Presented at the State Water Resources Control Board's
Water Quality Coordinating Committee October 23, 2023 meeting

Frequently Asked Questions regarding the U.S. Supreme Court's ruling in Sackett v. EPA

1. **What was the U.S. Supreme Court's ruling in *Sackett v. EPA*?**

On May 25, 2023, the U.S. Supreme Court issued its ruling in *Sackett v. Environmental Protection Agency* (2023) 598 U.S. 651 (*Sackett*), holding the Clean Water Act's definition of "waters of the United States" 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. Following the Court's decision, 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.

The Court's opinion in *Sackett* also endorsed language from *Rapanos v. U.S*. (2006) 547 U.S. 715 (*Rapanos*), in which four justices issued a plurality opinion holding that the scope of the 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.'" The *Sackett* decision was nominally unanimous, with no justice supporting the continued application of the "significant nexus" test articulated by Justice Kennedy's concurrence in *Rapanos*.

Note that *Sackett* does not affect the definition of "waters of the state" as used in California state law.

2. **Have the U.S. Environmental Protection Agency (U.S. EPA) and the U.S. Army Corps of Engineers (Army Corps) revised the regulations defining "waters of the United States" in response to *Sackett*?**

Yes. The U.S. EPA and the Army Corps issued a rule on September 8, 2023, to conform the regulatory definition of waters of the United States to *Sackett*. The rule deleted existing regulatory language referring to waters that either alone or in combination with similarly situated waters int eh region significantly affect the chemical, physical, or biological integrity of otherwise jurisdictional waters. The rule also revised the definition of "adjacent" to simply "having a continuous surface connection." Under the new rule, the definition of waters of the United States now includes only (1) traditional navigable waters, the territorial seas, and interstate waters, (2) tributaries to traditional navigable waters, the territorial seas, and interstate waters that are "relatively permanent, standing or continuously flowing bodies of waters," and (3) wetlands that have a continuous surface connection to waters in either (1) or (2).

The agencies have stated that they intend to develop further guidance in the future.

3. **How will the Supreme Court's ruling in *Sackett* v. EPA affect California?**

The *Sackett* decision will have serious consequences for the Clean Water Act and the scope of federal protections over the nation's waters. On a national level, *Sackett* stripped many wetlands nationwide of their federal protections. According to the Environmental Law Institute, approximately half of the states rely entirely on the Clean Water Act to protect waters and do not have independent state protections. As a downstream state, California will likely face the adverse effects of more wetlands being filled in upstream states and increases in unregulated discharges of pollutants in upstream states. As one example, the mainstem of the Colorado River, one of California's most important water supplies, will

continue to be afforded federal protection. But the intermittent streams that feed the Colorado River and the wetlands in the semi-arid Colorado River watershed, many of which are in states that lack independent state law protection, are at risk of losing federal protection.

Fortunately, California is well positioned to employ its state-level authorities to blunt some of the adverse effects from the loss of Clean Water Act protections within California and continue to protect water quality within its borders. In California, the Porter-Cologne Water Quality Control Act (Porter-Cologne) will be a powerful tool to ensure state protection where federal protection is no longer available. However, many of California's existing regulatory programs are structured and implemented based on how the scope of the Clean Water Act had been construed for the last 50 years. With the dramatic contraction of the Clean Water Act set forth in the *Sackett* ruling, the State Water Resources Control Board (State Water Board) and the nine Regional Water Quality Control Boards (Regional Water Boards) will need to restructure their programs to reflect the new bounds on federal jurisdiction. The State Water Board and Regional Water Boards (collectively, the Water Boards) administer various Clean Water Act programs in California, including the Clean Water Act section 401 water quality certification program, section 402 National Pollutant Discharge Elimination System (NPDES) permitting program, and section 303 water quality standards program. These federal programs are in addition to water quality protection requirements for "waters of the state" under Porter-Cologne, including the issuance of state permits or "waste discharge requirements" for all discharges of waste that can affect the quality of waters of the state. The Water Boards expect that going forward there will be a greater reliance on regulation of discharges using waste discharge requirements issued solely under state law and a heavier state workload and attendant need for increased staff resources and training.

