

**September 1, 2023**

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Dear Mr. Moore,

The undersigned 9 environmental and conservation organizations appreciate the opportunity to submit these written comments in response to the list of questions posed to stakeholders regarding the creation of state dredge and fill program.

Our organizations support Colorado swiftly developing a state dredge and fill program to protect wetlands, streams, and other water bodies that have lost federal Clean Water Act protections in the wake of *Sackett v. EPA*. Most wetlands nationwide have lost federal protections, and many non-perennial streams have likely met the same fate. Because many of Colorado's wetlands are isolated (meaning they don't have a direct surface connection to a traditionally navigable water body), and a significant number of Colorado's streams do not flow year-round, these vital resources could suffer degradation or irreparable harm if no state action is taken to protect them.

#### Question 1

*Do you have any recommended modifications or additions to the exemptions and exclusions included in section 5 of the Water Quality Control Division's enforcement discretion policy (<https://drive.google.com/file/d/1EyAEk-ABtIIC4mV66CR5KwUrkDybQOrH/view>)?*

Exemptions and exclusions must be justified, not just adopted because they have been incorporated into the federal program. To our knowledge, none of the exclusions that the Corps and EPA have historically used have undergone any meaningful review to see if treating such features as not "waters of the US" would allow for substantial adverse environmental impacts. Similarly, we are not aware of any evaluation of the environmental consequences of Congress's decision to create the permitting exemptions in section 404(f). We recommend that Colorado take a critical look at the exclusions and exemptions to assure itself that they will not result in the loss of important resources and aquatic functions. At a minimum, we recommend that the state program include provisions that "recapture" certain features or discharges where necessary to protect water quality, akin to the provision in section 404(f)(2) of the federal law.

As the state considers whether to adopt any of the permitting exemptions in section 404(f), it should take account of the Army Corps' longstanding regulations, which provide more details about the exemptions' implementation. 33 C.F.R. § 323.4. We recommend that the state ensure that dischargers that would require permitting under these regulations likewise will be required to obtain permits under state law.

We have a specific recommendation regarding the "prior converted cropland" exclusion, if the state decides to codify it. In the enforcement discretion policy, the Water Quality Control Division says: "Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years." This

interpretation makes the exclusion very broad, such that it could be used for non-agricultural purposes or by non-agricultural dischargers; we recommend that the state align its interpretation with that of EPA and the Army Corps. *See* 88 Fed. Reg. 3004, 3105-09 (Jan. 18, 2023) (explaining, among other things, that “the exclusion will cease upon change in use, and that a change in use means that the prior converted cropland is no longer available for the production of an agricultural commodity”). This alignment will clarify that changes in land uses, such as development activities on previous agricultural land, do not receive an exemption.

## Question 2

*What aspects of the federal 404 permitting program have not worked well?*

Too much of section 404 permitting is accomplished using general permits. The use of this approach accounts for virtually all of the Corps’ permitting activity; specifically, “[m]ore than 97% of the Corps’ regulatory workload is processed in the form of general permits.”

Congressional Research Service, *The Army Corps of Engineers’ Nationwide Permits Program: Issues and Regulatory Developments* (Jan. 12, 2017), available at <https://crsreports.congress.gov/product/pdf/RL/97-223>.

There is also a lack of transparency in the general permitting process. Our organizations recommend that a state program include, at a minimum, (1) a requirement for public notice of intent to certify general permits, (2) a requirement that general permits be subject to review every 5 years after public notice and comment, and (3) a requirement that the state retain its ability to determine when an individual permit is required to protect sensitive state waters or waters of special ecological significance.

The failure to require individual permits in all but a tiny fraction of instances is inconsistent with the clear intent of the provision of the Clean Water Act that authorizes general permitting. Section 404(e) allows general permits for a category of discharges only if “the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” However, the Corps routinely skirts this obligation by authorizing activities that are dissimilar in nature or, more importantly, have obvious and substantial adverse effects on the environment. Take Nationwide Permit 12, for instance—this permit authorizes massive oil and gas pipelines, without any project-level public comment and absent a rigorous environmental analysis of the impacts of pipeline projects.

