

Others have already [posted](#) about the Supreme Court's Sackett decision that significantly cuts back on the geographic scope of Clean Water Act Section 404 regulation protecting wetlands. Understandably, there has been a [lot of attention](#) to the [direct effects of that change](#), which means that federal permitting will no longer apply to many wetlands in the United States. In California, the state government [has argued that because of California state law protecting wetlands](#), Sackett will have much less of an impact in California than elsewhere.

Not quite.

That's because environmental law often operate in interconnected ways. The narrowing of the scope of Section 404 regulation does not just mean wetlands will receive less protection under the Clean Water Act. It also means many endangered species will receive less protection under the federal Endangered Species Act (ESA), including in California.

Understanding why requires a little exposition on how the ESA works. When species are listed under the ESA, one of the important ways they are protected is through Section 7 of the ESA, which prohibits the federal government from taking actions that would jeopardize the existence of that species or adversely modifying that species' critical habitat. Federal government actions covered under Section 7 include situations when the federal government issues permits to private actors to do something that is regulated by federal law - for instance, issuance of a Section 404 permit.

Because of the prior geographic scope of Section 404 regulation, there was a lot of Section 7 ESA consultation for a lot of development projects that required Section 404 permits. That meant that ESA-listed species that might have been affected by the development project would be covered by the Section 7 process, which can provide significant protections for species. However, now that connection is gone. If a development project is in wetlands that are not covered by Section 404, and if there is no other federal connection to the project, Section 7 will not apply.

It is true that there are other provisions of the ESA that might still apply to these projects. Section 9 of the ESA prohibits take of listed species, and take can include habitat modification in certain circumstances. But Section 9 is harder to enforce than Section 7. It's also a process that private developers dislike - in general, a private actor seeking an ESA permit much prefers to go through Section 7 than through Section 10 (the permitting process for Section 9).

California has a lot of federally listed species. Moreover, state wetlands regulation is not a

federal permitting process, so it won't trigger Section 7. Thus, the protections of the federal ESA in California in practical terms shrank quite a lot with Sackett, even in California.

California does have its own state law to protect endangered species - the California Endangered Species Act (CESA). Could CESA fill in the gap for these species? Not really, or at least not for all of them, for three reasons.

First, there are many species in California that are listed for protection under the ESA, but not under CESA. There hasn't been a lot of urgency in California to rectify that situation, in part because the state assumed that the federal ESA would be around to provide a backstop. That is less true now.

Second, CESA only regulates take. It doesn't provide a comparable protection against government actions that might harm species as a whole, but not cause take, like the ESA does. (The CESA provisions that provided such protections were repealed a few decades ago.) In theory, the California Environmental Quality Act (CEQA) might provide protections against state and local government actions that harm species but do not cause take, since it requires mitigation of significant environmental impacts by state and local government actions. But unlike the ESA, CEQA has a provision that allows a government actor to declare mitigation infeasible and avoid the mitigation requirement.

In addition, there is still some debate about whether take under CESA covers habitat modification. Again, if it does not, then the loss of coverage under Sackett is even more damaging to many listed species in California.

Third, it is not clear if plant or terrestrial invertebrate species in California are protected from take, even if they are currently listed under CESA. There has been a long debate over the regulatory scope of CESA for both sets of species. Again, this was less of a significant issue when the ESA provided Section 7 protection for plant and insect species listed under the ESA and CESA - but again, that scope has shrunk substantially. (And because wetlands are often an important location for rare plant and insect species, this loss of protection is an important one.)

Fortunately, the state does have the power to address the situation. It could take some steps to restore protection to these species, undo at least some of the harms from Sackett, and make the CESA a stronger and better conservation tool. First, the state could provide for automatic listing of all ESA-listed species under CESA. Second, the state could provide that state and local government actions cannot jeopardize the existence of CESA-listed

species, and require mitigation where appropriate for those impacts that might jeopardize the existence of the species. Third, the state could clarify that take under CESA covers habitat modification. And fourth, the state could clarify that plant and insect species listed under CESA in California are protected from take. (I provide more details on all of these ideas in an [article last year on reforming CESA](#), which I summarized in a [blog post](#) last year as well.)

There is even an opportunity to make these changes in the very near future. The governor has asked the legislature to [repeal protections](#) for [fully protected species](#) (a category of protection for species under state law that is separate from CESA) as part of his efforts to [streamline infrastructure permitting in California](#). That request has created [some controversy](#). If the state is going to make these changes to state conservation law, then it seems appropriate for the state to take additional steps to restore protections that were previously present in California for a wide range of endangered species. Such an approach seems particularly appropriate for a governor who has staked [a large claim](#) to [advancing biodiversity protection](#) in the state. Pairing the above changes with repeal of fully protected species would go a long ways to helping the governor back up his words with actions.