



State Water Resources Control Board

January 5, 2026

U.S. EPA Administrator Lee Zeldin
Assistant Secretary of the Army (Civil Works) Adam Telle

Submitted via Federal eRulemaking Portal: <https://www.regulations.gov/>

RE: Docket ID No. EPA-HQ-OW-2025-0322; FRL 11132.1-01-OW

Dear Administrator Zeldin and Assistant Secretary Telle:

Thank you for the opportunity to comment on the proposal by the U.S. Environmental Protection Agency and U.S. Department of the Army (collectively the "Agencies") to update the definition of "waters of the United States" ("Proposed Rule"), 90 Fed. Reg. 52498-546 (Nov. 20, 2025), protected under the federal Clean Water Act. The California State Water Resources Control Board ("State Water Board"), in conjunction with the nine California Regional Water Quality Control Boards (collectively, "Water Boards"), is designated as California's water pollution control agency for the Clean Water Act. The definition of "waters of the United States" profoundly affects the Clean Water Act programs that are administered by the Water Boards, including section 401 water quality certification, section 402 permitting, and section 303 water quality standards.

To better accommodate variable hydrology throughout the nation, ensure practical implementation is possible, and attain the Proposed Rule's stated goals, the Agencies should revise the Proposed Rule in line with the following recommendations:

1. The definition of "relatively permanent" should not require that flow be concurrent with and for the entire duration of the wet season and should instead require seasonal flow.
2. If the Agencies retain the concept of the wet season, the Proposed Rule should not determine the length of the wet season solely based on average precipitation compared to average evapotranspiration.
3. The definition of "continuous surface connection" should not require surface water during the wet season. Like the definition of "relatively permanent," such a requirement would exclude wetlands that are fed from snowmelt, groundwater, or other sources where there may be a temporal lag with the wet season. Additionally, this requirement would be burdensome to implement, limit the Agencies' ability to delineate in the dry season, and create a complex and

E. JOAQUIN ESQUIVEL, CHAIR | ERIC OPPENHEIMER, EXECUTIVE DIRECTOR

confusing permitting landscape when there are impacts to a wetland that is partially jurisdictionally and partially non-jurisdictional.

4. The Proposed Rule should retain the ditch exclusion that has been implemented consistently under the pre-2015 regulatory regime.
5. The definition of “tributary” should be revised to not categorically allow non-permanent flow through a non-jurisdictional feature to eliminate jurisdiction for upstream waters.
6. The Proposed Rule should retain the category of interstate waters as waters of the United States.
7. The Proposed Rule should be revised to state that the applicant has the burden of proof to establish when an exclusion applies.

Without these revisions, the Proposed Rule would result in more complicated and unpredictable jurisdictional determinations and a more complex permitting landscape. Especially if the Proposed Rule is adopted alongside anticipated proposed revisions to the Clean Water Act section 401 regulations, the Proposed Rule could undercut the ability of states to manage their own water resources and for wetlands, create the need to obtain both a section 401 certification and a state authorization in more cases.

1. *The definition of “relatively permanent” would not adequately protect relatively permanent seasonal flows that are not concurrent with the wet season.*

The Proposed Rule defines “relatively permanent” as meaning “standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season.” The Agencies acknowledge that this definition “could result in many streams in the arid West not meeting the proposed definition of ‘relatively permanent’” where there is a lag in surface hydrology response to seasonal precipitation. (Fed. Reg. at 52521.)

The Water Boards recommend revisions that would include waters that have seasonal flow that is not concurrent with the entire duration of the wet season. The Proposed Rule would include waters that have seasonal flow as long as the flow is contemporaneous with the wet season, but exclude waters that have seasonal flow that is not contemporaneous with the wet season simply because the source of the seasonal flow is snowmelt or a rising groundwater table. The Proposed Rule purports to be neutral regarding the source of water, Fed. Reg. at 52524, but requiring flow during the wet season effectively excludes streams that are reliant on snow as their primary water source. In addition to snowpack melt and groundwater, wetland and floodplain storage and managed releases or return flows can also shift the timing and duration of continuous flow relative to local precipitation. Similarly, there may be a lag time before a lake releases water into a downstream tributary to navigable waters if the lake drops below the natural rim during dry periods and downstream releases do not resume until after wet season inflows bring lake levels back up to the natural rim. Excluding waters simply because they do not flow during a timeframe focused on precipitation, would exclude waters that “are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’” (*Sackett* (2023) 598 U.S. 651, 671 [citations omitted].)

