, not a marginal category.

The California State Water Resources Control Board (State Water Board) is the state agency that would implement the Proposal in California. The State Water Board's Surface Water Ambient Monitoring Program has assessed waterways in California and, of roughly 284,000 kilometers of stream length mapped in the National Hydrography Dataset for California, approximately 73 percent is classified as non-perennial.[3] The Board's memo concludes that non-perennial streams make up the majority of the stream network in California, they are the critical interface between land-use activities and downstream impacts, and they support a wide variety of aquatic life uses. Non-perennial streams constitute nearly all of the stream network in the state's arid regions and most of the headwater network in its mountainous regions.[4] In the San Diego region, studies place the non-perennial share at roughly 75 percent of stream miles, with some datasets showing barely 6 percent perennial.[5] The Natural Resources Defense Council's scenario analysis, submitted to this docket in May 2026 and built on the same federal datasets the agencies used, finds that under a perennial standard only 65,969 of the 718,076 stream kilometers mapped in California — 9.2 percent — would remain protected. Where wetlands must also be permanently inundated, as the proposed definition of "continuous surface connection" requires, protected non-tidal wetland acreage in California would fall to 52,134 acres of a 1,227,051-acre baseline, or 4.25 percent.[6] The two sets of figures measure different things. The State Water Board's figure classifies the medium-resolution National Hydrography Dataset; NRDC's analysis uses the high-resolution dataset, which maps far more small headwater channels, and models the full proposed definition of "relatively permanent." Both conclude that, under a perennial standard, the great majority of the stream network in California falls outside the Clean Water Act.

These are not trivial ditches that will lose Clean Water Act protections. The streams that would lose protection include the headwaters of the Sacramento, San Joaquin, Salinas, Santa Ana, Santa Margarita, San Diego, Russian, Ventura, and Los Angeles river systems; the arroyos and creeks that carry runoff from Southern California's cities to the Pacific; and the seasonal reaches where adult salmonids migrate and juveniles rear.

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[3] Surface Water Ambient Monitoring Program, Cal. State Water Res. Control Bd., *Management Memo: Extent of California's Perennial and Non-Perennial Streams* 2 (2011), https://www.waterboards.ca.gov/water_issues/programs/swamp/docs/reports/mgmt_memo2extent.pdf (reporting that the NHD classifies 206,000 of 284,000 km, or 73 percent, of California's stream network as non-perennial) [hereinafter SWAMP Management Memo].

[4] *Id.*

[5] Lilian Busse, San Diego Reg'l Water Quality Control Bd., *Extent, Hydrology, and Ecology of Non-Perennial Streams in the San Diego Region* 5 (rev. May 2, 2013) (non-perennial streams comprise about 75 percent of stream miles in the San Diego region) (citing Mazor et al., S. Cal. Coastal Water Rsch. Project, *Final Report on Nonperennial Streams* 2012), https://waterboards.ca.gov/water_issues/programs/swamp/docs/workplans/r9_nprm_plan.pdf

[6] Nat. Res. Def. Council, Supplemental Comment Letter on Proposed Rule, Updated Definition of "Waters of the United States" 7-8 tbls. 1 & 2 (May 21, 2026), Docket No. EPA-HQ-OW-2025-0322, https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-15443 [hereinafter NRDC Supplemental Comment Letter].

B. The 30-Day Standard Is Incompatible with California's Mediterranean Hydrology.

The proposed definition of "relatively permanent" permits a jurisdictional water to go dry, under ordinary conditions, for a single period of no more than 30 consecutive days in any given year. The agencies illustrate the consequence themselves: a water that lacks standing or flowing water from June through August every year "would not be relatively permanent."[7]

California's dry season is not 30 days. It runs, in most of the state, from roughly May through October — five to six months with little or no rain. A 30-day allowance does nothing to accommodate that climate, and would remove Clean Water Act protection from most of the state's streams. The agencies have drawn the line at a duration that no significant portion of the non-perennial network in California can satisfy. Commenters told the agencies that a seasonal approach "properly accounts for regional variation,"[8] and the agencies' own November 2025 proposal used a wet-season standard. The proposed definition abandons that approach without explaining why a standard that accommodated the West's climate should give way to one that excludes it.

The "single period" qualifier compounds the problem and has no defensible basis. Under the Proposal, a stream that ceases to flow for 30 consecutive days in August is jurisdictional, while a stream that ceases to flow for ten days in July and ten days in September — twenty days total, one-third less dry time — is not. The agencies offer no water quality, ecological, hydrologic, or statutory reason why the pattern of interruption should control while the total duration does not. California streams commonly exhibit exactly the disqualifying pattern: intermittent surface flow that disconnects and reconnects with the shallow alluvial aquifer several times across the transition from wet to dry season. The Proposal penalizes the hydrology that is most characteristic of the West.

C. California's surface hydrology does not track the precipitation calendar, and its streams routinely disconnect and reconnect.

A flow-duration test assumes that surface water follows rainfall. In much of California it does not. Roughly thirty percent of the state's developed water supply originates as Sierra Nevada snowpack, and snowmelt-fed streams carry surface water for months after the precipitation season has ended.[9] Wetland and floodplain storage, managed reservoir releases, agricultural return flows, and a rising and falling alluvial water table all shift the timing and duration of flow away from local precipitation. A lake that drops below its natural rim in the dry season may not resume downstream releases until wet-season inflows bring it back up. The State Water Board has told the agencies that a jurisdictional test keyed to precipitation "effectively excludes streams that are reliant on snow as their primary water source," notwithstanding the agencies' assertion that the November 2025 Proposal is neutral as to the source of water.[10]

California streams also lose and regain surface flow along their length as a matter of course. Perennial headwaters in the Sierra Nevada and in the Transverse and Peninsular Ranges flow onto alluvial fans and permeable valley fill, go subsurface for a reach, and re-emerge downstream. The Mojave, Santa Ana,

[7] Updated Definition of "Waters of the United States," 91 Fed. Reg. 57,284, 57,288, 57,291 (proposed Sept. 9, 2026) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pt. 120) (supplemental notice of proposed rulemaking).
[8] *Id.* at 57,287 (describing comments supporting the *Rapanos* Guidance alternative).
[9] Press Release, Cal. Dep't of Water Res., *First Snow Survey of the Season Finds Below Average Conditions for California* (Jan. 2, 2024) https://water.ca.gov/News/News-Releases/2024/Jan-24/First-Snow-Survey-of-the-Season-Finds-Below-Average-Conditions-for-California (Sierra snowpack supplies about 30 percent of California's water needs on average).
[10] Cal. State Water Res. Control Bd., Comment Letter on Proposed Rule, Updated Definition of "Waters of the United States" 2 (Jan. 5, 2026), Docket No. EPA-HQ-OW-2025-0322, https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0922 [hereinafter State Water Board Comment Letter].

Salinas, Santa Clara, and San Diego systems all behave this way. If the agencies carry forward the November proposal's rule that flow through a non-jurisdictional or non-relatively-permanent feature severs jurisdiction for everything upstream, the effect in California is to strand perennial headwaters above a single losing reach. The NRDC analysis quantifies that consequence nationally at more than 100,000 kilometers of perennial stream that would lose protection solely because of what lies downstream of it.[11] The State Water Board has warned that this rule "would encourage gamesmanship," because constructed features "can be intentionally manipulated to change flow patterns" and thereby extinguish jurisdiction upstream.[12]

D. The drought provisions are backwards in the arid West.

The agencies propose to treat only extreme (D3) and exceptional (D4) drought as an "anomalous event," and to nullify the drought exception after five continuous years, at which point the drought becomes "the new normal" and the water loses jurisdiction.[13] Applied to California, this produces two backwards results.

First, the D3/D4 threshold is too high. Moderate (D1) and severe (D2) drought are routine conditions in California — common enough that in many years a substantial share of the state sits in one or the other. Those conditions are fully capable of drying reaches that are perennial in a normal year. Under the Proposal, a genuinely perennial California river that goes dry during a D2 year loses federal protection, because D2 does not qualify as anomalous.

Second, the five-year nullification rule removes protection when it matters most. The 2020–2022 drought produced the driest three-year period in the state's recorded history.[14] A rule providing that prolonged drought converts a water into a non-water means that waters in California would be deregulated precisely when flows are lowest, dilution capacity is smallest, pollutant concentrations are highest, water temperatures are most stressful to salmonids, and public water supplies are most dependent on every remaining source. The agencies describe this as recognizing a "new normal." In practice, the scarcer California's water becomes, the less of it the Clean Water Act protects.

E. The Proposal rewards taking water out of rivers and not putting it back.

Many California stream reaches are dry not because of climate but because of upstream diversion, groundwater pumping, or impoundment. Under the proposed definition of "relatively permanent," whether a stream is perennial would be judged by observed surface flow "under ordinary conditions," without regard to why the water is or is not there.[15] In California, late-summer flow often reflects human decisions as much as climate. Once a reach runs dry for more than 30 days, or twice in one year, it is no longer "relatively permanent," and every water above it loses jurisdiction as well. The Proposal therefore attaches a federal regulatory benefit to every action that removes water from a stream or keeps water from returning to it. The Supreme Court has rejected the premise that the Clean Water Act is indifferent to water quantity: reduced flow can destroy the very uses the Clean Water Act protects, and the distinction between water quantity and water quality is "artificial." *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 719 (1994). A rule that makes dewatering the trigger for losing federal protection inverts that holding.