The most immediate effects, which are discussed in greater detail below in question 4, will be on the Water Boards' dredge and fill program. For discharges of dredged or fill material to waters of the United States, applicants are required to obtain a Clean Water Act section 404 permit from the Army Corps and a complementary section 401 water quality certification from the applicable Water Board. The Water Boards have typically relied on the Army Corps' work product, as well as expertise and resources, to employ a smaller number of section 401 certification staff. As substantially fewer projects will now need to obtain section 404 permits to dredge or fill wetlands, the Water Boards will not have the benefit of the Army Corps' work in areas such as wetland delineation, alternatives analysis, and compensatory mitigation. In addition to new uncertainty regarding jurisdictional scope and available permitting pathways, applicants are also likely to encounter higher state permit feeds to account for the resulting increased state staffing resources needed to issue waste discharge requirements under state law for their discharges.

As described in additional detail below in question 5, the Water Boards are also assessing how *Sackett* affects the NPDES program. NPDES permits for discharges to wetlands are less common than NPDES permits regulating discharges to rivers and other flowing waters. Non-perennial tributaries to jurisdictional waters will lose their status as waters of the United States if they are not "relatively permanent, standing or continuously flowing bodies of water." This aspect of *Sackett* is not particularly clear, because the plurality opinion in *Rapanos* noted that its reference to "relatively permanent" waters did "not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months." Also, an NPDES permit may still be required for some point source discharges of pollutants to tributaries that are not waters of the United States. The plurality opinion in *Rapanos* explained that courts have consistently found that the Clean Water Act applies to the discharge of pollutants that are not directly into covered waters but pass through conveyances in between. *Sackett*

also did not address the application of *County of Maui*, *Hawaii v. Hawaii Wildlife Fund* (2020) 140 S.Ct. 1462 (*County of Maui*), which held that an NPDES permit is still required for a point source discharge of pollutants even if the discharge is not directly into waters of the United States, as long as the discharge is the "functional equivalent" of a direct discharge from a point source into waters of the United States. It is important to note that the issue of NPDES permitting for discharges of pollutants to non-perennial tributaries of jurisdictional waters is expected to be an area of high uncertainty for several years, as the federal agencies issue specific jurisdictional determinations and the federal courts resolve specific controversies. Even where the Clean Water Act no longer regulates the discharge of a pollutant, dischargers will likely need to obtain state waste discharge requirements from the Water Boards. Unlike when issuing NPDES permits, the Water Boards must fully comply with the California Environmental Quality Act (CEQA) when issuing state waste discharge requirements. The Water Boards anticipate needing additional resources to complete the necessary analysis and to adopt replacement waste discharge requirements where NPDES permits are no longer required.

Water Board programs could also be impacted by changes in federal funding, particularly under Clean Water Act section 106, but the parameters of those changes are not yet clear. The Water Boards may need to increase fees to account for this loss of federal funding. The Water Boards are committed to working with our federal and state partners to fully identify the ramifications of *Sackett* in the coming months and years.

The contraction of federal water quality protections highlights the importance of the work that California does on the state level. State law level environmental protections will be increasingly critical in the wake of *Sackett*. The Water Boards are fortunate to have dedicated and diligent staff that will continue to fulfill the Water Boards' mission to preserve, enhance, and restore the quality of California's water resources for the protection of the environment, public health, and all beneficial uses for the benefit of present and future generations.

4. How will *Sackett* affect the protection of wetlands?

On the national level, the *Sackett* decision stripped many vulnerable wetlands of their federal protections. Wetlands provide environmental and economic benefits, including flood and stormwater control, surface and ground water supply, fish and wildlife habitat, erosion control, pollution treatment, nutrient cycling, and public enjoyment. Wetlands ameliorate the effects of global climate change by providing floodwater storage, sequestering carbon, and maintaining vulnerable plant and animal communities. Many of these critical areas nationwide have bene lost to fill and development. Impacts from increasing population growth, land development, sea level rise, and climate change continue to threaten wetlands. The Clean Water Act has historically provided essential, minimum protections for wetlands, including requiring projects to avoid, minimize, and compensate for adverse impacts to wetlands.