Requiring flow for the entirety of the wet season would also be resource intensive to implement. The Agencies state that “landowners often know when surface hydrology is occurring in waterbodies on their land, and such visual observations and other local knowledge and records would be helpful when identifying the occurrence and duration of surface hydrology.” (Fed. Reg. at 52521.) Although this knowledge would be helpful, it would likely not be sufficient under a strict interpretation of the Proposed Rule, which would require knowledge of exactly when flow begins and ends, and would not aid the Agencies who bear the burden of proof under the Proposed Rule. In other words, requiring flow for the entirety of the wet season suffers from the same infirmities as a numeric threshold: “even landowners familiar with their properties may not know the exact number of days a stream flows a year.” (Fed. Reg. at 52520.)

The Agencies similarly lack comprehensive tools that could identify with precision the beginning and end dates of when surface water is present and confirm the presence of surface water for the full duration of the wet season for all relevant waters. Although there are some available tools regarding stream flow, the dataset is far from comprehensive. For example, in California there are just over 800 USGS stream gauges, which cover less than 8% of the state’s stream network. Additionally, USGS stream gauges are less likely to be in non-perennial streams. Streamflow Duration Assessment Methods (SDAMs) are another useful tool, but SDAMs require a site visit and the availability of SDAM results is limited. Further, SDAMs are designed to classify streams as perennial, intermittent, or ephemeral, but the definitions of those terms used by SDAMs do not exactly align with the Proposed Rule. The presence of surface water may not always be assessed via desktop analysis because photos may not clearly show the presence of surface water and present only a snapshot, not the continuity required by the rule. Implementation of the Proposed Rule may necessitate extensive site visits during the wet season.

Instead, the Proposed Rule should define “relatively permanent” consistent with the pre-2015 regulatory regime, which would include waters with standing or continuously flowing water at least seasonally (e.g., typically three months). (Fed. Reg. at 52520.) This concept is from the 2008 *Rapanos* Guidance and is accordingly well understood. This standard is consistent with the Proposed Rule’s stated goal of including “extended periods of predictable, continuous surface hydrology occurring in the same geographic feature year after year in response to the wet season,” Fed. Reg. at 52518, but does not require the additional resources that would be necessary to confirm flow for the entire duration of the wet season and is sufficiently flexible to accommodate regional variability. Importantly, this recommended definition would not improperly exclude many waters in the arid West that are described in ordinary parlance as “streams” and “rivers.”

2. *If the Agencies retain the reference to the wet season, the Proposed Rule should not determine its length solely based on months when average precipitation exceeds average potential evapotranspiration.*

The Agencies should not define the wet season as when monthly precipitation exceeds average monthly evapotranspiration. The Agencies’ own technical work shows that this is not an adequate basis for a brightline legal standard, particularly in California and other regions affected by the North American monsoon, snowpack, and other complex hydroclimatic processes. According to the U.S. Army Engineer Research and

Development Center (“ERDC”) and the Army Corps of Engineers (“Corps”) Technical and User Guide for the Antecedent Precipitation Tool (“APT”), precipitation-only tools have important limitations for characterizing hydrologic normalcy and streamflow-based datasets provide a more accurate indicator of streamflow conditions than APT’s precipitation analysis alone. In other words, climate-based indicators are not the only factors that contribute to hydrology. In assessing the APT, the Corps has found that precipitation alone “negates the physical, spatial, and temporal components of the hydrologic system and the other elements of the hydrologic cycle that can impact aquatic resources.” (Sparrow, et al., *Evaluation of Climatic and Hydroclimatic Resources to Support the US Army Corps of Engineers Regulatory Program* (Sept. 2022) at p. 4.) Relying on precipitation compared with evapotranspiration alone ignores other factors that affect stream flows, which as explained above, includes a temporal lag caused by melting snowpack or storage capacity in other waters as well as managed releases. Defining the wet season based on a precipitation metric exacerbates all the problems with requiring flow for the entire duration of the wet season described above.

