

California Wetland Protection and Effects of the Sackett Decision

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Sackett Decision

- Held that the Clean Water Act extends to only those “wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right,” so that they are “indistinguishable” from those waters.
- According to the majority opinion, the Clean Water Act covers only adjoining wetlands, a reading that excludes wetlands separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like that had previously been protected by eight different Presidential administrations.
- Decision does not affect the definition of waters of the state as used in state law.

Sackett Impacts to Other Waters?

- The majority opinion endorsed language from the *Rapanos v. United States* plurality that the scope of Clean Water Act covers “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’”
- No justice supported the continued application of the significant nexus test articulated by Justice Kennedy’s concurrence in *Rapanos*.
- Could this rationale in *Sackett* be used to argue that other water bodies without a continuous surface connection to waters of the United States should also be excluded from the scope of the Clean Water Act?
- U.S. EPA and the Corps will be promulgating a regulation to redefine waters of the United States in response to *Sackett*.

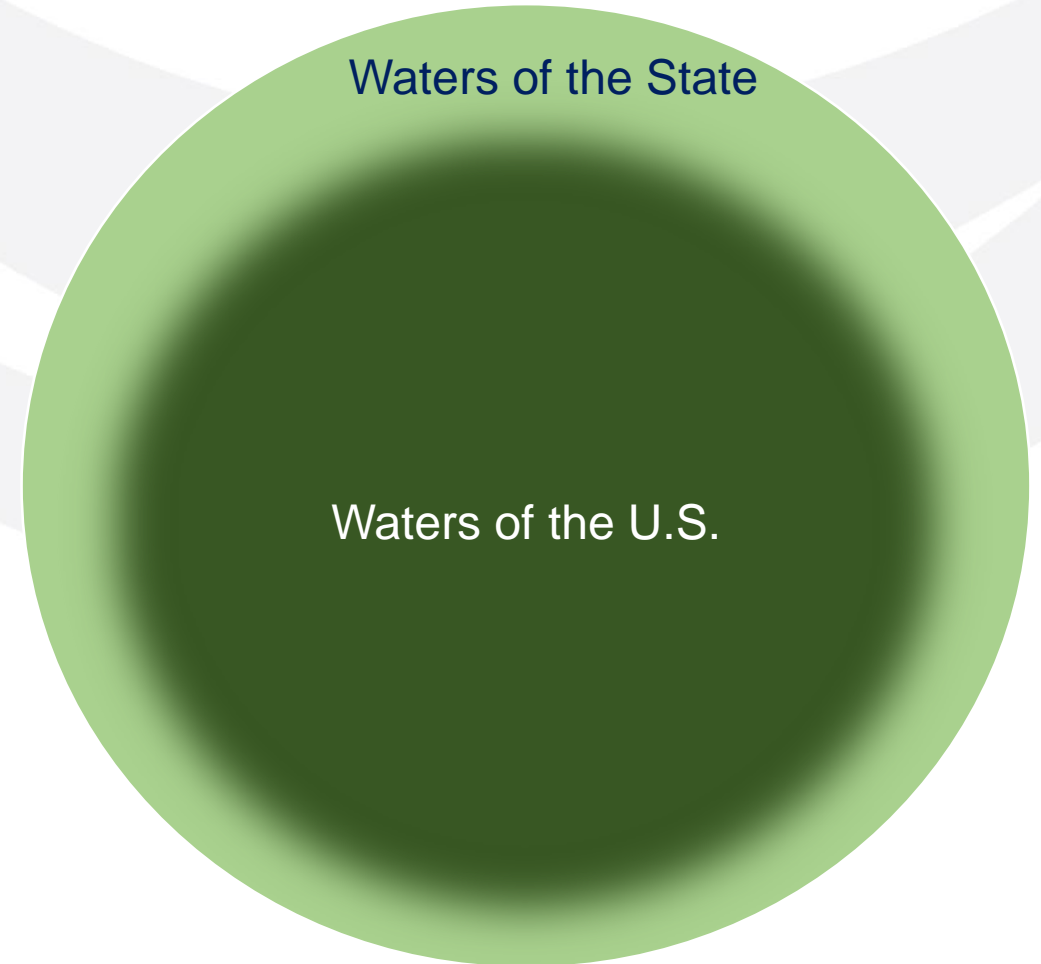
Water Board Programs Affected by Sackett

- Program Impact Evaluation is Underway – Affected programs may include:
- CWA Section 401 Certifications, esp. Wetland Protection
 - More reliance on state permitting processes
 - Less support from federal agency (e.g. aquatic resource verification, mitigation banking)
- NPDES Permitting
 - More reliance on state permitting processes
- Impaired Waters Assessment
 - Expensive, staff intensive process. Do we include non-federal waters of the state?
- Grant funding programs connected to water quality impairments

The Good News!