An additional significant failing of the federal section 404 program is that the permitted impacts to water bodies are not consistently compensated for by mitigation. A report done by the Corps’ Institute for Water Resources and funded by EPA and the Corps contains this summary table of the percentage of different kinds of permits that require compensatory mitigation:

**Table 5. Percentage of authorizations requiring compensatory mitigation issued in Calendar Years 2010-2014.**

| Year        | General Permits |            |           |           | Individual Permits |            |            | All Permits |
|-------------|-----------------|------------|-----------|-----------|--------------------|------------|------------|-------------|
|             | All GP          | NWP        | PGP       | RGP       | All IP             | SP         | LOP        |             |
| 2010        | 10%             | 12%        | 5%        | 8%        | 33%                | 50%        | 12%        | 11%         |
| 2011        | 7%              | 11%        | 1%        | 5%        | 32%                | 48%        | 11%        | 9%          |
| 2012        | 10%             | 15%        | 1%        | 5%        | 29%                | 46%        | 10%        | 12%         |
| 2013        | 7%              | 9%         | 1%        | 5%        | 29%                | 48%        | 10%        | 8%          |
| 2014        | 8%              | 10%        | 6%        | 2%        | 34%                | 54%        | 13%        | 10%         |
| <b>Mean</b> | <b>8%</b>       | <b>11%</b> | <b>3%</b> | <b>5%</b> | <b>31%</b>         | <b>49%</b> | <b>11%</b> | <b>10%</b>  |

Permit category type acronyms include General Permits (GP) and Individual Permits (IP). Permit type acronyms include nationwide permits (NWP), programmatic general permits (PGP), regional general permits (RGP), standard permits (SP), and letters of permission (LOP)

Institute for Water Resources, The Mitigation Rule Retrospective: A review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources, at 50 (Oct. 2015), available at

[https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterf/x/exhibits/docs/SOSC/sosc\\_10.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterf/x/exhibits/docs/SOSC/sosc_10.pdf).

A more recent statistic addressing compensatory mitigation associated with nationwide permits is in keeping with these prior figures: “In FY 2018, approximately 11 percent of activities verified by district engineers as qualifying for NWP authorization required compensatory mitigation.”

<https://www.federalregister.gov/documents/2021/01/13/2021-00102/reissuance-and-modification-of-nationwide-permits>

The obvious implication of authorizing damage to protected water resources and not requiring adequate compensatory mitigation is the net loss of water bodies and the functions they perform. Colorado can do better; compensatory mitigation should be required for all permitted adverse impacts to covered waters and must consider function in addition to stream length/wetland area in determining how much mitigation is adequate to compensate for the losses a project will cause. Additionally, we believe that at least 2:1 mitigation must be mandatory (again, using both area and function), and we believe that a strong program would include greater ratios for permittee-responsible mitigation (given that such mitigation is the least preferable method under the federal approach) and for high-quality or already impaired watersheds.

### Question 3

*What aspects of the federal 404 permitting program have worked well?*

At least on paper, the review that a project undergoing permitting gets is substantial and appropriately thorough. First, permits must ensure consistency with guidelines jointly developed by EPA and the Army Corps; these “404(b)(1) Guidelines” require the evaluation of how the proposed activity will impact the physical, chemical, and biological condition of affected waters and they ensure that projects will not proceed if there is a practicable alternative that is less harmful or if the activity will cause significant degradation of waters. 40 C.F.R. §§230.10-

230.61. This process also requires the EPA and Army Corps to comprehensively evaluate and mitigate secondary effects associated with the dredge and fill activity. *Id.* § 230.11(h).

Second, the permitting process includes a “public interest” review that involves weighing the reasonably expected benefits and detriments of the project; as the Corps’ regulations explain:

All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.

33 C.F.R. § 320.4(a). Where the proposed activity is not, on balance, in the public interest, the Corps may not permit the discharge. Finally, under appropriate circumstances, the Corps’ permit process may trigger other reviews under other laws, including the National Environmental Policy Act and the Endangered Species Act; these requirements help ensure that the permitting authority has a comprehensive picture of the impacts of, and alternatives to, the proposed activity.