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[11] NRDC Supplemental Comment Letter, *supra* note 6, at 6.
[12] State Water Board Comment Letter, *supra* note 10, at 8.
[13] 91 Fed. Reg. at 57,290-91.
[14] *See* Press Release, Cal. Dep't of Water Res., *California's Snowpack Is Now One of the Largest Ever, Bringing Drought Relief, Flooding Concerns* (Apr. 3, 2023) https://water.ca.gov/News/News-Releases/2023/April-23/Snow-Survey-April-2023 (describing 2020–2022 as the driest three years on record).
[15] *See* 91 Fed. Reg. at 57,288, 57,290-91.

Riparian and appropriative diversions already dewater reaches below diversion points across the state every summer. After Friant Dam began diverting the river to Central Valley farms and cities in the 1940s, roughly 60 miles below the dam went dry, and what had been the nation's largest spring run of Chinook salmon disappeared. Water did not return to that reach for more than six decades, until interim flows started in 2009 under a 2006 settlement of litigation brought by environmental groups, which Congress authorized federal agencies to implement that year.[16] That litigation established that the dam's operation violated California's requirement that dam owners keep fish below the dam in good condition. *Nat. Res. Def. Council v. Patterson*, 333 F. Supp. 2d 906, 924-925 (E.D. Cal. 2004). The problem persists on smaller rivers. For example, flows in the Scott and Shasta rivers fell below levels needed by threatened coho salmon, and the State Water Board had to curtail diversions through emergency minimum-flow regulations beginning in 2021.[17] California courts have also held that the public trust doctrine reaches groundwater pumping that adversely affects the Scott River's surface flow. *Env't L. Found. v. State Water Res. Control Bd.*, 26 Cal. App. 5th 844, 859-60 (2018). Under the Proposal, a diverter who takes a little more, or times its diversions to extend a dry period past 30 days, removes federal protection from the reach below and the tributary network above.

Wells near a stream intercept the groundwater that sustains its baseflow and, as drawdown deepens, pull water out of the streambed itself, eventually disconnecting the stream from its aquifer. Under the Proposal, groundwater overdraft becomes grounds for withdrawing federal protection. In Sonoma County, many of the Russian River's smaller tributaries depend on groundwater inflow to stay wet through the summer, and those tributaries are critical rearing habitat for endangered Central California Coast coho salmon and threatened steelhead. State and federal fisheries agencies have warned the County since at least 2014 that its well permitting was depleting those streams. Under the Proposal, every tributary that runs dry due to groundwater extraction would lose federal protection, along with every water above it. Modeling of Mark West Creek, a Russian River tributary with high-priority salmonid habitat, found that streamflow depletion from wells builds over decades, and that every well in the watershed eventually depletes the creek regardless of its distance from the waterway.[18]

Below a dam, streamflow is whatever the operator releases. California requires dam owners to release enough water to keep fish below the dam in good condition.[19] California courts enforce that requirement as a mandatory duty. *Cal. Trout, Inc. v. State Water Res. Control Bd.*, 207 Cal. App. 3d 585, 631-33 (1989). The Proposal gives operators a countervailing federal reason to release as little as possible and gives everyone downstream a reason to resist release requirements. After Monticello Dam was completed in 1957, a downstream diversion dam sent Putah Creek's flow into agricultural and urban canals, and during the drought of the 1990s, lower Putah Creek repeatedly went dry for long periods because releases were cut.[20] Under the Proposal, the same release cuts that violated state law would also have ended federal jurisdiction over the creek.

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[16] *See* San Joaquin River Restoration Settlement Act, Pub. L. No. 111-11, tit. X, subtit. A, pt. I, 123 Stat. 991, 1349 (2009); *San Joaquin River and San Joaquin River Restoration Program*, Water Educ. Found., https://www.watereducation.org/aquapedia/san-joaquin-river-and-san-joaquin-river-restoration-program (last updated Feb. 2026).

[17] *See* Cal. Code Regs. tit. 23, § 875 *et seq.* (establishing drought emergency minimum instream flow requirements and curtailment authority for the Scott River and Shasta River watersheds).

[18] Jeremy Kobor et al., O'Connor Env't, Inc., *Integrated Surface and Groundwater Modeling and Flow Availability Analysis for Restoration Prioritization Planning, Upper Mark West Creek Watershed, Sonoma County, CA* 11, 21 (2020), https://sonomarcd.org/wp-content/uploads/2020/12/MarkWestCreek_FlowAvailabilityAnalysis_FINAL_REPORT.pdf.

[19] Cal. Fish & Game Code § 5937.

[20] *See Putah Creek Council v. Solano Irrigation Dist.* (Sacramento Super. Ct. 1996) (holding that inadequate releases violated Fish and Game Code section 5937); Putah Creek Accord (2000).

In much of Southern California, treated wastewater makes up most of the dry-season flow in rivers such as the Los Angeles and Santa Ana. When a treatment plant diverts effluent to recycling, or when conservation reduces the volume it discharges, the river below receives less water. Effluent from the Tillman, Los Angeles-Glendale, and Burbank plants makes up roughly 90 percent of the Los Angeles River's dry-season flow, and the City of Los Angeles has committed to recycling all of its wastewater by 2035. Studies of that transition project that large reductions in discharge would sharply reduce aquatic habitat in the river.[21] Under the Proposal, each such decision could also end federal jurisdiction over the river it once sustained.

Tailwater recovery, stormwater capture, and the diversion of dry-weather urban runoff to sewers or for reuse all reduce the water reaching streams. CCKA strongly supports stormwater capture, but the Proposal would disincentivize stormwater capture by reducing Clean Water Act protections for urban streams that are dependent on urban runoff. The City of Los Angeles, for example, operates eight low-flow diversions that send dry-weather storm drain flow to the sewer to meet the Santa Monica Bay beaches bacteria TMDL.[22] The Proposal would reward compliance by eliminating the federal protection the compliance was meant to serve. The State Water Board is also considering alternative compliance pathways by encouraging small communities to capture full storm events to reduce pollution, but the Proposal would also make those waters no longer jurisdictional under the Clean Water Act.

The agencies cannot defend these incentives. The Proposal gives regulated parties a new reason to oppose instream flow requirements, reservoir release obligations, groundwater recovery under the Sustainable Groundwater Management Act, and the water rights enforcement that keeps water in rivers throughout California. A test that measures jurisdiction by depleted flow does not defer to state allocation authority; it lets the consequences of allocation decisions — including uses California law treats as unreasonable — set the reach of a federal pollution statute. California's Constitution forbids the waste or unreasonable use of water[23], and the State may curtail diversions that harm fish under that standard. *Light v. State Water Res. Control Bd.*, 226 Cal. App. 4th 1463, 1482-88 (2014); *see Nat'l Audubon Soc'y v. Superior Ct.*, 33 Cal. 3d 419, 445-57 (1983) (State retains continuing supervisory authority over diversions that harm public trust resources). Nor does *Sackett* compel this result. The Court's allowance for interruptions caused by "dry spells" describes natural phenomena,[24] and nothing in its opinion suggests that a stream dried by human withdrawals ceases to be a stream.

The final rule should provide that a water that is perennial under natural conditions does not lose jurisdiction because water is later taken out of it or no longer returned to it. Any flow-duration standard should disregard interruptions attributable to diversion, groundwater extraction, impoundment, or reductions in discharge. The agencies should not adopt a jurisdictional test that rewards dewatering with deregulation.

II. The 30-day perennial test is infeasible in California.

The Proposal repeatedly asserts that a member of the public could determine jurisdiction "simply by observation," by "the naked eye," "without the need for any further analysis or professional consultation,"

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[21]Geraldine Burrola, *Reclaiming LA's "Mulholland Moment": Wastewater Recycling, the Public Trust Doctrine, and Saving the LA River*, 111 Calif. L. Rev. (2023) (wastewater from the Tillman, Los Angeles-Glendale, and Burbank plants provides almost 90 percent of the river's flow outside rain events; City committed in 2019 to recycle 100 percent of its wastewater by 2035), https://www.californialawreview.org/print/reclaiming-las-mulholland-moment.
[22]City of Los Angeles Dep't of Pub. Works, *Final Project Report for Santa Monica Bay Low Flow Diversion Upgrades Project* 3-4 (Apr. 23, 2012) (Clean Beaches Initiative) https://waterboards.ca.gov/water_issues/programs/beaches/cbi_projects/docs/summaries/513_city_la_lowflow_diversions.pdf.
[23] Cal. Const. art. X, § 2.
[24]*See Sackett v. EPA*, 598 U.S. 651, 678 (2023).

and that continuous monitoring would not be required.[25] To establish that a water flows "every day of the year," that any interruption was "a single period," and that the period did not exceed 30 consecutive days, someone must know the flow status on all 365 days. The agencies have made federal jurisdiction turn on a day-specific historical fact that no field inspection can establish. Regulated parties are entitled to fair notice of what the law requires. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). That principle carries special weight under a statute that carries criminal penalties, and was a reason *Sackett* rejected a jurisdictional test that left landowners unable to determine in advance whether their property was covered. *Sackett v. EPA*, 598 U.S. 651, 680–81 (2023).

A person standing beside a dry California waterway cannot tell whether surface water disappeared 29, 30, or 31 days ago; a dry bed looks the same on each of those days. Nor can a later inspection reveal whether a short pulse of snowmelt, groundwater emergence, storm runoff, irrigation return flow, or a reservoir release briefly interrupted the dry period and restarted the clock. The single-period requirement makes the problem worse. Distinguishing one continuous 31-day dry period from two shorter periods separated by a brief return of flow requires even finer temporal resolution than measuring total annual flow duration. In California, where streams routinely disconnect and reconnect as groundwater levels, snowmelt, releases, and storms change, the Proposal would make distinctions lasting hours or days dispositive of federal jurisdiction. A site visit, or a handful of them, cannot establish a negative across a year.