California Water Code, § 13050(e)
“Waters of the state” means any surface water or groundwater, including saline waters, within the boundaries of the state.”

Waters of the U.S. definition is in flux, but “waters of the state” is more inclusive than “waters of the U.S.”



**Venn Diagram of Waters of the U.S.
and non-Federal Waters of the State**

State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State

- 2008 Water Board resolution directed staff to develop a policy to address waters of the state that are no longer protected as waters of the U.S. under the CWA due to Supreme Court Decisions
- Adopted in 2019 Effective May 2020
- Developed using input from state, federal and local experts including technical advisory team
- https://www.waterboards.ca.gov/water_issues/programs/cwa401/wrapp.html#related

State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State

Wetlands Only

- Wetland definition (section II)
- Wetland jurisdictional framework (section II)
- Wetland delineation (section III)

Dredge or Fill Application Procedures (All Waters)

- Application submittal (section IV.A)
- Water Board review (section IV.B)
- Exclusions (section IV.D)
- Appendix A: State Supplemental Dredge or Fill Guidelines

Wetland Definition

An area is wetland if, under normal circumstances, (1) the area has continuous or recurrent saturation of the upper substrate caused by groundwater, or shallow surface water, or both;

(2) the duration of such saturation is sufficient to cause anaerobic conditions in the upper substrate; and

(3) the area's vegetation is dominated by hydrophytes or the area lacks vegetation.

State V. Federal Definition

Similarities

- 3 Parameters
 - Hydrology
 - Soils
 - Vegetation
- Uses existing Corps Delineation Manuals and supplements
- Same Regulatory Outcome in nearly all instances

Differences

- Directly incorporates “Special Aquatic Resources” (i.e. vernal pool, mudflats) into state Wetland Definition
- Vegetation is dominated by hydrophytes or the area lacks vegetation
- Anaerobic substrate instead of hydric soils

Wetland Definition & Jurisdiction Framework

Does this aquatic feature meet the technical definition of a “wetland”?

If yes, is the “wetland” a water of the state, i.e., within the jurisdiction of the Water Boards?

Jurisdictional Wetlands

Wetlands that are waters of the state:

1. Natural wetlands
2. Wetlands created by a modification of a water of the state
3. Artificial wetlands that meet specific criteria
 - a. Compensatory mitigation
 - b. Identified in a water quality control plan
 - c. Resulted from historic human activity
 - d. Greater than one acre in size, unless it was created for a specific purpose



Examples of Excluded Artificial Wetlands

- Industrial or municipal wastewater treatment or disposal
- Certain types of stormwater treatment facilities
- Agricultural crop irrigation
- Industrial processing or cooling
- Fields flooded for rice growing



Key Elements in State Permitting Requirements

- Greater clarity on application requirements
- First avoid, then minimize, and lastly compensate
- No net loss of the overall abundance, diversity, and condition of aquatic resources in a watershed
- No violation of water quality standards; consistent with all applicable water quality control plans and policies for water quality control
- No significant degradation of the water of the state

Dredge or Fill Procedures Implementation

- Staff and Public Training in early 2020 including implementation tools:
 - Procedures and Staff Report
 - Links to relevant regulations
 - Topical Guidance Document developed to assist applicants
 - Application completeness checklist
 - Background and Training videos
 - https://www.waterboards.ca.gov/water_issues/programs/cwa401/#application_guidance_material

Remaining Sackett Issues

- 401 Certification Process more efficient
- Delegation Issues with the State Permitting Process
- Cost of replacing Corps Services
- Ongoing uncertainty about federal landscape and USEPA response to Sackett



Thank you and Questions

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