

WRITTEN TESTIMONY OF:

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Waters of the United States Implementation Post-Sackett Decision: Experiences and Perspectives

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Thank you, Chairman Rouzer, Ranking Member Napolitano, Chairman Graves, Ranking Member Larsen, and distinguished subcommittee members, for the opportunity to testify before you today. My name is Nicole Rowan, and I serve as the Director of the Colorado Department of Public Health and Environment's Water Quality Control Division. We are the primary water quality protection program in the state. Since 1975, we have implemented a delegated Section 402 program under the federal Clean Water Act (or "federal Act") and a Section 401 water quality certification program. Our 250-person division regulates 11,000 businesses across Colorado to ensure that they can operate effectively while protecting the state's water resources.

I am submitting this written testimony on behalf of the State of Colorado to accompany my oral testimony concerning Colorado's proactive response to the U.S. Supreme Court's decision in *Sackett v. EPA* (May 2023). Colorado led the nation to establish a state dredge and fill program in response to the *Sackett* decision through legislation. Our program reinstates water quality protections that had been in place for 50 years at the federal level prior to *Sackett*, and also addresses a number of Colorado-specific priorities. While we take pride in this success story, we also want to take this opportunity to emphasize the resulting

significant financial burden on states like Colorado that wish to continue wetland and water quality protection at the pre-*Sackett* level, as well as the entities regulated by those states.

As you know, the U.S. Supreme Court's decision in *Sackett v. EPA* significantly narrowed the scope of waterways and wetlands historically protected under the Clean Water Act. The Court's decision altered the decades-long status quo that acknowledged the interconnectivity of all water sources, regardless of navigability or permanence. The *Sackett* decision saddled states with the burden of filling the gaps in longstanding, uniform federal protection - to the extent states choose to do so at all. The decision will undeniably result in a patchwork of regulatory schemes across the nation to address water quality protection, which is counter to the intent and purpose of the federal Clean Water Act since wetlands serve to protect both seasonal and permanent waterways that eventually flow across state borders. The decision also greatly undermines the principle of cooperative federalism that is the cornerstone of the Clean Water Act - through which the federal government is responsible for setting uniform, protective nationwide standards that states may choose to implement in different ways with federal assistance and oversight.

I. IMPLICATIONS OF THE SACKETT DECISION FOR COLORADO

From a proportional standpoint, the *Sackett* decision has some of the greatest implications for the arid and semi-arid states in the West, such as Colorado. This is because approximately 50% of Colorado's streams are seasonal and thus do not satisfy the "relatively permanent" test under *Sackett* to be considered "waters of the United States." Further, because of Colorado's dry climate and topography, over 50% of the state's wetlands do not have a "continuous surface connection" to relatively permanent waters, although the vast majority of these wetlands are vital to protecting downstream waters. Colorado is also home to many fens, which are a special kind of wetland in our mountainous regions that take

thousands of years to form. Fens are especially effective in filtering pollution from downstream waters and also act as carbon sinks.

The impacts of the *Sackett* decision in Colorado are particularly stark because water in our state is increasingly scarce, and yet vital to our prosperity. As the state's water needs expand, the health of our waterways becomes even more important to support our economy and growing population. Indeed, Colorado's wetlands and seasonal streams provide countless opportunities for outdoor recreation, including rafting and kayaking, hunting and fishing, and observing wildlife. Colorado also takes great pride in its agricultural economy, which relies on clean and predictable water supplies. Wetlands, in particular, provide broad public benefits, including erosion control, flood control, groundwater recharge, minimization of wildfire impacts, and water quality enhancement through filtration of pollutants. Further, as a headwaters state where most of our water originates high in the Rocky Mountains through snowfall, the 17 downstream states that depend on water originating in Colorado through interstate compacts are also affected by the quality of our water.