One example of a type of wetlands that will be excluded from Clean Water Act jurisdiction under *Sackett* is western vernal pools. Vernal pools are shallow, seasonal wetlands that are found in California that generally would not be "adjacent wetlands" as defined by the *Sackett* decision because vernal pools do not typically have a continuous surface water connection with a water of the United States. Vernal pools are valuable because they sustain a unique diversity of native flora and fauna. U.S. EPA has previously described western vernal pools as "reservoirs of biodiversity."

The Water Boards have a regulatory framework in place to continue to provide robust protections over wetlands within California's borders. In 2019, the State Water Board adopted the State Wetland Definition and Procedures for the Discharge of Dredged or Fill Material to Waters of the State (Dredge or Fill Procedures), which aligned federal and state protections where feasible and established greater consistency in regulation of discharges of dredged or fill material across the nine Regional Water Boards. In addition, the Dredge or Fill Procedures include a definition of wetlands that qualify as waters of the state that is broader than both the former federal definition (because it includes wetlands that are not vegetated, such as desert playas) and the new *Sackett*-based federal definition (because it does not require that the wetlands have a continuous surface connection such that they are indistinguishable from otherwise jurisdictional waters.

Although California state law is situated to continue to provide similar protections under state law, a narrowed scope of the Clean Water Act will mean that the Water Boards will not have the benefit of the Army Corps' expertise and resources for many dredge or fill projects. Prior to *Sackett*, the Water Board frequently relied on aquatic resource delineations provided by the Army Corps. To adjust to more regular Water Board delineation verifications, Water Board staff will need additional training regarding implementing the delineation procedures outlined in the Dredge or Fill Procedures, and to promote greater consistency for non-wetland resources, the State Water Board may consider adopting delineation procedures for non-wetlands. Water Board staff will also need to conduct an alternatives analysis for more projects to identify the least environmentally damaging practicable alternative. Prior to *Sackett*, the Army Corps typically provided this analysis for individual permits. Finally, some streamlined permitting options, such as projects that qualify under the Water Boards' certification of the Army Corps' nationwide or Regional General Permits, will no longer be available for projects wholly outside of federal jurisdiction.

For discharges of dredged or fill material to wetlands that are no longer within the jurisdiction of the Clean Water Act, project proponents will not need a federal permit and accordingly do not need a Clean Water Act section 401 water quality certification. Instead, project proponents will need to apply for waste discharge requirements from the applicable Water Board. Some of the procedural efficiencies available for a Clean Water Act section 401 water quality certification are not available for waste discharge requirements issued by a Regional Water Board. In particular draft waste discharge requirements must be available for public comment for at least 30 days prior to adoption in accordance with Water Code section 13167.5 and must be adopted by the Regional Water Board rather than the Regional Water Board Executive Officer. The increased workload by the Water Boards will likely increase the amount of fees needed to avoid significant permitting delays in the dredge or fill program, which is primarily funded by fees.

At this time, the Water Boards are not planning on revising Clean Water Act section 401 water quality certifications issued prior to *Sackett*. Clean Water Act section 401 water quality certifications are generally also issued pursuant to the Water Boards' waste discharge requirements authority pursuant to State Water Board Water Quality Order No. 2003-0017-DWQ and therefore previously issued 401 certifications are expected to continue to have full force and effect.

5. How will *Sackett* affect implementation of the NPDES program?

Although the context for the *Sackett* decision was a section 404 dredge or fill permit for discharges to wetlands, the decision will likely have ramifications for the Clean Water Act section 402 NPDES point source permit program. The Water Boards are in the process of identifying any NPDES permits for

ongoing discharges to wetlands that do not have a continuous surface water connection to a water of the United States.

