

## **U.S. Supreme Court Decision in *Sackett v. Environmental Protection Agency* and Implications for CVWD**

June 29, 2023

On May 25, 2023, the U.S. Supreme Court issued a major decision on the scope of the Federal Clean Water Act in the case of *Sackett v. Environmental Protection Agency*. A five-justice majority stated that the Clean Water Act only applies to “wetlands with a continuous surface connection to the bodies that are ‘waters of the United States’ in their own right,’ so that they are ‘indistinguishable’ from those waters.” The Court also ended the fact-specific “significant nexus test” that EPA and the Army Corps of Engineers have used since 2006 to find that many wetlands and ephemeral streams were subject to Clean Water Act jurisdiction, or “Waters of the United States.”

Shortly after the Court’s decision, the Army Corps of Engineers stopped processing requests for Approved Jurisdictional Determinations. On June 26, 2023, EPA and the Army Corps of Engineers posted and filed in court statements that they are developing an amendment to their current rule defining Waters of the United States, and that the agencies intend to issue a final rule by September 1, 2023.

### **Implications of the Court’s Decision**

**Wetlands:** The Court’s decision ends federal Clean Water Act protections and permitting requirements for all wetlands in the United States that either (1) lack a continuous surface water connection to a body of water that is subject to Clean Water Act jurisdiction, or (2) are “distinguishable” from the adjacent water body. According to a 2017 analysis of the Trump Administration’s proposed definition of Waters of the United States by the Environmental Protection Agency and Army Corps of Engineers, the first exclusion would remove 51% of the nation’s wetlands from federal Clean Water Act jurisdiction. It is not clear how the agencies and the courts will apply the second, and new, “indistinguishable” standard in the coming months and years, but it will certainly remove some amount of additional wetlands from federal jurisdiction.

**Ephemeral and Intermittent Streams:** The *Sackett* decision ended the Significant Nexus standard that the agencies had applied since 2006, and that was often the basis for their determination that ephemeral streams were Waters of the United States, subject to Clean Water Act jurisdiction. The *Sackett* opinion also endorsed and quoted Justice Scalia’s plurality opinion in the 2006 case *Rapanos v. United States*, holding that “waters” of the United States includes “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.’ Depending on how the courts ultimately define “relatively permanent,” this new standard will likely exclude many ephemeral streams in the arid West from Clean Water Act jurisdiction.

Under the EPA and Army Corps of Engineers 2008 guidance following the *Rapanos* decision, an ephemeral or intermittent reach of a stream is “relatively permanent” if it has “continuous flow at least seasonally (e.g., typically three months).” Under the 2023 regulation defining Waters of the United States, the standard for “relatively permanent” is lower:

relatively permanent flow may occur as a result of multiple back-to-back storm events throughout a watershed, during which the combination of runoff and upstream contributions of flow is high enough to exceed rates of transmission loss for an extended period of time. Relatively permanent flow may also follow one or more larger storm events, when floodwaters locally recharge the riparian aquifer through bank infiltration, which supplies sustained baseflow throughout the monsoon season.

The 2023 regulation states that streams are not “relatively permanent” if they “often dry rapidly following a storm event (e.g., within minutes, hours, or days).” In the arid West, the 2023 regulations recommends a tool called a Streamflow Duration Assessment Method for determining whether a reach is “relatively permanent” based on such factors as the presence of wetland plants, aquatic invertebrates, aquatic insects, algae, and fish. The 2023 regulation currently applies in California, though courts have enjoined its use in 27 other states. On June 22, 2023, the Assistant Secretary of the Army for Civil Works testified to Congress that he believes the 2023 rule’s standard for “relatively permanent” would not be changed by the post-*Sackett* amendment the agencies are preparing to issue by September 1st. The 2023 rule’s standard for “relatively permanent” waters is lower than the standard in the agencies’ 2008 guidance, would likely include more ephemeral and intermittent streams under Clean Water Act jurisdiction, and will likely be the subject of legal challenges.

Wetlands and ephemeral streams no longer under federal Clean Water Act jurisdiction are no longer subject to federal permit requirements, protections, or mitigation requirements of Section 404 of the Clean Water Act, and no longer require Section 401 state water quality certifications, if they are drained or filled. They are also no longer protected against or subject to permit requirements for pollution discharges into them under Section 402 of the Clean Water Act.



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In California, all wetlands and ephemeral streams will continue to be “Waters of the State” that are subject to Waste Discharge Requirements under the Porter Cologne statute, and wetlands will be subject to the State Water Resources Control Board’s Procedures for Discharges of Dredged or Fill Material to Waters of the State, which includes mitigation requirements. But a key difference is that wetlands and ephemeral streams that are not Waters of the United States will no longer be subject to citizen lawsuits under the Clean Water Act.

### Potential Impacts for CVWD

CVWD is starting or working to complete the permitting process for several groundwater recharge and stormwater projects that are in ephemeral reaches that, before the *Sackett* decision, were presumed to be subject to Clean Water Act jurisdiction, and required Section 404 permits and Section 401 water quality certifications. Many of these ephemeral reaches do not appear to meet the standard for being considered “relatively permanent” bodies of water, and therefore they should no longer be subject to federal Clean Water Act jurisdiction. Currently the Army Corps of Engineers has halted its process of confirming whether a reach is within or outside Clean Water Act jurisdiction while it develops its post-*Sackett* amendments to the 2023 rule. Once the agencies amend their 2023 rule by September 1<sup>st</sup>, we expect the Army Corps to resume processing and issuing Approved Jurisdictional Determinations. But we also expect the standard for which ephemeral or intermittent streams are “relatively permanent” to be further refined in the courts following legal challenges.

Going forward, significantly fewer projects and water infrastructure facilities in CVWD’s service area will be subject to federal Clean Water Act jurisdiction, permitting requirements, or citizen suits. However, they will continue to be subject to state regulation under the Porter Cologne Act.



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