California's data cannot fill the gap. The State Water Board has found that the best available stream maps for California are "replete with inaccuracies about the extent and classification of perennial and non-perennial streams," and a field study in Southern California found that the flow status of more than half of streams was misclassified in existing datasets.[26] The two authoritative California datasets disagree with each other by roughly seven percentage points across 284,000 kilometers of stream — tens of thousands of kilometers.[27] If the agencies' professional partners cannot agree on which California streams are perennial, a landowner cannot resolve the question by looking. Instrumentation does not close the gap either. Only about eight percent of California's rivers and streams are monitored by stream gauges, and gauges are disproportionately sited on large, perennial rivers, leaving unmonitored the non-perennial streams for which the 30-day calculation matters most.[28] The State Water Board has told the agencies that the agencies lack the tools to identify with precision when surface water begins and ends.[29]

The result is an evidentiary standard that cannot be applied consistently, either prospectively or retrospectively. A landowner deciding whether a permit is required cannot know whether a waterway will stay dry for 29 days or cross the line on day 31. Months later, when a permit application, enforcement action, or jurisdictional determination is made, there may be no reliable evidence of which day the threshold was crossed. Two hydrologically identical waterways could receive opposite determinations because one happened to have a camera, gauge, dated photograph, or witness at the right moment and the other did not. Jurisdiction would turn on day-by-day evidence that usually does not exist, and determinations would be inconsistent. Approved jurisdictional determinations are final agency action subject to judicial review, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597-600 (2016), so a test that cannot be applied

[25] 91 Fed. Reg. at 57,290-92, 57,296.
[26] SWAMP Management Memo, *supra* note 3, at 1.
[27] *Id.* at 2. (NHD classifies 73 percent of stream length as non-perennial; Perennial Streams Assessment field data indicate approximately 66 percent).
[28] *See* Lucy Andrews & Theodore Grantham, Nature Sustainability (finding that only about 8 percent of California's streams are gauged); *see* Univ. of Cal., Berkeley, *Gauging the Status of Monitoring California's Streams*, https://mavensnotebook.com/2024/06/04/uc-berkeley-water-in-californias-streams-is-poorly-monitored-impeding-effective-management/
[29] State Water Board Comment Letter, supra note 10, at 3.

consistently will generate exactly the uncertainty, and the constant stream of lower court rulings, that the agencies say they want to end.

The test is also unstable from year to year. The Proposal measures the permissible dry period "in any given year," but does not say over how many years a water's flow is to be judged or whether a waterway that fails the test in a dry year may regain its status in a wet year. In California, that omission is highly consequential. The State's precipitation varies more from year to year than anywhere else in the country, and the same stream can flow year-round after a wet winter and go dry for months after the next winter. If status is assessed annually, federal jurisdiction would switch on and off with the weather, and an NPDES permit or approved jurisdictional determination could outlast the jurisdiction on which it rests. If a single dry year ends jurisdiction for good, then one below-average winter permanently removes Clean Water Act protections from a water that satisfied the agencies' own test in most years.

III. Pollutants Discharged to a Non-Perennial Waterway Do Not Stay There.

The central factual premise of the supplemental options is that a waterway without year-round water is not meaningfully part of "the waters." In a Mediterranean climate, that premise is wrong. A seasonal waterway stores pollutants through the dry season and releases them when the rains return.

The agencies' own science says the same. EPA's 2015 synthesis of more than 1,200 peer-reviewed publications concluded that all tributary streams — perennial, intermittent, and ephemeral — are physically, chemically, and biologically connected to downstream rivers and exert a strong influence on their integrity, including by storing and transporting the sediment and contaminants that reach those rivers.[30] The agencies may not adopt a definition that treats those streams as disconnected from downstream waters without confronting that record.

Through California's five-to-six-month dry season, pollutants accumulate on impervious surfaces, in roadside ditches, in storm drain systems, and on the beds of dry and intermittent waterways. These pollutants include metals and tire-wear compounds from roadways, pesticides and herbicides, nutrients, sediment, trash, and fecal indicator bacteria. They stay there until it rains.

When the first significant storms arrive, much of that accumulated mass moves at once — a pattern known as the seasonal first flush. An analysis of California stormwater monitoring data found pollutant concentrations in early-season storms ranging from 1.2 to 20 times higher than in late-season storms, with the effect most pronounced for organic compounds, minerals, and heavy metals.[31] Los Angeles County likewise recognizes that in climates with distinct wet and dry seasons, "additional first flush phenomena can be expected during the first storm or storms of the season," because pollutants build up over the dry months — which is why runoff from the first three-quarters of an inch of rainfall in every storm must be treated or infiltrated.[32]

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[30] U.S. Env't Prot. Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA/600/R-14/475F, at ES-2 to ES-3 (Jan. 2015).

[31] Haejin Lee, Sim-Lin Lau, Masoud Kayhanian & Michael K. Stenstrom, *Seasonal First Flush Phenomenon of Urban Stormwater Discharges*, 38 Water Res. 4153 (2004) (analyzing California monitoring data from the 1999–2003 wet seasons).

[32] *What Does "First Flush": Mean?,* L.A. Cnty. Dep't of Pub. Works, https://pw.lacounty.gov/general/faq/index.cfm?Action=getAnswers&FaqID=IyMtMz0K&Theme=default; *see* L.A. Reg'l Water Quality Control Bd., Order No. R4-2021-0105, NPDES No. CAS004004 (Regional Phase I MS4 Permit).

Consider a typical California watershed. A discharger deposits a pollutant into a waterway that flows four months a year. Under the proposed definition of "relatively permanent," that waterway is not a water of the United States, and unless the agencies confirm that section 301(a) still reaches pollutants that wash downstream into covered waters, dischargers and permitting authorities will treat the discharge as outside the permit program: no NPDES permit, no effluent limitation, no monitoring, and no citizen enforcement. The pollutant remains in the waterway. In November, the first storm mobilizes it and carries it two miles downstream into a perennial river that everyone agrees is jurisdictional, and from there to a bay, an estuary, or the Pacific Ocean.

The mass loading to the water of the United States is unchanged. What changes is (1) the legal control on the discharge, which in practice disappears, and (2) the delivery profile, which worsens. Instead of a regulated, attenuated, permit-limited discharge, the receiving water gets a single concentrated slug at the beginning of the wet season, when biological receptors are least acclimated and dilution has not yet arrived. The agencies' proposal does not prevent a single pound of pollution from reaching a navigable water. It prevents the Clean Water Act from doing anything about it.

IV. The Supplemental Options Are Not Authorized by the Text of the Clean Water Act.

The agencies present the supplemental options as compelled by *Sackett*. Read against the statutory text Congress actually enacted — sections 502(7), 502(12), 502(14), 404(f), 404(g)(1), 101(b), and 510 — the supplemental options either exceed the agencies' authority or rest on provisions that do the opposite of what the agencies say they do.

The threshold question is what *Sackett* and the plurality in *Rapanos v. United States*, 547 U.S. 715 (2006), actually hold. After *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), a reviewing court will decide the best reading of the statute for itself, and *Sackett*'s construction binds the agencies and the court alike. Neither decision compels a perennial-only definition, and the plurality's footnote 5 forecloses it.

A. Neither *Sackett* nor *Rapanos* compels "perennial"; the *Rapanos* plurality forecloses it.

The agencies argue that "relatively" cannot cancel out "permanent." *See* 91 Fed. Reg. at 57,289. But neither can "permanent" cancel out "relatively," and defining "relatively permanent" to mean "perennial, with one 30-day exception" does exactly that. The agencies' own supplemental text concedes the point: the definition of "relatively permanent" would be "perennial bodies of water." *Id.* at 57,288. The modifier does no work.

The Proposal quotes *Rapanos* footnote 5 for the proposition that drought does not defeat permanence, but omits the sentence that immediately follows in the same footnote. The plurality wrote: "By describing 'waters' as 'relatively permanent,' we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months — such as the 290-day, continuously flowing stream postulated by Justice Stevens' dissent." *Rapanos*, 547 U.S. at 732 n.5 (plurality). The plurality thus expressly contemplated that a river with *no flow during dry months* — the definition of a California seasonal stream — may be relatively permanent. Its own example is a stream that is dry for roughly 75 days a year — more than twice the single 30-day period the Proposal allows. The agencies rely on half of a footnote and propose a rule that the other half of that footnote forecloses.

The plurality also stated that it had "no occasion in this litigation to decide exactly when the drying-up of a stream bed is continuous and frequent enough to disqualify the channel." Neither *Rapanos* nor *Sackett* compels the 30-day line. The agencies should not represent a discretionary policy choice as a judicial command, and a rule defended on the ground that the Court required it is arbitrary if the Court did not. An agency action premised on the mistaken belief that a result is legally compelled cannot stand, even if the

agency might have reached the same result as a matter of discretion. *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *Prill v. NLRB*, 755 F.2d 941, 947–48 (D.C. Cir. 1985). The agencies cannot maintain both that *Sackett* compelled this result and that they exercised discretion in choosing it.