II. COLORADO'S BIPARTISAN RESPONSE TO THE SACKETT DECISION

For all of these reasons, the *Sackett* decision and subsequent change to the regulatory definition of "waters of the United States" made it imperative for Colorado to take immediate action to fill the gap left in oversight of dredge and fill activities. Since 1975, Colorado has administered an EPA-approved point source discharge permitting program under Section 402 of the federal Act. The state, however, did not establish a permitting program to regulate discharges of dredged or fill material. Instead, along with 47 other states, Colorado has historically relied on the U.S. Army Corps of Engineers' ("USACE") Section 404 permitting program to protect its waterways from the impacts of dredge and fill activities. Through Colorado's Section 401 authority, Colorado has worked cooperatively with the USACE for nearly 50 years to ensure that activities being conducted under individual 404 permits do not

adversely impact water quality. Without the 404 permit trigger, however, Colorado lacked a program designed to protect its wetlands and waterways from the impacts of dredge and fill activities.

Indeed, the *Sackett* decision put certain projects in Colorado on hold and left those project proponents with no way to legally move forward with construction or maintenance activities. Like the federal Act, Colorado's Water Quality Control Act prohibits the discharge of pollutants (including dredged and fill material) into state waters without first obtaining a permit with effluent limitations designed to meet water quality standards established by the Colorado Water Quality Control Commission. Colorado cannot issue 402-type permits for discharges of dredged or fill material because such discharges, by their nature, exceed water quality standards. For this reason, after the *Sackett* decision, project proponents in Colorado risked being in violation of state law (i.e., discharging pollutants into state waters without a permit) for conducting any dredge and fill activities in waters that were no longer under federal jurisdiction.

Three years before the announcement of the *Sackett* decision, Colorado undertook significant efforts to examine "gap-filling" options for water quality protection. In response to the Navigable Waters Protection Rule published in April 2020, the Colorado Department of Public Health and Environment led a stakeholder process to discuss legislative solutions for filling a similar gap in federal dredge and fill protection of our state's waterways and wetlands. That stakeholder effort began with monthly meetings and eventually evolved into weekly meetings during Colorado's 2021 legislative session. Although state dredge and fill legislation was not ultimately passed during that session, because of these outreach efforts, much of the foundation had already been laid by the time the *Sackett* decision was announced.

Colorado's proactive approach continued in anticipation of the *Sackett* decision. Shortly after the Supreme Court heard oral argument for the *Sackett* case in October 2022, Governor Polis convened a task force to examine options for a state-administered dredge and fill program. The task force included representatives from several important sectors within the state: agriculture, water supply, construction, industry and commerce (including mining and oil and gas development), local governments, and the conservation community. Representatives from the Governor's Office, the State Attorney General's Office, and various executive agencies, including Colorado's Department of Public Health and Environment, Department of Agriculture, Department of Natural Resources, and Department of Transportation, also participated. The task force met seven times from February 2023 to July 2023.

All members of Governor Polis's task force agreed that Colorado needed a program to fill the gap in dredge and fill protection left by the *Sackett* decision. The task force proposed four possible approaches (including the pros and cons of each) for Colorado to address dredge and fill activities in the post-*Sackett* landscape: (1) an enforcement discretion approach - a temporary option that would allow dredge and fill activities to continue until a more permanent solution could be agreed upon, involving installation of best management practices in exchange for no enforcement for discharging without a permit; (2) a "gap waters" approach, which would focus on protecting waters and wetlands previously protected under the "significant nexus" test from the Court's *Rapanos* decision and corresponding EPA guidance issued in 2008; (3) a Colorado "state waters" program, which would protect all "state waters," as that term is defined in state statute, including wetlands, that do not fall under federal jurisdiction; and (4) full assumption to administer the federal Section 404 program. The task force agreed that it would be important to continue the longstanding exemptions and exclusions found in the definition of "waters of the United States" and the

404 permitting program framework, while taking the opportunity to provide additional clarity and adding exemptions and exclusions to address Colorado-specific needs. In July 2023, these four approaches, along with the exemptions and exclusions, were presented in a series of sector-specific meetings open to a broader audience of interested stakeholders. The Task Force did not endorse or recommend any particular one of these approaches. Stakeholders were asked to provide written comments on the options to the Governor's Office by October 2023, which would be considered in crafting legislation to be introduced in Colorado's 2024 legislative session.

