

WILL COLORADO FILL THE GAPS IN THE POST-SACKETT WORLD?

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I. Introduction

The U.S. Supreme Court's decision in the *Sackett* case earlier this year dramatically altered the regulatory framework for wetlands, ephemeral waters, and intermittent streams in the United States. Now, there is a two-step process in determining whether a water is subject to the U.S. Army Corps of Engineers' (Corps) jurisdiction. First, find if there is a "water of the United States" (WOTUS) that is a "relatively permanent body of water connected to a traditional interstate navigable water." Second, if a WOTUS is present, then the Corps must analyze whether the wetland at issue has a continuous surface connection to the WOTUS to the extent that they are indistinguishable from one another. This change to how WOTUS is interpreted will leave many wetlands and other waters unprotected from the impacts of dredge and fill operations. Colorado estimates that 54% of watershed areas within the state are affected by this ruling.¹

States across the country, including Colorado, will now have to step up and fill the regulatory gap created by *Sackett*. They will have to decide whether and how to protect the watersheds within their borders that no longer fall within the jurisdiction of the Clean Water Act (CWA). And while the legal status of those gap waters may have changed because of *Sackett*, their vital role in ecological protection, agriculture, and recreation has not. This work is urgent. Before we know how to deal with these impacts here in Colorado, we need to understand where the law currently stands and what the state is doing to deal with this regulatory gap.

II. Before *Sackett*, Colorado's Wetlands Were Regulated at the Federal Level

In Colorado, the Corps issues permits for dredging and filling of WOTUS under section 404 of the CWA. The process requires individuals to apply to the Corps for a permit, and the Corps then determines if the water or wetland is subject to their jurisdiction, and in turn, if a permit for dredging or filling is required. Before *Sackett*, this permitting program applied across the state of Colorado to all waters considered to be within the Corps' jurisdiction under the federal CWA.

In reviewing applications for permits, the Corps must apply criteria established by the U.S. Environmental Protection Agency (EPA) known as the section 404(b)(1) guidelines.² The "guidelines" are binding on the Corps and include the following requirements:

- There is no practicable alternative that would have "less adverse impact on the aquatic ecosystem;"
- There is no violation of water quality standards or toxic effluent standards;

¹ Colo. Dep't of Pub. Health & Env't (CDPHE), *Dredge and Fill White Paper No. 1: Colorado Dredge and Fill Permitting Considerations in Response to the 2020 Navigable Waters Protection Rule* (Jan. 29, 2021), at 6, 9–10.

² 40 C.F.R. pt. 230.

- The discharge would not jeopardize a listed species or result in the destruction of adverse modification of critical habitat;
- The discharge would not cause or contribute to significant degradation of the waters of the United States; and
- The project must include “appropriate and practicable steps” that “will minimize potential adverse impacts of the discharge on the aquatic ecosystem.”

The Corps also conducts a public interest review based on a range of factors and only issues a permit after weighing the proposed impacts against the potential benefits of the proposed activity.³ In addition, the Corps must comply with other federal requirements, including environmental review under the National Environmental Policy Act (NEPA), section 7 consultation under the Endangered Species Act (ESA), identification and consideration of cultural resources under section 106 of the National Historic Preservation Act (NHPA), and consulting with affected tribes during the permitting process.

Following *Sackett*, these substantive and procedural protections no longer apply to the “gap waters” that fall outside the jurisdiction of the Corps under section 404 of the CWA. The state program that is designed to fill the “gap” should be built upon a robust framework that addresses these key components of the section 404 program.

III. Current Law in Colorado Is Inadequate to Fill the Gap Left by *Sackett*

Currently in Colorado, the Water Quality Control Act (WQCA) provides for the protection of all watersheds by prohibiting the discharge of pollutants into state waters unless operators obtain a water quality permit from the agency.⁴ Colorado defines state waters as “any and all surface and subsurface waters which are contained in or flow through the state, along with certain enumerated exclusions.”⁵ Colorado specifically recognizes wetlands and those other waters under the definition of state waters as “those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”⁶ The prohibition on discharge states that “no person shall discharge any pollutant into any state waters from a point source without first having obtained a permit from the division for such discharge,” which makes the dredging and filling of state waters illegal.⁷

The fundamental problem in Colorado, however, is that there is no state permitting program that applies to the discharge of dredge and fill material into state waters. Thus, a landowner has no way to get a permit that authorizes an activity that is plainly unlawful under the Water Quality Control Act. There is no funding mechanism for a permitting program authorized by the Colorado legislature. There are no substantive standards established under state law to guide the development and implementation of a gap waters permitting program. And there are no provisions for how the public would be involved in a permitting process.