The Web-Based Water-Budget Interactive Modeling Program (“WebWIMP”), which estimates the wet season by comparing average monthly precipitation to average potential evapotranspiration (“PET”), has limitations and as acknowledged by the Agencies, “may not have complete functionality in certain territories.” (Fed. Reg. at 52520.) This tool provides an estimate of approximate dates of the wet and dry season to contextualize site visits, but it was not designed to identify when it would be reasonable to expect flow in all situations. Even if the Agencies had comprehensive and effective tools to identify when precipitation exceeds PET, using this wet season definition would exclude streams and rivers that have seasonal flow, but do not flow during a timeframe defined by one metric that is not always the primary driver of streamflow conditions.

The Agencies “intend to use the WebWIMP outputs reported in APT as a primary tool to help identify the wet season when precipitation exceeds evapotranspiration rates.” (Fed. Reg. at 52520.) The Agencies are not clear regarding whether use “as a primary tool” precludes the use of other lines of evidence that do not focus on precipitation and PET alone to define the wet season. Because of the problems inherent to using precipitation and PET alone to define the wet season and the technical limitations of WebWIMP results described in more detail below, WebWIMP results should be used as part of a weight of the evidence approach, which is how the tool is currently used.

WebWIMP has coarse spatial and temporal resolution that can lead to overgeneralized mapping. WebWIMP relies on a monthly water-balance product with a 0.5° horizontal grid (on the order of 50 km x 50 km, or 2,500 km²) and temperature-based PET calculations. At this scale, each grid cell can span coastal ranges, interior valleys, foothills, and mixed rain–snow elevations typical of California and other mountainous regions. WebWIMP assigns a single wet/dry season designation for any observation point in that entire cell, which compresses substantial intra-cell differences in precipitation, PET, snow accumulation and melt, and runoff timing into a single “wet season” window. The APT Technical and User Guide acknowledges that WebWIMP’s effectiveness may be reduced during seasonal transitions, precisely the time at which the rule proposes to be most reliant on its results. In regions with sharp climatic and

topographic gradients, where hydrology can change markedly over a few kilometers, using a single WebWIMP-derived wet season for all streams in a large grid cell risks assigning the same jurisdictionally significant duration threshold to waters that experience fundamentally different hydrologic regimes. This over-generalization creates a potential misalignment between the modeled wet season and the actual timing and duration of surface hydrology.

The effectiveness of APT and WebWIMP is further constrained by data availability. WebWIMP relies on averages, which are prone to misinterpretation if a site visit is conducted at the beginning or end of any seasonal transition month. The use of averages may create inaccurate estimates in regions with highly variable precipitation patterns. Further, WebWIMP uses averages to fill in data gaps. When daily weather station data are missing, the system may substitute long-term monthly means to fill those gaps. While this maintains dataset continuity, it can mask short-term variability and further limit the tool's accuracy, especially during transitional months or in regions with highly variable precipitation patterns.

Although WebWIMP is a valuable tool, it is best suited to support weight of the evidence determinations because the accuracy of its results relies on corroborating evidence. Even if WebWIMP had no functionality or data limitations, it should not be the exclusive basis for making wet season determinations because it focuses on only one aspect of what may affect stream hydrology. Exclusively relying on WebWIMP results, as reported through the APT, is likely to lead to wet season determinations that are longer than the seasonality requirement that was implemented by the pre-2015 regulatory regime.

3. *The definition of “continuous surface connection” should not require surface water during the wet season because it would be impractical to implement.*

To establish a “continuous surface connection,” the Proposed Rule requires that the wetland, lake, or pond abuts another jurisdictional water and has surface water present during the wet season. The Proposed Rule should be revised to remove the second requirement.