Because the line is discretionary rather than commanded, two things follow. First, after *Loper Bright*, the agencies receive no deference for their choice and must show that a perennial-only definition is the *best* reading of "waters of the United States" — a burden they cannot carry while conceding in the same document that no scientific basis supports the 30-day figure and that they cannot quantify the baseline against which the choice would be measured. Second, to the extent any line-drawing authority remains, the agencies must exercise it through reasoned decision-making, and the statute's stated objective — to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, 33 U.S.C. § 1251(a) — is an "important aspect of the problem" they may not ignore. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Confronted with a range of permissible readings, the agencies have selected the one that most reduces the waters the Clean Water Act protects, without ever asking how that selection advances section 101(a).

The phrase "relatively permanent" appears nowhere in the Clean Water Act. It is a judicial gloss, drawn from a plurality opinion and adopted in *Sackett* as a limit on the statutory term "waters of the United States." The agencies now propose to treat their own definition as controlling over the statutory text Congress actually enacted — sections 303(a), 402(p), 502(7), 502(12), and 502(14) among them. That inverts the order of authority. The language of a judicial opinion is not "to be parsed as though we were dealing with language of a statute." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979). A judicial construction of a statutory term cannot be used to narrow the statute below what its enacted provisions require.

B. <u>A rule that protects nine percent of streams in California is 'not the best reading' of the Clean Water Act.</u>

Under the proposed definition of "relatively permanent," approximately nine percent of the mapped stream length in California and about four percent of the non-tidal wetland acreage there would remain "waters of the United States." The same rule, applied to Vermont, would leave roughly 87 percent of that state's stream network protected. Applied to Indiana, the rule would leave roughly 58 percent of that state's stream network protected.[33]

After *Loper Bright*, the question is not whether the agencies' reading is permissible, but whether it is the best reading of the statute. *Loper Bright, 603 U.S. at 400.* ("[I]f it is not the best, it is not permissible."). A reading of "the waters of the United States" under which the Clean Water Act no longer reaches the majority of stream miles in the nation's most populous state — a state with more than 800 miles of open-ocean coastline, the nation's second largest ocean economy by employment, and more than 7.3 million residents whose public drinking water systems rely at least in part on intermittent, ephemeral, or headwater streams — is not the best reading of a statute whose declared objective is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Proposal rests on the reading most difficult to reconcile with that objective. The agencies nowhere ask whether the perennial definition they propose advances section 101(a), and an agency that declines to analyze whether its rule is consistent with the statutory objective acts arbitrarily. *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949, 955 (D. Ariz. 2021).

Congress struck the word "navigable" from the operative definition precisely to prevent the narrowing the agencies now propose to accomplish by regulation. *See United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 133 (1985) (Congress "evidently intended to repudiate limits that had been placed on federal

[33] Natural Res. Def. Council (May 2026), Docket No. EPA-HQ-OW-2025-0322.

regulation by earlier water pollution control statutes"); *Sackett*, 598 U.S. at 672 ("the CWA extends to more than traditional navigable waters"). The Court has described the 1972 amendments as a "total restructuring" and "complete rewriting" of federal water pollution law. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981).

As applied in California, the Proposal would leave the Clean Water Act protecting less than the statutes it was enacted to replace. The Refuse Act of 1899 prohibited depositing refuse into "any tributary of any navigable water . . . from which the same shall float or be washed into" the navigable water. Rivers and Harbors Appropriation Act of 1899, § 13, 30 Stat. 1152. The Federal Water Pollution Control Act, as it stood immediately before 1972, reached pollution of interstate or navigable waters "(whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters)." 33 U.S.C. § 1160(a) (1970). Both statutes reached the Southern California arroyo that carries an accumulated dry-season pollutant load into the Santa Ana River with the first storm in November. Congress enacted the 1972 amendments to expand on those protections, not to retreat behind them. A rule under which that same arroyo discharge is entirely uncontrolled — no permit, no effluent limitation, no monitoring, no citizen suit — would leave the modern Clean Water Act reaching less in California than the laws it replaced.

Finally, the supplemental options dismantle the floor that the Clean Water Act creates. The Clean Water Act authorizes EPA "to create and manage a uniform system of interstate water pollution regulation." *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992). Congress intended the 1972 amendments to "establish an all-encompassing program of water pollution regulation." *City of Milwaukee*, 451 U.S. at 318. A definition that protects nine percent of the stream network in one State and eighty-seven percent in another does not create a uniform national floor. It creates one that depends on climate and on diversions, pumping, and impoundment. In the arid and Mediterranean West, the Proposal sets that floor at almost zero. Congress legislated for the whole country, including places where rivers flow in the winter but dry in the summer.

C. Sections 502(12) and 502(14): excluding a channel from "waters" does not exempt discharges that wash through it to covered waters — as the *Rapanos* plurality recognized.

This argument does not depend on treating non-perennial channels as waters of the United States. It goes to what excluding them would actually accomplish. Even if a channel falls outside the definition, a point source discharge into it that reaches a covered water downstream is still a discharge "to navigable waters." Section 301(a) prohibits "the discharge of any pollutant by any person," and section 502(12) defines that term as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §§ 1311(a), 1362(12). The statute does not say the addition of pollutants must be made "directly to navigable waters." The agencies' authority to define "waters of the United States" under section 502(7) does not carry with it authority to insert a word into section 502(12) that Congress omitted.

This is not a novel reading. The *Rapanos* plurality was presented with the objection that its narrow construction of "waters" would let dischargers evade permitting by routing pollutants into non-covered intermittent channels upstream of covered waters. It rejected the objection in terms that apply here:

> The Act does not forbid the "addition of any pollutant *directly* to navigable waters from any point source," but rather the "addition of any pollutant to navigable waters." . . . Thus, from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates § 1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between.

547 U.S. at 743 (plurality op.). The plurality added that the lower courts do not generally rely on the characterization of intervening channels as waters of the United States in applying section 301 to the pollutants subject to section 402, and that the proof of downstream pollutant flow required under section 402 is "substantially similar, if not identical" to the hydrologic-connection proof that would be needed to establish jurisdiction over the upstream channel itself. *Id.* at 744–45 (plurality opinion); *see, e.g.*, *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945, 946–47 (W.D. Tenn. 1976) (municipal sewer system between point source and navigable water); *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1137, 1141 (10th Cir. 2005) (2.5 miles of tunnel between point source and navigable water); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 118–21 (2d Cir. 1994).

County of Maui v. Hawai'i Wildlife Fund, 590 U.S. 165 (2020), points the same direction. A permit is required where a discharge is the functional equivalent of a direct discharge, judged by factors including transit time, distance traveled, and the extent of dilution or chemical change en route. Id. at 183–85. The Court rejected a reading that would have created a "large and obvious loophole" for pollutants that reach covered waters by an indirect route. *See id. at 179.*A discharge into a dry channel a short distance upstream of a perennial river satisfies those factors more readily than the groundwater pathway at issue in *Maui*: short distance, surface conveyance, little transformation, and delivery in a concentrated pulse. The final rule should state expressly that excluding a channel from the definition does not exempt point source discharges that reach jurisdictional waters through it.

D. Section 404(g)(1): "adjacent" is a term Congress chose.

In 1977 Congress amended section 404 to permit state assumption of the dredge-and-fill program for waters other than traditional navigable waters "including wetlands adjacent thereto." 33 U.S.C. § 1344(g)(1). *Sackett* reasoned from that text, observing that adjacent wetlands are "includ[ed]" within the waters of the United States and must therefore qualify as such in their own right. What *Sackett* did not do — and could not do — is render the word "adjacent" surplusage. Courts must give effect, "if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *see TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

The Proposal solicits comment on whether to delete "adjacent" and "abutting" from the regulations entirely and to restructure paragraph (a)(4) around indistinguishability alone. Doing so would read out of the regulations a term Congress placed in the statute, and would leave section 404(g)(1)'s reference to adjacent wetlands describing a category the agencies have defined out of existence. Congress does not legislate a state-assumption mechanism for a null set. The agencies should retain "adjacent" and "abutting" and should reject the option that would remove them.

E. Section 404(f): the statutory exemptions presuppose broad coverage.

Congress exempted from section 404 permitting the discharge of dredged or fill material from normal farming, silviculture, and ranching activities; from construction or maintenance of farm or stock ponds and irrigation ditches; and from construction and maintenance of farm roads and forest roads. 33 U.S.C. § 1344(f)(1). Those exemptions do very little if jurisdiction never extended beyond perennial rivers and permanently flooded wetlands. Congress does not exempt plowing, stock ponds, and farm roads from a permit program that reaches only year-round rivers and lakes. The natural inference — and the one the surplusage canon requires — is that Congress legislated against a background understanding of coverage broad enough to make those carve-outs necessary.

The same 1977 Congress declined to adopt a proposal that would have limited section 404 to traditional navigable waters, a legislative choice on which the Supreme Court relied in *United States v. Riverside*

Bayview Homes, 474 U.S. 121 (1985). The agencies' supplemental options would accomplish administratively a contraction close to the one Congress rejected.

F. Sections 101(b) and 510 are savings provisions, not deregulatory mandates.

The agencies invoke sections 101(b) and 510 as affirmative support for narrowing federal jurisdiction. Both provisions do the opposite of the work assigned to them.

Section 101(b) states the policy of Congress to recognize and preserve the "primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). It is a declaration about state authority to *protect* water quality, not a state authorization to allow the very pollution that the federal program would prohibit. Section 510 is a savings clause: it preserves state authority to adopt requirements *more* stringent than federal law. 33 U.S.C. § 1370. *See PUD No. 1*, 511 U.S. at 705; *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987) (section 510 preserves the right of States to impose stricter standards). A floor is not a ceiling, and a savings clause is not a substantive limitation on the scope of the statute it saves. Both provisions have been in continuous force since 1972, including throughout every period in which federal jurisdiction was construed far more broadly than the agencies now propose. Neither has ever been understood to require contraction.