Third, the Clean Water Act authorizes EPA to restrict, prohibit, deny, or withdraw the use of an area as a disposal site for dredged or fill material. This provision has resulted in protections for thousands of acres of wetlands and streams, ensuring against unacceptable adverse impacts to aquatic resources and downstream communities. It has also provided a key backstop in the regulatory process. Colorado can adopt a similar approach for its state program, even where the program is only housed within one agency.

Overall, the federal 404 program has been successful in minimizing adverse impacts to many wetlands and other water bodies, which is why a state dredge and fill program to cover the gap of lost federal protections is critical to protecting Colorado’s wetlands, streams, and other waters.

#### Question 4

*What other suggestions or concerns do you have related to a state dredge and fill permitting program?*

#### **State should maintain broad definition of “state waters”**

We believe Colorado’s Water Quality Control Act (WQCA) has greatly benefited the protection of state waters and improved water quality. We also support how the Act broadly defines “state waters” as “any and all surface and subsurface waters which are contained in or flow through the state.” Our organizations urge Colorado to retain this definition and to ensure the definition applies to dredge and fill activities impacting wetlands and streams but also any drainage activities.

Strong state protections for wetlands and other state waters are also critical to achieving the Colorado Water Plan goal that “by 2050 all Colorado waters will fully support their classified uses, which may include drinking water, agriculture, recreation, aquatic life, and wetlands.

Recognizing the inter-relationships between quality and quantity, strategies designed to meet Colorado's current and future consumptive, recreational, and environmental water needs will incorporate, as a key objective, the protection and restoration of water quality."

### **Program should be informed by the latest science**

Any state regulatory program must be informed and grounded in the latest and best available science to ensure robust protections of Colorado's water quality. In 2015, the U.S. Environmental Protection Agency (EPA) released a report which synthesized over 1,200 peer-reviewed publications on the science of streams and wetlands. EPA concluded the scientific literature unambiguously demonstrates that isolated wetlands and all streams (regardless of size or frequency of flow) affect the physical, chemical, and biological integrity of downstream waters. In 2022, EPA conducted an additional review of the latest watershed science and reached the same conclusions. Links to both of these reports are included in the resources section below.

### **Adequate funding and enforcement authority is vital to a successful program**

Creating a successful state dredge and fill program will require robust state funding for administration, staffing, and enforcement. The state must provide sufficient initial funding to establish the program as well as set up an annual permit fee structure for regulated entities to ensure the long-term financial sustainability of the program, including consistent funding for enforcement. Fees must be set at such a level that the program can operate effectively and have the resources necessary for agency staff to conduct enforcement. Establishing a sustainable, long-term funding stream will be essential to the success of a protective state dredge and fill program.

The state should explicitly authorize robust enforcement authority, including the right to issue cease and desist orders, restraining orders, injunctions, and civil and criminal penalties. Enforcement authority should cover both unpermitted activities and failure to abide by the terms of the permit. We would also support the state applying its same Section 402 (wastewater discharge permit program) enforcement authorities to a state dredge and fill permit program. The state program should also include a citizen enforcement provision.

### **Compensatory mitigation should be mandatory for all permitted adverse impacts**

As stated in our response to question 2 above, our organizations believe compensatory mitigation is necessary to deter activities in ecologically sensitive areas and must be required for all permitted adverse impacts to state waters. We encourage Colorado to model legislation after Minnesota's statutory requirements (see below Question 5 – State Program Examples) of no net loss/net gains requirements for impacts to wetlands. Required compensatory mitigation must occur within the same basin as the impacts, be a minimum of 2:1 for wetland/stream area lost and require restoration for all lost/adversely impacted ecological functions. We believe this requirement is warranted given that Colorado has lost nearly 50% of the state's wetlands since statehood. Studies show isolated wetlands and streams that have now lost protection under the *Sackett* ruling, provide greater water purification benefits relative to their size than larger water features with surface connections to downstream waters. Wetlands also assist with flood control and provide a buffer against the impacts of extreme weather. As much as 90% of the fish and wildlife depend on riparian habitats that include wetlands providing food and shelter during migration and breeding. Wetlands also act as significant carbon sinks, but altering a wetland's

hydrology can reduce its ability to sequester carbon and may lead to the release of previously stored soil carbon, see USGS Land Management Research Program: Freshwater Wetlands & Systems: Lakes, Rivers, and Springs, available at <https://www.usgs.gov/programs/land-management-research-program/freshwater-wetlands-systems-lakes-rivers-springs>