First, this requirement presents the same issues as the problems with the “relatively permanent” definition described above. Defining “continuous surface connection” as requiring surface water at least during the wet season arbitrarily excludes wetlands that do have surface water for significant portions of the year, but not during the wet season. For example, wetland meadows in mountainous regions that are fed by snowmelt may have seasonal surface water present, but not necessarily during the wet season because of the time it takes for the snowpack to melt.

Second, given that the definition of wetlands already includes a hydrology requirement, an additional hydrology requirement is not necessary. Even the imperfect information that the Agencies have¹ indicates that introducing the surface water requirement would exclude most wetlands from Clean Water Act protections nationwide. (Regulatory

¹ The Agencies use the definition of “semipermanently flooded” and the National Wetlands Inventory (NWI) to guide their analysis, but the NWI uses “growing season,” not the wet season, and is not a comprehensive database of wetlands.

Impact Analysis (“RIA”) at 46-47 [“[T]his information does suggest that the majority of wetland acreage in most States is likely not at least semipermanently flooded and therefore would less likely not meet the requirement under the proposed rule to have surface water at least during the wet season.”].) According to the Agencies’ analysis, in California, only 28% of total wetlands in NWI may have surface water at least during the wet season, with the effects being even more devastating in other states. Although the preamble flagged that this requirement would be particularly difficult to meet in the arid West, Fed. Reg. at 52527, the Agencies’ analysis shows that this requirement would severely limit wetland jurisdiction nationwide. For example, only 2% of Arizona’s wetlands and 7% of New York’s wetlands would be expected to meet this requirement.

Third, the surface water requirement imposes an additional burden of having to evaluate the wetland’s surface hydrology or assess records from other times during the year. (Fed. Reg. at 52530.) The Agencies acknowledge that this requirement “may result in additional processing times.” (RIA at 16.) Similar to the problems presented by “relatively permanent,” there are not readily available sources of data that would show when wetland surface water is present. This requirement would needlessly delay delineations conducted in the dry season.

Mosaic wetlands highlight the impractical implementation hurdles for the Proposed Rule. The Proposed Rule would require delineation of the wetlands in the mosaic individually and an analysis of the portion of the delineated wetland in the wetland mosaic that meets the definition of continuous surface connection. The Army Corps identifies “wetland/non-wetland mosaics” as a “Difficult Wetland Situation” in some regional supplements of its delineation manual precisely because mosaics are “a landscape where wetland and non-wetland components are too closely associated to be easily delineated or mapped separately.” The Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Western Mountains, Valleys, and Coast Region (2010) states that “[t]he problem for the wetland delineator is that microtopographic features are too small and intermingled, and there are too many such features per acre, to delineate and map them accurately.” (Mountain West Supplement at p. 123.) The Proposed Rule simply states that mosaic wetlands must be delineated individually but offers no practical implementation strategy for doing so accurately. Even if it is possible to map every single feature within the mosaic instead of using transect or point-intercept sampling to extrapolate, such an effort would be resource intensive. Delineators would also need to determine which part of the mosaic contained surface water during the wet season, further increasing costs and potential delays.

Finally, the Proposed Rule’s definition of “continuous surface connection” injects further confusion into the permitting for wetlands. Under the Proposed Rule, a wetland may be deemed only partially jurisdictional, but discharges to the wetland will not always be confined to only the jurisdictional area. In combination with the anticipated publication of proposed revisions to the section 401 regulations, which will likely propose limiting the scope of Clean Water Act certifications to only the discharge to waters of the United States, this Proposed Rule would further complicate the federal permitting over wetlands. Instead of simplifying the permitting process, the Proposed Rule would create a complex matrix of federal and state permitting requirements even when a proposed project affects only one wetland. By way of example, if a project proposes to fill a

wetland that is only partially jurisdictional, the project would necessarily need to obtain both a section 401 certification (limited to the discharge to the jurisdictional wetland) and a state authorization for impacts to the non-jurisdictional portion of the wetland even though it would be impracticable to disaggregate the impacts along those jurisdictional lines. Under the status quo, the same project would need to obtain only a section 401 certification from the State. The Agencies and the public have been unable to fully analyze the interaction between the Proposed Rule and the anticipated section 401 regulations because the proposed revisions to the section 401 regulations have not yet been published.