The agencies' own statements undercut that reliance. They acknowledge in the Proposal that some states have laws prohibiting them from being more stringent than federal requirements. In those states, section 510 preserves nothing, and the section 101(b) rationale for withdrawing federal protection has no factual basis.

There is a further reason the agencies cannot read a deregulatory command into section 101(b): Congress drew the federal–state line itself, repeatedly and specifically. Section 101(g) preserves each State's authority over the allocation of water quantity. Section 510 preserves State authority to be more stringent. Section 402(b) permits a State to assume the NPDES program, subject to EPA oversight and the Administrator's veto under section 402(d). Section 404(g) permits a State to assume the dredge-and-fill program for waters other than traditional navigable waters. Where Congress explicitly enumerates exceptions, "additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980). Each of those provisions, moreover, presupposes a federal program of real breadth for a State to assume or exceed. A State cannot assume a program that no longer reaches its waters.

V. The Supplemental Options Are Arbitrary and Capricious.

A. The 30-day threshold is arbitrary on the agencies' own account.

The Proposal concedes that "there are no precise, scientifically-grounded, nationally consistent time limits" for the duration of a temporary interruption and justifies 30 days on the basis that it is "roughly the length of a month" and therefore "predictable, transparent, and easy to administer." 91 Fed. Reg. at 57,290. Administrative convenience and calendar arithmetic are not a reasoned basis for a threshold that determines whether the Clean Water Act applies to the Nation's stream network. An agency must articulate a rational connection between the facts found and the choice made. *State Farm*, 463 U.S. at 43. The agencies have found no facts supporting the 30-day threshold and have said so.

The threshold also cannot be reconciled with the test it purports to implement. As Part IV.A explains, the *Rapanos* plurality's own example of a relatively permanent seasonal river is dry roughly 75 days a year, and *Sackett* acknowledged interruptions caused by "dry spells." *Sackett*, 598 U.S. at 678. And because the threshold departs from the agencies' existing approach, the agencies must also provide a reasoned

explanation for disregarding the facts that supported the prior policy — including the Connectivity Report findings discussed in Part III. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016). *Accord Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966–69 (9th Cir. 2015) (en banc) (agency may not disregard its prior factual findings without a reasoned explanation). They have not.

The "single period" restriction is arbitrary: it makes the pattern of interruption dispositive while the total duration is irrelevant, producing outcomes in which a drier stream is protected and a wetter one is not. The agencies offer no justification for this result because there is none. The Supreme Court has rejected readings of the Clean Water Act that turn coverage on characteristics bearing no relationship to the statute's purposes and that open obvious avenues of evasion. *County of Maui*, 590 U.S. 165 (2020).

B. The agencies cannot claim benefits from a rule whose effects they decline to quantify.

The Proposal states that without a quantitative baseline, the agencies "struggle to provide quantitative estimates of potential avoided costs and forgone benefits." The agencies nonetheless proceed to the most restrictive of the options on which they sought comment. This is not a permissible way to conduct a rulemaking. Reasonable regulation "ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Michigan v. EPA*, 576 U.S. 743, 753 (2015). If the baseline is unknown, the agencies cannot know that the avoided compliance costs exceed the forgone water quality benefits — and the practical effect of an unquantified analysis is that industry compliance savings are described qualitatively as real while drinking water, fisheries, and public health losses are described as unquantifiable and then disregarded. The Ninth Circuit has held that an agency acts arbitrarily when it credits costs while effectively assigning a value of zero to benefits that are difficult to quantify. *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1198–1203 (9th Cir. 2008); *see also California v. Bernhardt*, 472 F. Supp. 3d 573 (N.D. Cal. 2020) (vacating rescission that emphasized industry compliance savings while discounting forgone benefits).

The data gap is also self-inflicted. NRDC has performed a national GIS analysis of the proposal's effects using publicly available datasets and concluded that at least 86 percent of freshwater wetlands nationwide would lack protection under the November 2025 proposal, with the supplemental options reaching further still. If a nonprofit can generate that analysis, the agencies can. Their choice not to do so does not excuse them from the consequences under section 101(a) and the Administrative Procedure Act. NRDC has since supplemented that work with a scenario-specific analysis, submitted to this docket in May 2026, modeling the precise policy choices presented here. It finds that a perennial-flow standard would leave roughly 21 percent of the national stream network, and where wetlands must also be permanently inundated, 5.7 percent of baseline wetland acreage federally protected — and California at 9.2 percent and 4.25 percent. The agencies now have in the record the analysis they declined to perform and must respond to it. *See Ohio v. EPA*, 603 U.S. 279 (2024) (staying rule as likely arbitrary and capricious where agency failed to respond reasonably to significant comments).

The agencies have made this error before. When they last narrowed the definition, in the 2020 Navigable Waters Protection Rule, two courts vacated and remanded the rule, in part because the agencies failed to grapple with its effects on water quality, including the consequences of excluding ephemeral waters in the arid West. *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021); *Navajo Nation v. Regan*, 563 F. Supp. 3d 1164 (D.N.M. 2021). The supplemental options repeat that error on a larger scale.

C. The proposed definition of "continuous surface connection" would eliminate essentially all seasonal wetlands in California.

The proposed definition of "continuous surface connection" would require perennial surface water in a wetland, continuously connected to surface water in the jurisdictional water. Applied to California, this eliminates vernal pools — which are defined by seasonal inundation and are among the state's most imperiled and biologically distinctive habitats, supporting numerous listed species — along with seasonal wetlands throughout the Central Valley, the great majority of managed and remnant wetlands in the Sacramento–San Joaquin Delta, and coastal lagoon and seasonal marsh complexes that are central to Pacific Flyway migration.[34]

NRDC's figures understate this loss. Its California baseline, which reflects the wetlands that National Wetlands Inventory staff advised were regulated immediately before *Sackett*, omits roughly 430,000 acres of vegetated wetlands — about 167,000 acres of seasonally saturated wetlands and about 263,000 acres with intermittent or artificially managed flooding regimes — and roughly 81,000 acres of farmed wetlands.[35] Those categories likely include many of the vernal pools, Central Valley seasonal wetlands, and managed Delta wetlands described above. Because they fall outside the model's starting point, the 4.25 percent figure understates how much of California's seasonal wetland area the Proposal would place beyond federal protection. The model also omits tidal freshwater wetlands from both its baseline and every scenario; those wetlands remain jurisdictional because they are tidal, so NRDC's percentages describe non-tidal wetlands only.

Nothing in *Sackett* demands this. To the contrary, the Court expressly acknowledged that "temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells." *Sackett*, 598 U.S. at 678. *Sackett* asked whether a wetland is indistinguishably part of a covered water, not whether it holds standing water 365 days a year. *Riverside Bayview* upheld jurisdiction over wetlands actually abutting a navigable waterway without any requirement of perennial inundation, and *Sackett* cited it approvingly. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). A perennial-surface-water requirement would cover only a small fraction of non-tidal wetlands — a result irreconcilable with the text of section 404(g)(1).

The proposed "continuous surface connection" definition rests on two misreadings of *Sackett*. First, *Sackett* requires a continuous surface connection, not continuous surface water. The Court did not use the word "water" in that phrase and attached no duration to it; the agencies have supplied both. Second, the agencies treat "indistinguishability" as a separate element that a wetland must satisfy by holding perennial surface water. Under *Sackett* and the *Rapanos* plurality, indistinguishability is the reason the continuous-surface-connection test exists, not an additional requirement stacked on top of it. *See Rapanos*, 547 U.S. at 742 (plurality opinion). *See White v. EPA*, 737 F. Supp. 3d 310, 326 (E.D.N.C. 2024) ("The continuous surface connection powers the test."); *United States v. Valentine*, 751 F. Supp. 3d 617, 622 (E.D.N.C. 2024). The agencies also seek comment on an alternative drawn from Justice Thomas's concurrence rather than the *Sackett* majority. Two Justices are not a holding, and the agencies may not regulate more narrowly than the majority opinion requires on the strength of a concurrence the Court did not adopt. Nor may the agencies claim discretion to choose a narrower reading than the statute's best one. The scope of "waters of the United States" is a question of law that courts resolve independently, without deference to the agencies' preferred interpretation. *Loper Bright*, 603 U.S. at 412–13.

[34] U.S. Fish & Wildlife Serv., *Recovery Plan for Vernal Pool Ecosystems of California and Southern Oregon* (Dec. 2005).

[35] Natural Res. Def. Council, *Mapping Destruction* (2025); *see also* Natural Res. Def. Council (May 2026), Docket No. EPA-HQ-OW-2025-0322.

D. The agencies have not complied with the Endangered Species Act or NEPA.

Section 7 of the Endangered Species Act requires the agencies to consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to ensure that an action of this scope is not likely to jeopardize listed species or destroy or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2). The "may affect" threshold for consultation is low: any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the requirement. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (en banc). Nationally applicable regulations are agency actions subject to section 7, *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th Cir. 2011), and because the agencies are choosing among options they themselves describe as discretionary, the consultation obligation applies, *see Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). *See also Wash. Toxics Coal. v. EPA*, 413 F.3d 1024 (9th Cir. 2005) (EPA pesticide registrations required section 7 consultation); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994) (programmatic forest plans required consultation). The Services' recent rescission of the regulatory definition of "harm" does not change the obligation to consult under section 7(a)(2). That rule narrows what constitutes a prohibited "take" under section 9 of the Endangered Species Act, but section 7(a)(2) consultation is triggered by any action that "may affect" listed species or critical habitat and applies its own jeopardy and adverse-modification standards, neither of which turns on the definition of "take."