The Governor's Office and the Departments considered a myriad of written comments to assist the bill sponsors, Speaker of the House Julie McCluskie, Chair of the House Agriculture, Water and Natural Resources Committee Representative Karen McCormick, Chair of the Senate Agriculture and Natural Resources Committee Dylan Roberts, and Joint Budget Committee Member Barbara Kirkmeyer, in crafting legislation to authorize a state dredge and fill program. In January 2024, soon after Colorado's legislative session began, the House sponsors and the Department hosted a hybrid informational meeting to announce the proposed framework of the program and continuing opportunities for robust stakeholder involvement as details were being considered. Nearly 400 people attended that meeting, demonstrating a high level of interest in the program. Shortly thereafter, a draft bill was shared with stakeholders, kicking off three and half months of negotiating and fine-tuning bill language with representatives from the various sectors. This back-and-forth continued both before and after the bill was officially introduced as House Bill 24-1379. During this period, the bill sponsors held numerous in-person meetings and remained in constant contact with all stakeholders to consider various proposals. This process resulted in dozens of amendments to the introduced bill, demonstrating the high level of cooperation that went into the final product.

Incorporating input and specific language from the various stakeholders ultimately made the legislation stronger and more focused on Colorado's unique interests. The collaboration and expertise of several state agencies were also key factors in the bill's success, along with the partnership of Colorado's diligent and well-organized conservation coalition. Colorado Governor Jared Polis signed the bill into law on May 30, 2024, making Colorado the first state in the country to enact legislation in direct response to the *Sackett* decision. Colorado could not have achieved this accomplishment without bipartisan buy-in and collaboration from all stakeholders. All stakeholders were willing to work together to achieve the common goal of protecting Colorado's valuable water resources, with each sector having unique concerns and perspectives to contribute.

III. COLORADO'S DREDGE AND FILL PROGRAM FRAMEWORK AND CONTINUED STAKEHOLDER INVOLVEMENT

The resulting legislation established Colorado's Dredge and Fill Protection Program within the Colorado Water Quality Control Act, which protects all "state waters" from the impacts of dredge and fill activities. Consistent with the wishes of the regulated community, the Colorado program is based on the longstanding federal Section 404 permitting principles of avoidance and minimization of adverse impacts, and mitigation requirements to compensate for unavoidable impacts. The legislation also requires project proponents seeking to construct reservoirs under state-issued individual dredge and fill permits to develop a fish and wildlife mitigation proposal in consultation with the Division of Parks and Wildlife. The Colorado Parks and Wildlife Commission then evaluates the proposal and transmits its mitigation recommendation to the Colorado Water Conservation Board, which may affirm, modify, or amend the Commission's mitigation recommendation.¹ This requirement has been in place since 1987 for reservoirs being constructed under federal Section 404 permits, and

¹ Colorado Revised Statutes, § 37-60-122.2 (2024).

Colorado felt it was important to maintain these same protections for projects that no longer fall under USACE jurisdiction.

The legislation directs the division to administer USACE’s existing nationwide and regional permits to protect “state waters” that are no longer covered under the federal Section 404 permitting program. Colorado defines “state waters” as “any and all surface and subsurface waters which are contained in or flow through the state, including wetlands”² This includes all ephemeral and intermittent streams and other water features (unless otherwise excluded), even if they are isolated from other state waters. Colorado’s point source discharge program and dredge and fill program are purposefully designed to protect any and all state waters that do not otherwise fall under federal jurisdiction. The broad scope of our water quality protection programs provides regulatory certainty in light of the ever-changing federal definition waters of the United States.

While the scope of protection under the legislation is broad, it also eliminates the need for a significant nexus determination and provides numerous exemptions for certain activities and exclusions for specified types of waterbodies, including those that have been long-recognized under the federal definition of waters of the United States and the section 404 framework, but with added clarity. For example, the federal permitting exemption for “normal farming activities” in section 404 of the Clean Water Act has created confusion for years. The federal exemption includes “upland soil and water conservation practices” (e.g. erosion control) in its list of normal farming practices, but the term has never been defined in statute or regulation. At the request of agriculture stakeholders, Colorado included a detailed definition of the term, which also recognizes that farmers and ranchers implement these

² Colorado Revised Statutes, § 25-8-103(19) (2024). The division has historically included wetlands in its administration of the state’s point source discharge program, but Colorado took the opportunity in House Bill 24-1379 to specifically include “wetlands” in the statutory definition of state waters.

types of practices daily, thereby reducing nonpoint source pollution and improving water quality.