4. *The Agencies should not revise the jurisdictional exclusion for ditches.*

The Proposed Rule expands the longstanding jurisdictional exclusion for ditches by allowing jurisdictionally-excluded ditches to drain waters and to be relatively permanent. The Agencies should retain the existing requirements for the jurisdictional exclusion. The changes to the ditch exclusion bear no connection to implementing *Sackett*, and the Agencies lack sufficient information on how the Proposed Rule's revisions may affect the number of excluded ditches. (RIA at 53-54.) Additional information and analysis would be critical because the Proposed Rule deviates from how the ditches exclusion has long been implemented as part of the *Rapanos* Guidance.

The proposed revisions are also insufficiently clear. The Proposed Rule states that if a relatively permanent ditch is constructed in dry land and drains a jurisdictional tributary, the ditch would be non-jurisdictional. But the Proposed Rule also states that a rerouted tributary would be jurisdictional. (Fed. Reg. at 52525, 52539-40.) The Proposed Rule does not adequately explain how the Agencies or a discharger could distinguish between a non-jurisdictional ditch with relatively permanent flow and a jurisdictional rerouted tributary.

The Agencies should provide more implementation guidance, otherwise the Proposed Rule creates a pathway to break jurisdiction for tributaries and break continuous surface connection for wetlands, ponds, or lakes. Under the Proposed Rule, a discharger could create a ditch in dry land that drains a jurisdictional stream that severs the connection between a jurisdictional stream and wetland. This possibility would be inconsistent with the preamble's stated goal of not allowing a property owner to carve out wetlands from Federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the Clean Water Act. (Fed. Reg. at 52523.)

5. *Non-relatively permanent flow through a non-jurisdictional feature should not inherently sever jurisdiction for upstream waters.*

The Proposed Rule's definition of tributary states that a "tributary does not include a body of water that contributes surface water flow to a downstream jurisdictional water through a feature such as a channelized non-jurisdictional surface water feature, subterranean river, culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, wetland, or similar natural feature, if such feature does not convey relatively permanent flow." (Fed. Reg. at 52546.) As acknowledged in the preamble, hydrologic regime shifts of relatively permanent flow to non-relatively permanent flow back to relatively permanent flow may be commonly found in the arid West and mountainous regions. Under the Proposed Rule, these shifts from relatively permanent

to non-relatively permanent flow would sever Federal jurisdiction of upstream reaches under the Clean Water Act. (Fed. Reg. at 52523.)

The Proposed Rule's interpretation that flow through a non-jurisdictional feature inherently breaks jurisdiction would encourage gamesmanship to avoid Clean Water Act jurisdiction. The definition allows constructed features, which can be intentionally manipulated to change flow patterns, to eliminate jurisdiction in upstream waters. In addition, because the ditch exclusion was revised to allow draining of waters, dischargers would have an easy mechanism to skirt Clean Water Act regulation. Although the functional equivalent analysis could still be used in some cases to require NPDES permits for discharges to those upstream reaches, *County of Maui v. Hawaii Wildlife Fund* (2020) 590 U.S. 165, such an analysis would be rendered more resource intensive and not necessarily result in a conclusion that an NPDES permit is required. "Decisions should not create serious risks . . . of creating loopholes that undermine the statute's basic federal regulatory objectives." (*Id.* at 185.)