Withdrawing federal protection from most of the stream network in California and nearly all of the seasonal wetlands there plainly may affect Central California Coast coho salmon, California Coastal Chinook, steelhead — including endangered Southern California steelhead, whose spawning and rearing streams are overwhelmingly intermittent — the arroyo toad, the tidewater goby in seasonally closed coastal lagoons, California tiger salamander, California red-legged frog, and the vernal pool crustaceans and plants that depend on exactly the seasonally inundated habitats the proposed "continuous surface connection" definition would exclude. *See California ex rel. Lockyer v. U.S. Dep't of Agriculture*, 575 F.3d 999 (9th Cir. 2009) (repeal of nationwide Roadless Rule required NEPA analysis and ESA consultation). The Corps, which section 511(c) does not exempt from NEPA, 33 U.S.C. § 1371(c), must separately analyze the rule's environmental effects.

Failure to complete either process will render any final rule arbitrary and capricious. CCKA requests that the agencies initiate consultation and place any biological assessment and biological opinion in this docket, before finalizing. Substantive action taken without required ESA consultation is unlawful and subject to injunction. *Thomas v. Peterson*, 753 F.2d 754, 763–65 (9th Cir. 1985) (abrogated on other grounds as recognized by *Cottonwood Envtl. L. Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1092 (9th Cir. 2015)).

E. The agencies assert a federalism rationale without consulting the affected sovereigns on the options now proposed.

Executive Order 13132 calls for consultation with State and local officials on rules with federalism implications, and Executive Order 13175 and EPA's tribal consultation policy call for government-to-government consultation with federally recognized Tribes. Both orders require "an accountable process to ensure meaningful and timely input" from those officials in the development of regulatory policies that affect them. Exec. Order No. 13,132 § 6(a), 64 Fed. Reg. 43,255 (Aug. 10, 1999); Exec. Order No. 13,175 § 5(a), 65 Fed. Reg. 67,249 (Nov. 9, 2000); *see* U.S. EPA, *EPA Policy on Consultation and Coordination with Indian Tribes* (Dec. 7, 2023).

The agencies did consult before the November 2025 proposal, between March and June 2025. Tribal participants, whose consultation letters represented roughly 380 Tribes, urged the agencies to keep seasonal and ephemeral waters within the definition of relatively permanent waters and opposed treating natural or artificial features as severing a continuous surface connection. U.S. EPA, *Summary Report of Tribal*

Consultation and Engagement for the Proposed Updated Definition of "Waters of the United States" Rule (Nov. 2025). The supplemental options move in the opposite direction, and the agencies did not return to the Tribes or the States before proposing them. Government-to-government consultation on the Proposal is available only on request, within the same 30-day window as public comment. A process that solicits the sovereigns' views, receives them, and then proposes options further from those views without returning to them does not provide meaningful and timely input.

California's own water pollution control agency used its comments to tell the agencies that the November 2025 proposal would produce unpredictable jurisdictional determinations and would undercut the State's ability to manage its own water resources[36] — the opposite of what the Proposal reports States to have said. The Proposal reports that States are "both prepared and well-equipped to regulate non-jurisdictional waters," 91 Fed. Reg. 57,284, 57,292 (Sept. 9, 2026), while conceding within the same paragraph that some States lack the resources to do so or are barred by their own law from regulating more stringently than federal law. *Ibid*. A federalism rationale that rests on States' capacity to fill the gap cannot survive the agencies' own acknowledgment that many cannot.

California is home to more than 100 federally recognized Tribes whose trust, subsistence, and cultural resources depend on seasonal and headwater streams and on the salmon runs those streams support. *See* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 91 Fed. Reg. 4102 (Jan. 30, 2026). The assumption that waters removed from federal jurisdiction will be protected by another sovereign does not hold for Tribes. State civil regulatory authority generally does not reach Indian country, even in a Public Law 280 State like California. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207–10 (1987), *superseded by statute on other grounds*, Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq., *as recognized in Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014); *Bryan v. Itasca County*, 426 U.S. 373, 388–90 (1976). A Tribe may administer Clean Water Act programs only after EPA approves it for treatment in a manner similar to a State, 33 U.S.C. § 1377(e), and many Tribes have not obtained that approval. For those waters, deregulation does not shift authority to another sovereign; it leaves no regulator at all. That result also implicates the federal trust responsibility, under which federal agencies are held to "the most exacting fiduciary standards" in their dealings with Tribes. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

Whatever the independent enforceability of those Executive Orders, an agency that rests a rule on cooperative federalism while failing to consult the affected sovereigns on the options it now proposes, and then mischaracterizes what they said, has not engaged in reasoned decision-making. Having made the views and capacity of States and Tribes the premise of the Proposal, the agencies cannot ignore what those sovereigns actually told them without "entirely fail[ing] to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

VI. The State Backstop the Agencies Rely Upon Does Not Exist.

The Proposal invokes Clean Water Act section 101(b) and reports that commenters told the agencies states are "prepared and well-equipped" to regulate non-jurisdictional waters. California does have independent authority under the Porter-Cologne Water Quality Control Act, and the State Water Board retains jurisdiction over waters of the state. But state authority is not the same as state capacity, and it does not replicate the federal program. Loss of federal jurisdiction does not simply shift a permit from one agency to another; it eliminates the NPDES program's numeric effluent limitations and technology-based standards, the section 303(d) listing and TMDL wasteload allocation framework, section 401 certification leverage over federally licensed projects, section 404 review of dredge and fill, and the citizen suit under

[36] State Water Res. Control Bd., Comments on Proposed Updated Definition of "Waters of the United States" (Jan. 2026), Docket No. EPA-HQ-OW-2025-0322.

section 505, which has no full state analogue. Congress made citizen enforcement a central supplement to government enforcement, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987); *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 175 (2000), and that check disappears with federal jurisdiction. California's Legislature considered a comprehensive state backstop in the 2025–26 session (Senate Bill 601, the Right to Clean Water Act) and it did not pass.[37] Legislating and funding a parallel state program covering most stream miles in California is a multi-year, multi-agency undertaking with an uncertain outcome, occurring against a constrained state budget. The agencies should not premise a national deregulation on an assumption of seamless state substitution that the recent legislative record does not support.

The state backstop also shrinks as federal jurisdiction shrinks, a mechanism the agencies nowhere acknowledge. Section 401 certification authority attaches only to discharges to waters of the United States; narrowing that term narrows California's leverage over federally licensed projects along with it. *See S.D. Warren Co. v. Me. Bd. of Env't Prot.*, 547 U.S. 370, 386 (2006); *PUD No. 1*, 511 U.S. at 711–13. For hydropower projects licensed by the Federal Energy Regulatory Commission, the stakes are higher still. The Federal Power Act preempts state regulation of those projects outside section 401, so section 401 certification is California's principal remaining tool. For those projects, a narrower definition does not transfer authority to California; it extinguishes it. *See California v. FERC*, 495 U.S. 490, 506–07 (1990) (Federal Power Act preempts state minimum-flow requirements for FERC-licensed projects); *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n*, 328 U.S. 152, 164–67, 175–76 (1946). Nationally, the picture is worse: the agencies' own 2022 analysis found that twenty-four States define their jurisdiction by reference to the federal definition, twenty-six States have no broadly applicable dredge-and-fill permitting program for non-federal waters, and eighteen States have no no-net-loss goal for wetlands.[38] Cooperative federalism under sections 101(b) and 510 means a federal floor that States may build above. It does not mean that the floor may be removed on an assumption that fifty States will independently replace it.

VII. The Proposal Will Cause Concrete Harms to California.

California is the world's fourth-largest economy, with a gross domestic product of $4.25 trillion in 2025.[39] That economy depends on clean water flowing through the state's rivers, streams, and creeks.

A. Drinking water for millions of Californians.

EPA's own geospatial analysis of California found that of 32,688 stream miles within source protection areas feeding public surface water intakes, 18,592 miles — 57 percent — are intermittent, ephemeral, or headwater streams, and that more than 7.3 million Californians receive drinking water from public systems that depend at least in part on those streams.[40] In some counties, the dependence reaches 87 percent or more

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[37] S.B. 601, 2025–2026 Reg. Sess. (Cal.).

[38] U.S. Env't Prot. Agency & Dep't of the Army, *Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule* (Dec. 2022), Docket No. EPA-HQ-OW-2021-0602.

[39] Office of Governor Gavin Newsom, *California's Economy Isn't Just Bigger than Texas and Florida — It's Growing Faster, Too* (July 24, 2026), https://gov.ca.gov/2026/07/24/californias-economy-isnt-just-bigger-than-texas-and-florida-its-growing-faster-too/ (citing U.S. Bureau of Economic Analysis data).