³ 33 C.F.R. § 320.4.

⁴ Colo. Rev. Stat. § 25-8-501(1).

⁵ *Id.* § 25-8-103(19).

⁶ 5 Colo. Code Regs. § 1002-31.5.

⁷ Colo. Rev. Stat. § 25-8-501(1).

These provisions do not exist under state law, because these kinds of permits have always been issued by the Corps under the CWA, until now. The Supreme Court's decision in *Sackett* created a gaping hole in Colorado's program for protecting and regulating discharge and fill activities, and the current state of the law in Colorado is inadequate to fill the gap.

IV. Previous and Ongoing Efforts to Develop a State-Run Regulatory Program

In 2020, the Colorado Department of Public Health and Environment (CDPHE) began a stakeholder engagement process for designing and implementing a state-run regulatory program. At that time, the Trump administration was attempting to shrink the scope of federal jurisdiction under the CWA by amending the regulatory definition of WOTUS (i.e., the Navigable Waters Protection Rule). Recognizing that this process could leave a regulatory gap in Colorado, CDPHE convened stakeholder groups and produced two white papers discussing the impact of these developments within Colorado, summarizing the stakeholder engagement process, and identifying other potential issues to be considered in designing a state wetland permitting program.

Although the process started in 2020, it did not result in legislation moving through the Colorado legislature because the Navigable Waters Protection Rule was enjoined by a federal court. The federal government therefore continued to implement the 2008 version of WOTUS in Colorado up until the *Sackett* decision earlier this year.

In response to *Sackett*, CDPHE issued a policy on "[Enforcement of Unpermitted Discharges of Dredged and Fill Material into State Waters](#)" in July 2023. The enforcement policy states that the division "does not intend to take enforcement action" against unpermitted discharges if owners and operators supply notice of the activity to CDPHE and the impacts do not exceed .1 acres of wetlands or .03 acres of streambed, or if the activity would not have originally required pre-construction notification to Corps regardless of size. Applicants must provide notice to CDPHE of their intent to dredge or fill and so far, the department has only received eight notifications since the policy was implemented.⁸ There are many other details, and parties should review the policy carefully if they believe their activities may be covered.

This enforcement policy is, at best, a short-term solution that suffers from potential defects or concerns, including the following:

- **Uncertainty for the regulated community.** The enforcement policy does not result in issuance of a permit, authorize the discharge, or otherwise change the status of the activity prohibited by the WQCA. This uncertainty may complicate financing and insurance arrangements and create other uncertainties for owners and operators. The policy also applies only to a subset of relatively small projects and does not clarify how other kinds of activities will be regulated.
- **Lack of public participation regarding notice, permitting, and enforcement.** The enforcement policy does not address how the public will be notified and involved in activities that affect state waters. There are no provisions for public notice of activities, or public involvement in the regulatory or enforcement processes, which are important components of the federal program under the CWA.

⁸ Telephone Interview with Kelly Morgan, Water Quality Control Div., CDPHE (Oct. 3, 2023).

- **There is no funding mechanism to create additional administrative capacity.** The enforcement policy does not address the long-term increase in staffing and other administrative capacity for CDPHE to effectively manage a regulatory program that had previously fallen within the Corps' purview.
- **Lack of substantive standards and regulatory tools like mitigation.** The enforcement policy does not establish substantive standards that guide review and authorization of proposed activities, nor does it authorize the kinds of regulatory tools like wetland mitigation that the Corps and other agencies have used to ensure a no-net loss policy.⁹

CDPHE has also submitted a [request for funding](#) this year to provide enforcement and compliance of gap waters not currently subject to federal regulation. The money will be used for one full-time equivalent to perform inspections, supply oversight of the coordinated efforts of the state and federal agencies, and to hire a consultant to formulate options for regulating dredge and fill activities at the state level. While this funding is certainly not a long-term answer, Colorado is hopeful that their non-enforcement policy will provide short-term solutions until a formal regulatory program is set up.

Addressing the permitting gap with our state waters and formalizing a plan that protects them from any further degradation is vital. Part of the plan must include legislation creating a state permitting program in Colorado that ensures robust public participation and includes the procedural and substantive safeguards that provide the foundation for the federal program. If we wait too long, we may jeopardize the ecological, social, and economic values that Colorado's unique watersheds provide to the people of the state.

⁹ **No-net loss** is a practical management tool requiring the creation of new wetlands in the same or similar size to the impacted area. Mandatory mitigation programs such as the no-net loss mandate are vital because of the important function wetlands provide in the natural environment.