6. Interstate waters should be categorically included as waters of the United States.

The Proposed Rule would remove "interstate waters" as a separate category of jurisdictional waters because the Agencies anticipate that interstate waters would likely be covered under another category, such as traditionally navigable waters. The Proposed Rule should continue to include interstate waters as a separate category because the category is straightforward to implement, and its inclusion would reduce the risk of unintentionally eliminating waters from jurisdiction. Absent Clean Water Act jurisdiction and the accompanying federal oversight, downstream states are deprived federal protections from pollution and modification of upstream waters that are not relatively permanent that adversely impact downstream waters. Congress passed the Clean Water Act to set a regulatory floor, promote nationwide consistency, and ensure states could not externalize their water pollution problems. Federal protections are necessary to prevent downstream states from having to bear a disproportionate burden from upstream pollution. The Clean Water Act has provided an essential baseline that ensures that downstream states are not responsible for addressing a disproportionate amount of pollution for which they do not have any control. Not all upstream states have sufficient existing state authority to regulate and control pollutants to the same degree as required by the Clean Water Act, and even those that do have sufficient authority are not guaranteed to exercise that authority.

The preamble asserts that the removal of interstate waters "would likely have few practical impacts and would not undermine significant reliance interests, as the agencies rarely identify waters as jurisdictional solely because they are interstate as they often fall under one of the other categories of 'waters of the United States.'" (Fed. Reg. at 52516.) As evidence for this assertion, the Agencies explain that in the past ten years there have been 15 approved jurisdictional determinations determining waters to be jurisdictional because they were interstate. The approved jurisdictional determination process can be lengthy and approved jurisdictional determinations are not a representative sample of waters of the United States. It is possible that there are few approved jurisdictional determinations relying on this category because whether a water

is interstate is easy to determine and is likely not worth the effort of requesting an approved jurisdictional determination.

Even if those 15 jurisdictional determinations were representative of interstate waters that may lose jurisdiction, reliance on that number fails to recognize the importance of those waters. The preamble uses the Amargosa River, which flows from Nye County, Nevada, and terminates in Death Valley, California, as an example of an interstate water. The Amargosa River has historically been treated as a water of the United States, and several segments of the river in California are designated as a National Wild and Scenic River. While the flow of the Amargosa River is variable, there are areas of perennial flow that sustain riparian and wetland habitat and that serve as critical habitat for a variety of plants and animals including the Amargosa vole, a state and federally listed endangered species. Retaining interstate waters as a discrete category eliminates the risk that rivers like the Amargosa would lose their jurisdictional status.

As another example, there are streams that straddle the border between Oregon and California that are unlikely to be jurisdictional under any of the other proposed categories. Although the preamble correctly acknowledges that a non-jurisdictional tributary may function as a point source such that discharges of pollutants from these features could require a Clean Water Act permit, Fed. Reg. at 52521-22, the Clean Water Act would not regulate any dredging or filling activities in these tributaries. Dredge or fill activities could affect the water quality of the downstream waters, but may occur outside of California's boundaries and outside of regulation via California's state authorities.

Retaining interstate waters as a jurisdictional category also helps ensure that impaired interstate waters, such as the Carson River, which crosses the California-Nevada border, receive the same minimum protections across state boundaries. The Agencies are valuable co-regulators of waterbodies that cross state lines. Interstate issues are more readily and effectively resolved where federal jurisdiction over interstate waters is maintained.

7. The applicant should bear the burden of proof for establishing that a jurisdictional exclusion applies.

Throughout the preamble, the Proposed Rule emphasizes that landowners are in the best position to understand what waters are present on their property, including whether waters are relatively permanent. (E.g., Fed. Reg. at 52521 ["landowners often know when surface hydrology is occurring in waterbodies on their land"]; Fed. Reg. at 52525 ["landowners will often have sufficient knowledge to understand how water moves through their properties"]; Fed. Reg. at 52532.) Yet, the Proposed Rule concludes that the burden of proof for establishing jurisdiction is appropriately placed on the Agencies.