[40] U.S. Env't Prot. Agency, *Percentage of Surface Drinking Water from Intermittent, Ephemeral, or Headwater Streams in California* (2009) (based on Safe Drinking Water Information System data, 4th Quarter 2006), https://19january2021snapshot.epa.gov/sites/static/files/2015-06/documents/2009_12_29_wetlands_science_surface_drinking_water_surface_drinking_water_ca.pdf; *see generally* U.S. Env't Prot. Agency, *Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S.* (July 2009), https://www.epa.gov/sites/default/files/2015-04/documents/2009_12_28_wetlands_science_surface_drinking_water_surface_drinking_water_study_summary.pdf

of contributing stream miles.[41]

Deregulating those miles does not reduce the cost of protecting drinking water; it shifts that cost from dischargers to ratepayers, who pay for additional treatment at the intake. The regulatory impact analysis does not account for that shift. The burden falls hardest on small and rural systems that draw from surface water and have the least capacity to add treatment.[42]

B. California's coastal tourism economy.

California has the second-largest ocean economy among the nation's coastal states, generating on the order of $51 billion or more annually and supporting hundreds of thousands of jobs, with coastal tourism and recreation as its largest component.[43] The non-market value of beach recreation in California alone has been estimated at $2.25 billion to $7.5 billion per year.[44] Those numbers depend on beaches that are safe to swim.

Stormwater is the largest cause of California beach closures and advisories. San Diego County alone has recorded hundreds of closure or advisory days in a single year, and Orange County has recorded more than 750 closure or advisory days.[45] The familiar advisory against swimming for 72 hours after rain exists because of the first flush described above. Modeling of Southern California beaches indicates that improving water quality by a single letter grade at one beach can generate millions of dollars in benefits over a decade.[46]

The waterways that discharge pollution to our beaches and produce those advisories are exactly the waterways the Proposal would deregulate. Bacteria, nutrients, and trash accumulate in dry waterways and storm drains through the summer tourist season and discharge to the surf zone in the fall and winter storms. The Proposal would remove Clean Water Act protections over the upstream half of that pathway while leaving the economic consequences entirely in place at the downstream end.

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[41] *Id.* (county-level map; highest category 87–100 percent).

[42] *See* State Water Res. Control Bd., *Drinking Water Needs Assessment*, https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/documents/needs/2025needsassessment.pdf.

[43] Nat'l Oceanic & Atmospheric Admin., Office for Coastal Mgmt., *2024 Marine Economy Report – California* (2024) (2021 data; $51.3 billion GDP and 511,324 jobs; California ranked second of 30 coastal states for marine GDP and employment; tourism and recreation accounts for 67 percent of marine employment and 47 percent of marine GDP), https://coast.noaa.gov/data/digitalcoast/pdf/marine-economy-california.pdf; *see also* Nat'l Oceanic & Atmospheric Admin., *NOAA Report on the National Significance of California's Ocean Economy* (2015) (2012 data; $44.8 billion GDP and 489,000 jobs, with tourism and recreation the largest sector), https://coast.noaa.gov/data/digitalcoast/pdf/california-ocean-economy.pdf.

[44] Linwood Pendleton & Judith Kildow, The Non-Market Value of Beach Recreation in California, 74 Shore & Beach 34 (2006) (non-market value of $2.25–$7.5 billion per year, 2005 dollars).

[45] Jill Witkowski, Noah Garrison & Colin Kelly, San Diego Regional MS4 Permit: Environmental Group Testimony (May 8, 2013) (presentation to the San Diego Regional Water Quality Control Board) (reporting that San Diego County had nearly 300 closing or advisory days in 2011, and Orange County more than 750, with stormwater the largest cause), https://waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/2013-0508_NRDC_SDCK_OCCK.pdf; *see also* Nat. Res. Def. Council, *Testing the Waters: A Guide to Water Quality at Vacation Beaches* (22d ed. 2012), https://www.nrdc.org/sites/default/files/ttw2012.pdf (reporting that stormwater runoff was the largest known source of beach closing and advisory days nationally in 2011).

[46] Vernon R. Leeworthy & Peter C. Wiley, Nat'l Oceanic & Atmospheric Admin., *Southern California Beach Valuation Project: Economic Value and Impact of Water Quality Change for Long Beach in Southern* California, *as cited in* Letter from Nat. Res. Def. Council, Heal the Bay & L.A. Waterkeeper to Cal. Reg'l Water Quality Control Bd., L.A. Region, https://www.waterboards.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/la_ms4/CommentLetters/Environmental%20Agencies.pdf.

C. Fisheries and ocean ecosystems.

California's commercial and recreational salmon fisheries have been closed or severely curtailed in recent years, with devastating consequences for coastal fishing communities from Crescent City to Half Moon Bay.[47] Recovery of those stocks depends on the quality of spawning and rearing habitat in exactly the seasonal and headwater reaches the Proposal abandons. Salmonids do not use only perennial mainstems; juveniles rear in seasonal tributaries, and adults ascend reaches that are dry for months of the year.[48] A jurisdictional line drawn at year-round surface flow does not track the biology of the species the state is spending hundreds of millions of dollars to recover.[49]

The same is true of nearshore ocean resources. California has invested in a statewide network of Marine Protected Areas and in Areas of Special Biological Significance that receive no protection from land-based pollution if the terrestrial pathway delivering that pollution is unregulated.[50] Nutrient loading contributes to harmful algal blooms. In 2024, shellfish harvesting advisories or closures related to harmful algal blooms affected eight of California's fifteen coastal counties.[51] Waters off California are already substantially more corrosive to marine life than in the pre-industrial baseline, and land-based nutrient loading exacerbates local acidification and hypoxia.[52] Every one of these stressors is delivered through the watershed.

As such, completely removing Clean Water Act coverage for over 90 percent of California's streams will significantly contribute to, and accelerate, the collapse of California's valuable fisheries. When considering the broader economic footprint—including seafood processing, wholesale, distribution, retailing, and

[47]Office of Governor Gavin Newsom, *Let's Go Fishing! Salmon Fishing Is Back in California After More Than 3-Year Closure* (Apr. 13, 2026) (commercial ocean salmon fishing closed 2023–2025, with six recreational days in 2025), https://www.gov.ca.gov/2026/04/13/lets-go-fishing-salmon-fishing-is-back-in-california-after-more-than-3-year-closure/; Alastair Bland, *Commercial Salmon Season Is Shut Down — Again. Will California's Iconic Fish Ever Recover?*, CalMatters (Apr. 15, 2025) (describing losses to fishers, charter operators, processors, and coastal businesses), https://calmatters.org/environment/water/2025/04/commercial-salmon-season-shut-down-again-california/.

[48]Parker J. Wigington Jr. et al., *Coho Salmon Dependence on Intermittent Streams*, 4 Frontiers in Ecology & the Env't 513 (2006); U.S. Env't Prot. Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA/600/R-14/475F (Jan. 2015).

[49]*See, e.g.*, Rachel Becker, *The World's Largest Dam Demolition Has Begun. Can the Dammed Klamath River Finally Find Salvation?*, CalMatters (Aug. 31, 2023) ($250 million in Proposition 1 bond funds toward Klamath River dam removal), https://calmatters.org/environment/2023/08/klamath-river-dams-demolition/; Office of Governor Gavin Newsom, *California Distributes $50 Million to Boost Salmon Population* (Mar. 13, 2024), https://www.gov.ca.gov/2024/03/13/california-distributes-50-million-to-boost-salmon-population/; Cal. Fisheries & Seafood Inst., *California Allocates $71 Million to Boost Salmon Recovery Efforts* (Nov. 21, 2025) (Wildlife Conservation Board awards for salmon and steelhead), https://calseafood.net/2025/11/21/california-allocates-71-million-to-boost-salmon-recovery-efforts/.

[50]*See* Marine Life Protection Act, Cal. Fish & Game Code § 2850 *et seq.*; Marine Managed Areas Improvement Act, Cal. Pub. Res. Code § 36700 *et seq.*; Cal. Water Code § 13391.5 (defining Areas of Special Biological Significance); State Water Res. Control Bd., *Water Quality Control Plan for Ocean Waters of California* (California Ocean Plan) (prohibiting waste discharges to ASBS absent an exception).

[51]Cal. Ocean Prot. Council, *California Coast and Ocean Report: Status, Progress, and What's Ahead*, Harmful Algal Blooms 1 (2026), https://opc.ca.gov/wp-content/uploads/2026/03/Harmful-Algal-Blooms.pdf.

[52]Cal. Ocean Prot. Council, *California Coast and Ocean Report: Status, Progress, and What's Ahead*, Ocean Acidification (2026) (volume of seawater corrosive to shell-forming organisms off California is six times larger than before widespread fossil fuel use; acidification is intensified by land-based nutrient sources, especially near urban areas), https://opc.ca.gov/wp-content/uploads/2026/03/Ocean-Acidification.pdf; Cal. Ocean Prot. Council, *Resolution on Ocean Acidification and Hypoxia*, Exhibit A (Mar. 3, 2025), https://opc.ca.gov/wp-content/uploads/2025/02/Item-6-OAH-Resolution-Exhibit-A-508.pdf; *see also* Fayçal Kessouri et al., *Coastal Eutrophication Drives Acidification, Oxygen Loss, and Ecosystem Change in a Major Oceanic Upwelling System*, 118 Proc. Nat'l Acad. Scis. e2018856118 (2021).

secondary ripple effects—the commercial fishing and seafood industry contributes billions of dollars in total economic activity and supports tens of thousands of jobs across the state.[53]

D. California's Agriculture Industry

California is the nation's leading agricultural state. Its farms and ranches grow nearly half of the country's vegetables and more than three-quarters of its fruits and nuts, and they generated $64.7 billion in cash receipts in the most recent year.[54] That output depends on irrigation. In an average year, agriculture accounts for roughly 40 percent of the State's water use, about four-fifths of the water used by farms and cities combined.[55] Much of that water is diverted from the same rivers and streams the Proposal would deregulate. Protecting that use is part of the Clean Water Act's design. Water quality standards must take into account a water's "use and value for . . . agricultural . . . purposes,"[56] and California law protects agricultural supply as a beneficial use of its waters.[57] In the Delta, the State Water Board sets salinity objectives specifically to protect irrigation water.[58] These standards protect farmers as downstream water users without regulating farming. Irrigation return flows, agricultural stormwater, and normal farming activities are already exempt from NPDES and dredge-and-fill permitting.[59] Removing federal jurisdiction from upstream tributaries therefore relieves California agriculture of no permitting burden. It only removes protection from the water farms draw.

