



# Waters of the State

CALIFORNIA



**STATE WATER RESOURCES CONTROL BOARD**

# Waters of the State

- What are “waters of the state”?
- What is California’s response to *SWANCC* and *Rapanos*?
- How has the 9<sup>th</sup> Circuit responded to *SWANCC* and *Rapanos*?

# "Waters of the state"

- Defined more broadly than "waters of the United States"
- Means "any surface water or groundwater, including saline waters, within the boundaries of the state" (Water Code section 13050(e))
- Broadly construed to include all waters within the state's boundaries, whether private or public, including waters in both natural and artificial channels

# Waters of the State Includes:

- All “waters of the United States”
- All surface waters that are not “waters of the United States, e.g. non-jurisdictional wetlands
- Groundwater
- Territorial seas

# Territorial Seas

- Under state law, territorial boundaries extend 3 nautical miles beyond outermost islands, reefs, and rocks and includes all waters between the islands and the coast.
- Under federal law, the state's boundaries extend 3 nautical miles from the coast and include a 3-mile-wide band around any islands lying off the coast, but exclude waters between the islands and the coast
- So . . . waters in the Santa Barbara Channel that are beyond the 3-mile limit are within state boundaries

# State Response to *SWANCC* & *Rapanos*

- Decisions have no effect on state's ability to regulate waste discharges to wetlands, vernal pools, ponds.
- Since 1993, California policy has been no net loss of wetland acreage.
- In 2004, State Water Board adopted general waste discharge requirements for minor discharges of dredge and fill to non-federal waters.
- In 2004, staff initiated a workplan to fill the gaps in wetland protection. The workplan identified the need to develop a state wetland definition and a policy for wetland protection.

# State Response – Part 2

- In April 2008, the State Water Board adopted a resolution to develop a wetlands and riparian areas policy
- The policy will involve collaboration with Regional Water Boards and will use Stream and Wetland Systems Protection Policy basin plan amendment being developed by San Francisco Bay and North Coast Regional Water Boards

# State Response – Part 3

- The policy will be adopted in 3 phases:
  - Phase 1 will establish a policy to protect wetlands from dredge and fill activities
  - Phase 2 will expand the policy to protect wetlands from all other activities impacting water quality
  - Phase 3 will extend the policy to riparian areas

# 9<sup>th</sup> Circuit Response to *SWANCC* & *Rapanos*

- Intermittent Tributaries that flow into waters of the United States
  - **Post-*SWANCC***: *Headwaters, Inc. v. Talent Irrigation District* (9<sup>th</sup> Cir. 2001) 243 F.3d 526 (“Even tributaries that flow intermittently are ‘waters of the United States.’”)
  - **Post-*SWANCC* & post-*Rapanos***: *United States v. Moses* (9<sup>th</sup> Cir. 2007) 496 F.3d 984, petn. for cert. filed on Jan. 9, 2008 (a seasonally intermittent stream that ultimately empties into a water of the United States is a water of the United States)
  - **Post-*SWANCC* & post-*Rapanos***: *San Francisco Baykeeper v. Cargill Salt Division* (9<sup>th</sup> Cir. 2007) 481 F.3d 700 (*Rapanos* limited to adjacent wetlands; *Headwaters* is relevant to permissible scope of tributary jurisdiction.)

# 9<sup>th</sup> Circuit Response – Part 2

- Other waters (not wetlands or tributaries) – apply Kennedy “significant nexus” test
  - *Cargill*: Non-navigable, intrastate pond, adjacent to navigable waters not a water of the United States
  - *Northern California River Watch v. Healdsburg* (9<sup>th</sup> Cir. 2007) 496 F.3d 993: *Non-navigable, intrastate pond adjacent to Russian River is a water of the United States*



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