Colorado's legislation also expands and clarifies the federal statutory exemption for "construction and maintenance of farm ponds, stock ponds, or irrigation ditches or the maintenance of drainage ditches" to better align with Colorado's extensive use of ditches and acequias for irrigation and drainage. The state provision, crafted in partnership with our agriculture stakeholders, exempts:

Construction or maintenance of farm ponds, stock ponds, farm lagoons, springs, recharge facilities located in uplands, and irrigation ditches or acequias, or maintenance of a drainage ditch, roadside ditch, or a ditch or canal conveying wastewater or water. Construction of new work or to extend, expand, or relocate an irrigation ditch or acequia for municipal or industrial purposes is not an exempt activity....

The provision goes on to include detailed definitions of the terms "construction," "maintenance," "irrigation ditches," and "acequias," which, again, were agreed upon by representatives from Colorado's farming and ranching sectors.

We also crafted additional exemptions and exclusions to address the specific concerns of the various sectors, including common-sense provisions to allow for certain infrastructure and water supply projects to be constructed and maintained in a more efficient manner. For example, a permitting exemption was included for dredging and other maintenance activities in off-channel reservoirs, which does not exist at the federal level.

The legislation directs Colorado's Water Quality Control Commission to adopt rules governing certain aspects of the program such as: (1) procedures and guidelines for the division's issuance of individual permits for larger projects and incorporation of the federal 404(b)(1) guidelines as the framework of those permits; (2) procedures for consultation with relevant state and local agencies in developing individual permit terms; (3) compensatory mitigation requirements for projects that meet certain impact thresholds; (4) rules for the

issuance of general permits to promote efficiency for activities in response to wildfire or other natural disasters, voluntary ecological restoration activities, and activities impacting isolated state waters; and (5) fee amounts to assist with covering the cost of administering the program. The Department recently initiated a new stakeholder effort that will continue until the rulemaking hearing, scheduled for December 2025. Meetings will be held with stakeholders on a monthly basis to discuss all aspects of the regulation and to receive comments, even before the formal rulemaking process begins in August 2025.

IV. THE RESULTING FINANCIAL BURDEN ON COLORADO AND OTHER STATES

While Colorado considers the passage of House Bill 24-1379 to be a major bipartisan success for the protection of our valuable water resources, administering a program to fill the gap in protection left by the *Sackett* decision will result in a significant fiscal impact for the state - just to *maintain* the longstanding status quo of prior federal protection. The Department anticipates spending approximately \$500k-\$600k per year and hiring four full-time employees. In order to sustain the program, a portion of the program costs will be passed to the regulated community through cash fees, which they are not used to paying at the federal level.

Later this year, Colorado anticipates receiving a grant through EPA's Wetland Program Development Grant ("WPDG") program, which will allow the Department to hire contractors to assist with program development. While these resources are valuable, funding for the WPDG program has remained flat for more than a decade, maintained at approximately \$14.5 million per year. When adjusted for inflation, FY23 funding levels are at a 22% reduction from ten years ago. Additionally, these grants are for program development and not ongoing administration of programs. By upending the 50-year status quo, the *Sackett* decision left states to establish and administer fully protective dredge and fill programs. More than ever,

states will need to rely upon federal assistance to protect their wetlands and downstream water resources.

V. CONCLUSION

In conclusion, while Colorado has taken significant steps to address the regulatory gaps left by the *Sackett* decision, our experience underscores the critical need for sustained federal support and collaboration. The proactive measures we have implemented, including the creation of a state dredge and fill program, reflect our commitment to maintaining the high standards of water quality that Coloradans—and those downstream—rely upon. However, the financial and administrative burdens placed on states by this decision are substantial and ongoing. As we continue to navigate the complex and evolving landscape of water regulation, it is imperative that the federal government remains an engaged partner, providing both financial assistance and consistent regulatory frameworks to ensure that states can effectively protect their water resources. Only through such cooperative efforts can we uphold the foundational principles of the Clean Water Act and safeguard the health of our nation's waters for future generations.