The *Sackett* decision and the subsequent conforming regulations did not provide any substantive analysis of how *Sackett* should be interpreted in conjunction with the NPDES discussion set forth in the plurality opinion in *Rapanos*, where Justice Scalia explained that the relatively permanent standard should not significantly reduce the scope of section 402 of the Clean Water Act because courts have long recognized that discharges of pollutants into intermittent channels that naturally wash downstream are covered by the Clean Water Act. Similarly, *Sackett* did not alter the Supreme Court's decision in *County of Maui*, which held that discharges injected into non-jurisdictional groundwater connected to the Pacific Ocean could be protected under the Clean Water Act if they were the functional equivalent of a direct discharge to a jurisdictional water, such that the discharger is still required to obtain an NPDES permit. Generally speaking, unless the U.S. EPA has determined that an NPDES permit is no longer required, the Water Boards expect to continue to require point source discharges to tributaries of waters of the United States to obtain NPDES permits.

Where the discharge of a pollutant is no longer within the scope of the Clean Water Act, dischargers may need to obtain waste discharge requirements from the Water Boards. The issuance of waste discharge requirements, unlike the issuance of NPDES permits, will require full compliance with CEQA. Pursuant to California Water Code section 13389, waste discharge requirements that serve as NPDES permits are largely exempt from CEQA. This CEQA exemption is not available for waste discharges requirements that do not serve as NPDES permits.

6. If I discharge to a water that is no longer a water of the United States after *Sackett*, do I still need to obtain a permit?

Yes, as discussed in questions 4 and 5 above. In addition to 401 certifications and NPDES permits for discharges to waters of the United States, the Water Boards also issue waste discharge requirements for discharges of waste that can affect the quality of waters of the state pursuant to Porter-Cologne. Porter-Cologne defines "waters of the state" broadly to include "any surface water or groundwater, including saline waters, within the boundaries of the state." (Wat. Code, § 13050(e).) The broader definition of waters of the state includes many types of waters that have never qualified as waters of the United States under any of its historic regulatory definitions or judicial interpretations, including many wetlands, ephemeral streams, and groundwater. "Waters of the state" also necessarily includes all waters that have ever qualified as waters of the United States. The State Water Board determined that waters of the state includes all waters that qualified as waters of the United States in 2000, prior to any regulatory or judicial limitations on the federal definition of waters of the United States. (Cal. Code of Regs., titl. 23, § 3831(w).) This regulation has remained in effect despite subsequent changes to the federal definition. Therefore, waters of the state includes features that have been determined by U.S. EPA or the Army Corps to be "waters of the United States" in an approved jurisdictional determination; "waters of the United States" identified in an aquatic resource report verified by the Army Corps upon which a permitting decision was based; and features that are consistent with any current or historic final judicial interpretation of "waters of the United States" or any current or historic federal regulation defining "waters of the United States" under the federal Clean Water Act. Therefore, any waters that have lost their status as waters of the United States due to *Sackett* are still considered to be waters of the state, and discharges to those waters are subject to state permitting.

7. How does *Sackett* affect the Water Boards' enforcement tools?

The reduction in Clean Water Act jurisdiction limits the availability of some enforcement tools that the Water Boards have traditionally used in reliance on the broader definition of "waters of the United States." Porter-Cologne provides more direct enforcement authority for violations of the Clean Water Act, whereas, imposing civil liabilities for violations of non-NPDES WDRs often requires additional notice to the violator or the adoption of an enforceable order before a potential discharge can be subject to administrative penalties. (Wat. Code, §§ 13265, 13350.)

Additionally, Porter-Cologne penalties for Clean Water Act violations can be substantially higher than penalties for violations of California law. For example, Clean Water Act violations may be assessed both a daily and volumetric administrative civil penalty under California Water Code Section 13385, subdivision (c)(1) at a rate of $10,000 per day and $10 per gallon discharged but not cleaned up. Administrative civil penalties under California Water Code Section 13350, subdivision (e), for violations of California law for discharges to non-federal waters of the state are assessed either a penalty of $5,000 per day of violation or a volumetric penalty of $10 per gallon discharged, but not both. Judicial civil penalties are similarly higher for Clean Water Act violation than analogous violations involving waters of the state. (Wat. Code §§ 13385 (b)(1), 13350 (d).) Therefore, both the per gallon and per day penalties for California law violations for discharges to waters that lost their status as waters of the United States will be lower than if those waters had remained protected under the Clean Water Act. In addition, unlike the Clean Water Act, the California Water Code does not authorize citizen enforcement actions for violations associated with discharges to non-federal waters of the state.