The Proposed Rule should be revised to clarify that the burden of proof for establishing a jurisdictional exclusion falls on the person seeking the exclusion. If not, ditches are defined so broadly that the Agencies would need to expend more resources to establish jurisdiction even when flow is relatively permanent and would be described in ordinary parlance as a stream or river. The Proposed Rule defines ditch as "a constructed or excavated channel used to convey water." Hydrology has been extensively modified such that this broad definition could arguably be applied whenever there has been any

modification of a water course. It should not be the Agencies' burden of proof to demonstrate that a ditch serves to relocate a tributary or was constructed or excavated in a tributary or other aquatic resource when the flow in the ditch is relatively permanent. (Fed. Reg. at 52541.) The Agencies' circular rationale for changing the burden of proof to the Agencies for establishing jurisdiction over ditches is "excluded ditches are not part of the naturally occurring [sic] tributary system and therefore do not fit within the ordinary meaning of the term 'waters'. . . ." (*Id.*) This rationale fails to account for landscapes where hydrology has been extensively modified. The Proposed Rule states that "streams that have been altered or relocated can be tributaries," Fed. Reg. at 52525, but this reassurance is not meaningful if it is not clear how to distinguish between an altered or relocated tributary and a ditch, and the Agencies bear the burden of doing so. Under the Proposed Rule's broad definition of ditch, it would be far too easy to assert that any water course that has been modified in any way is a constructed channel within the definition of a ditch and require the Agencies to engage in a resource-intensive process.

The information needed to determine whether a jurisdictional exclusion applies is often in the possession of the landowner or discharger. This knowledge imbalance is particularly pronounced for applying the prior converted cropland exception. The Proposed Rule would "recognize designations of prior converted cropland made by the Secretary of Agriculture," but would not require that such a designation had been made, which would expand the areas that may meet this exclusion. Even in cases where there has been an official designation, that designation may not be available to the Agencies. As the Agencies explain, "[U.S. Department of Agriculture's Natural Resources Conservation Service] is statutorily prohibited from sharing data and information on program participants and their land, even with other Federal agencies." (RIA at 53.) "The USDA is subject to specific statutes designed to protect landowner privacy and, as such, is prohibited from making certain parcel-specific information available without the landowner's consent." (Fed. Reg. at 52537.) The Proposed Rule still finds that the burden of proving the water is a water of the United States remains on the Agencies. (Fed. Reg. at 52538.) Instead, it should be the Agencies' burden to prove whether there are jurisdictional wetlands, but the burden of establishing that the prior converted cropland exception applies should fall on the person seeking the exclusion – otherwise the Proposed Rule would encourage stonewalling.

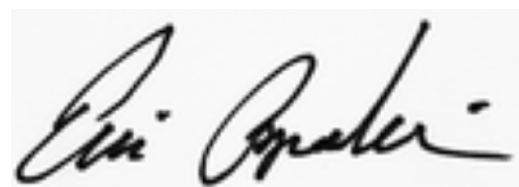
Conclusion

The 45-day comment period, which overlapped with multiple holidays, was inadequate to meaningfully analyze the ramifications of the Proposed Rule, especially considering the introduction of novel definitions and changes to the longstanding jurisdictional exclusion for ditches. Additional time is also warranted in light of the anticipated proposed changes to the Clean Water Act section 401 regulations, which have not yet been released for public comment. The Proposed Rule purports to implement congressional intent to ensure the primary responsibilities and rights of States to regulate their land and water resources. (Fed. Reg. at 52514.) But given U.S. EPA's anticipated proposed changes to the regulations governing Clean Water Act section 401 water quality certifications, the reduction in scope of waters of the United States would undercut the ability of States to protect their own resources in certain situations. For

discharges associated with projects licensed by the Federal Energy Regulatory Commission, a narrow definition of waters of the United States would mean that state authority over more of these types of projects would be preempted by the Federal Power Act. The Water Boards urge the Agencies to take more time to gather information regarding the potential ramifications of the Proposed Rule.

We encourage the Agencies to continue to consult with the states as the Agencies consider the public comments and the rulemaking moves forward. If you have any questions regarding this submittal, please contact Serena Liu at serena.liu@waterboards.ca.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric Oppenheimer", is centered on a light gray rectangular background.

Eric Oppenheimer
Executive Director
State Water Resources Control Board