**Program should include stronger protections for Colorado waters of special significance**

Our organizations urge the state to require stronger protections for wetlands and other water bodies that are considered sensitive and/or of special significance. The program should be tailored to provide additional protections (i.e., larger buffers, more protective avoidance or minimization protocols, or larger compensatory mitigation ratios) for certain sensitive or significant areas. Examples of such sensitive areas could include wetlands that are critical fish or wildlife habitat and/or provide valuable flood mitigation functions, or the headwaters of major rivers and sources of drinking water, such as the Colorado, Arkansas, and South Platte. Wetland types of significant ecological importance to Colorado include playa wetlands and intermountain basin playas, alpine wetland meadows, and Rocky Mountain fens. See the Colorado Natural Heritage Program website for more information on rare and sensitive wetland types in our state: <https://cnhp.colostate.edu/ourwork/wetlands/>

**Program should be transparent and provide a means for public involvement**

As mentioned in our response to question 2 above, information on activities authorized under general permits should be publicly available and include sufficient information for interested citizens to understand the location, nature and impact of the permitted action. For more impactful activities that will require individual permits, a robust public notice and comment process should be adopted so that concerned parties can provide relevant information to inform the state's decision process, including the opportunity to comment on any analysis of a proposed activity's expected impacts.

Question 5

*Is there any relevant research you would like to share, or examples of programs in other states or agencies that should be looked to as a model?*

**Relevant research on the science of wetlands and streams**

As mentioned in our response to question 4 above, EPA has reviewed and synthesized over 1200 peer-reviewed scientific publications on the science of streams and wetlands. Our organizations urge Colorado to craft a state waters regulatory program that is grounded in the scientific findings summarized in both the 2015 *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report)* and the 2022 *Technical Support Document for the Final "Revised Definition of 'Waters of the United States'" Rule*.

The 2015 Connectivity Report can be downloaded here:

[https://cfpub.epa.gov/si/si\\_public\\_record\\_report.cfm?Lab=NCEA&direntid=296414](https://cfpub.epa.gov/si/si_public_record_report.cfm?Lab=NCEA&direntid=296414)

And the 2022 Technical Support Document is available here:

[https://www.epa.gov/system/files/documents/2022-12/TSD-FinalCombined\\_508.pdf](https://www.epa.gov/system/files/documents/2022-12/TSD-FinalCombined_508.pdf)

The United States Geological Survey (USGS) National Hydrography Dataset (NHD) indicates that a quarter of Colorado's stream miles are ephemeral, and almost half are intermittent, though that is likely an underestimate. Intricate hydrological systems of wetlands (including those

lacking a surface connection to other waters) and both perennial and non-perennial streams play a key role in safeguarding water supplies in all nine of Colorado's river basins, including headwaters of South Platte, Arkansas, and Colorado rivers, which are vital sources of drinking water for millions of people. A 2019 analysis conducted by St. Mary's University in Minnesota and the Colorado Natural Heritage Program estimated that 55 percent of wetlands (nearly 37,000 acres) in the South Platte Headwaters are not adjacent to a perennial stream, which means that post *Sackett* decision, they are no longer protected under the federal Clean Water Act:

<https://www.arcgis.com/apps/Cascade/index.html?appid=f3de6b30c0454c15ac9d3d881f18ae33>

Full report on that analysis is available here:

[https://static1.squarespace.com/static/578f93e4cd0f68cb49ba90e1/t/5c50c0e988251bc68fe33388/1548796144041/Hewlett\\_report\\_Final.pdf](https://static1.squarespace.com/static/578f93e4cd0f68cb49ba90e1/t/5c50c0e988251bc68fe33388/1548796144041/Hewlett_report_Final.pdf)

Wetlands, including depression wetlands like playa lakes and other types of isolated wetlands, safeguard vital sources of Colorado's drinking water by trapping and settling out nutrients, heavy metals, and other toxic pollutants before they enter lakes, rivers, and streams. For example, a study of a subalpine wetland in the upper Arkansas River basin found that this wetland "removed iron from a stream affected by acidic mine drainage that flowed through the wetland," see <https://www.fws.gov/sites/default/files/documents/National-Water-Summary-Wetland-Resources-Colorado.pdf> page 138.