On the farm, water quality is a food safety issue. Irrigation water touches crops that are eaten raw, and federal rules now require produce growers to assess the hazards in their agricultural water, including whether it comes from surface water and what animal activity and land uses lie nearby.[60] After three *E. coli* O157:H7 outbreaks were traced to Salinas Valley romaine in the fall of 2019, FDA identified agricultural water contaminated by nearby cattle operations as a plausible route to the crop. It also detected *E. coli* O157:H7 in a sample from the Salinas River,[61] one of the losing river systems described in Section I.C. A rule that withdraws federal protection from seasonal streams draining grazing land and other upstream sources makes it more likely that contaminated water reaches irrigated fields. The cost of that risk falls on growers, who must treat or replace their water, and on the consumers who eat what they grow.

E. EPA's Own Published Findings Confirm the Value of the Wetlands the Proposed Rule Would Abandon.

The Proposed Rule would require perennial flow and a continuous surface connection. Those requirements would remove federal protection from wetlands next to intermittent and ephemeral waters. In California's Mediterranean climate, that covers most of the state's remaining wetlands: vernal pools, seasonal freshwater

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[53] https://caseagrant.ucsd.edu/our-work/research-projects/discover-california-commercial-fisheries.
[54] Cal. Dep't of Food & Agric., *California Agricultural Production Statistics*, https://www.cdfa.ca.gov/Statistics/ (last visited Oct. 8, 2026).
[55] Jeffrey Mount, Ellen Hanak & Caitlin Peterson, Pub. Pol'y Inst. of Cal., *Water Use in California* (Apr. 2023), https://www.ppic.org/publication/water-use-in-california/ (agriculture uses about 40 percent of statewide water in an average year, compared with about 10 percent for cities and suburbs).
[56] 33 U.S.C. § 1313(c)(2)(A).
[57] Cal. Water Code § 13050(f) (beneficial uses include "agricultural . . . supply").
[58] State Water Res. Control Bd., *Water Quality Control Plan for the San Francisco Bay/Sacramento–San Joaquin Delta Estuary*, tbl. 2 (Dec. 12, 2018) (water quality objectives for agricultural beneficial uses).
[59] 33 U.S.C. §§ 1342(l)(1), 1362(14), 1344(f)(1).
[60] Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption Relating to Agricultural Water, 89 Fed. Reg. 37,448 (May 6, 2024) (codified at 21 C.F.R. pt. 112, subpt. E).
[61] U.S. Food & Drug Admin., *Investigation Report: Factors Potentially Contributing to the Contamination of Romaine Lettuce Implicated in the Three Outbreaks of E. coli O157:H7 During the Fall of 2019*, at 1, 11, 13 (2020), https://www.fda.gov/media/138238/download.

marshes, and the wetlands along streams that run only in the wet season. California has already lost roughly 90 percent of its historic wetlands.[62] The Agencies offer no analysis of what the remaining wetlands do or what would be lost if they were left unprotected.

EPA has already done that analysis, and it is on EPA's website now. The agency states that wetlands "provide values that no other ecosystem can," and that "[p]rotecting wetlands can protect our safety and welfare."[63] EPA updated that page on July 2, 2026, two months before the Agencies proposed to strip protection from these wetlands. An agency acts arbitrarily when it "entirely fail[s] to consider an important aspect of the problem."[64] It must also give a reasoned explanation when it disregards facts underlying its prior policy.[65] The Agencies have done neither. They must account for the following wetland functions, each of which EPA itself recognizes.

EPA describes wetlands as "natural sponges" that trap surface water, rain, snowmelt, and floodwaters and release them slowly. This lowers flood peaks and reduces erosion downstream. EPA singles out wetlands within and downstream of urban areas as "particularly valuable," because they absorb the increased rate and volume of runoff from pavement and buildings.[66] EPA also documents what happens when wetlands disappear. The bottomland wetlands along the Mississippi River once stored at least 60 days of floodwater. They now store only 12 days, because most have been filled or drained.[67] Seasonal wetlands do this work in exactly the storms that matter most. California's atmospheric-river events deliver most of a year's precipitation in a few days.

EPA lists shoreline erosion control among the services wetlands provide "at no cost."[68] Coastal and estuarine marshes dissipate wave energy and hold sediment in place. That function will become more valuable as sea levels rise along California's coast and in San Francisco Bay.

EPA recognizes that wetlands maintain "surface water flow during dry periods" by storing water and releasing it slowly.[69] This produces a perverse result under the Proposed Rule. The wetlands that sustain flow in California's intermittent streams lose protection *because* those streams are not perennial. The rule would remove the very features that make western flows more permanent. It would also cut the dry-season base flow that salmon, steelhead, and downstream water users depend on.

EPA identifies "natural water quality improvement" as a core wetland value, along with the protection and improvement of water quality.[70] Wetlands trap sediment, nutrients, metals, and other pollutants before they reach downstream waters. As discussed above, the first wet-weather flows mobilize pollutants and deliver them to traditionally navigable waters. Wetlands on non-perennial streams are often the last line of defense against that pollution. EPA also promotes *constructed* wetlands to treat wastewater and stormwater.[71] The Agencies cannot credibly engineer wetlands to remove pollution while proposing to leave natural ones unprotected.

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[62]T.E. Dahl, U.S. Fish & Wildlife Serv., *Wetlands Losses in the United States 1780's to 1980's* (1990) (estimating a 91 percent loss of wetlands in California).
[63]U.S. Env't Prot. Agency, *Why Are Wetlands Important?* (last updated July 2, 2026), https://www.epa.gov/wetlands/why-are-wetlands-important.
[64]*Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[65]*FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009).
[66]U.S. Env't Prot. Agency, *Why Are Wetlands Important?*, *supra* note 63.
[67]*Id.*
[68]*Id.*
[69]*Id.*
[70]*Id.*
[71]U.S. Env't Prot. Agency, *Constructed Wetlands*, https://www.epa.gov/wetlands/constructed-wetlands.

EPA states that "[m]ost commercial and game fish breed and raise their young in coastal marshes and estuaries." Its own examples include species central to California's fishing economy: striped bass and Dungeness crab.[72] EPA reports that in the Southeast, nearly all of the commercial catch and more than half of the recreational harvest depend on the estuary–coastal wetland system.[73] Migratory waterfowl rely on coastal and inland wetlands for resting, feeding, and breeding. That includes the Pacific Flyway populations that winter in the Central Valley's seasonal wetlands.[74] Juvenile Chinook and coho salmon rear in floodplain and estuarine wetlands that are inundated only seasonally.

EPA calls wetlands "among the most productive ecosystems in the world, comparable to rain forests and coral reefs."[75] It also reports that more than one-third of the nation's threatened and endangered species live *only* in wetlands, and nearly half use wetlands at some point in their lives.[76] California's vernal pools are seasonal by definition. They support federally listed species, including the vernal pool fairy shrimp and the California tiger salamander. They are precisely the waters a perennial-flow test would exclude.

EPA recognizes that wetlands store carbon in their plant communities and soils instead of releasing it as carbon dioxide. In EPA's words, this means wetlands "help to moderate global climate conditions."[77] Draining or filling an unprotected wetland releases that stored carbon. These are not isolated observations. EPA's 2015 Connectivity Report reviewed more than 1,200 peer-reviewed publications and was reviewed by EPA's Science Advisory Board. It concluded that wetlands in riparian areas and floodplains are physically, chemically, and biologically integrated with the rivers they border. It also found that non-floodplain wetlands provide functions, such as water storage, that benefit downstream waters.[78] The Proposed Rule does not engage with that record or with EPA's current public statements. The Agencies should withdraw the Proposed Rule. At a minimum, they must explain why the functions EPA itself describes do not matter for wetlands adjacent to non-perennial waters.

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The Clean Water Act's objective is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. A rule that removes federal protection from the majority of the stream network in California — while leaving unchanged the pollutant mass those streams deliver each winter to drinking water supplies, beaches, estuaries, and salmon runs — does not serve that objective. A rule that would leave nine percent of the stream network in California federally protected is not an implementation of *Sackett*. It is the repeal of the Clean Water Act across the arid and Mediterranean West, accomplished by regulation. We urge the agencies to withdraw the supplemental options.

Sincerely,



Sean Bothwell
Executive Director
California Coastkeeper Alliance

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[72]U.S. Env't Prot. Agency, *Why Are Wetlands Important?*, *supra* note 63.
[73]*Id.*
[74]*Id.*
[75]*Id.*
[76]*Id.*
[77]*Id.*; U.S. Env't Prot. Agency, *How Do Wetlands Function and Why Are They Valuable?* (last updated Apr. 15, 2026), https://www.epa.gov/wetlands/how-do-wetlands-function-and-why-are-they-valuable.
[78]U.S. Env't Prot. Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA/600/R-14/475F (Jan. 2015).