Using satellite imagery and computer modeling, Colorado State University researchers were able to show that small, isolated wetlands are more effective at trapping pollutants like nitrogen and phosphorous than larger, well-connected wetlands see <https://iopscience.iop.org/article/10.1088/1748-9326/acab17/pdf>. These isolated wetlands provide invaluable ecosystem services in the form of safeguarding Colorado's rivers, streams, and lakes from additional nutrient pollution, and the state must protect them from destruction or harm in a post-*Sackett* reality.

### **State programs examples**

Prior to *Sackett*, several states already had programs in place to issue permits for dredge and fill activities in wetlands and other water bodies. Our organizations encourage the state to take a close look at Minnesota's wetlands regulatory program. We are also continuing to review other existing state programs and will share any good examples we find.

#### *Minnesota*

Minnesota has separate permitting structures for public waters (lakes, rivers, streams, and certain wetlands), wetlands that are not public waters, and state shoreland zones, see <https://www.dnr.state.mn.us/wetlands/regulations.html>. The state's Wetlands Conservation Act prohibits draining, filling, and in some cases excavating in wetlands unless the activity is exempt, or the wetlands are replaced by restoring or creating wetland areas of at least equal public value to achieve the goal of no net wetlands loss.

Minnesota has a statutory no net loss/net gain goal for wetlands: "The legislature finds that the wetlands of Minnesota provide public value by conserving surface waters, maintaining and improving water quality, preserving wildlife habitat, providing recreational opportunities, reducing runoff, providing for floodwater retention, reducing stream sedimentation, contributing



to improved subsurface moisture, helping moderate climatic change, and enhancing the natural beauty of the landscape, and are important to comprehensive water management, and that it is in the public interest to: (1) achieve no net loss in the quantity, quality, and biological diversity of Minnesota's existing wetlands; (2) increase the quantity, quality, and biological diversity of Minnesota's wetlands by restoring or enhancing diminished or drained wetlands; (3) avoid direct or indirect impacts from activities that destroy or diminish the quantity, quality, and biological diversity of wetlands; and (4) replace wetland values where avoidance of activity is not feasible and prudent.” See <https://www.revisor.mn.gov/statutes/cite/103A.201>

Permitted projects generally require a minimum replacement of two acres of replaced wetlands for every acre adversely impacted. On site wetland replacement is preferred and there are also other specific requirements for wetlands replacement, such as size, type, etc. See <https://www.leg.mn.gov/docs/2007/other/070605.pdf>

### **Other resources**

An issue paper on the consequences of limiting federal Clean Water Act protections: <https://www.nrdc.org/sites/default/files/clean-water-act-consequences-sackett-v-epa-ip.pdf>

A “checklist” prepared by the Environmental Protection Network (a group of 550+ former EPA employees) that describes the protections that states and tribes should ensure they have in response to the loss of federal protections: <https://www.environmentalprotectionnetwork.org/wp-content/uploads/2023/07/EPN-CWA-State-Protections-Checklist.pdf>

Comments filed by NRDC and other organizations on the 2022 Waters of the US proposed rule; pages 20-48 discuss the importance and functions of numerous kinds of waters, many of which will be adversely impacted by *Sackett*: <https://cleanwateraction1.sharepoint.com/:b:/s/Campaigns2/EcZNTesbLltKtCh8h9SXdnIBT5KCEgw7bsIgtFJ5Pp5zVQ?e=JqGwuU>

Thank you for considering our comments. We look forward to providing additional feedback during future stakeholder engagement opportunities.

Sincerely,

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