



**DREDGE AND FILL WHITE PAPER NO. 1**  
**Colorado Dredge and Fill Permitting**  
**Considerations in Response to the**  
**2020 Navigable Waters Protection Rule**  
**January 29, 2021**

## **Executive Summary**

In 2020, the United States Environmental Protection Agency and the United States Army Corps of Engineers promulgated a new definition of “waters of the United States” (the Navigable Waters Protection Rule or 2020 Rule) that is far more narrow than the previous rule. This new rule articulates a significantly narrower definition of waters of the United States than any prior definition in the history of the Clean Water Act. In May 2020, Colorado filed suit in the District Court of Colorado against the federal government to challenge the Navigable Waters Protection Rule under the federal Administrative Procedure Act, the National Environmental Policy Act, and the Endangered Species Act. On May 28, 2020, Colorado filed a motion for a preliminary injunction, requesting that the federal court enjoin the effectiveness of the 2020 Rule in Colorado. On June 19, 2020, the District Court of Colorado granted the state’s motion and enjoined the rule. That ruling is now under appeal in the Tenth Circuit. As of the publication date of this white paper, the 1988 regulations and the 2008 Guidance are the controlling legal definition of the waters of the United States (WOTUS) in Colorado.

During May and June of 2020, while the Colorado legislature was still in session and the outcome of the request for preliminary injunction was still unknown, the Colorado Department of Public Health and Environment (department) discussed with stakeholders draft legislation that addressed the state waters that would be left without environmental protection if the Navigable Waters Protection Rule were to go into effect in Colorado. The draft legislation included a proposal to address the state waters left without federal protection through a state dredge and fill permit program to effectively authorize and regulate activities essential to Colorado’s economy and infrastructure. This draft legislation was not introduced. The stay of the Navigable Waters Protection Rule in Colorado has allowed the department and stakeholders to continue dialogue on the subset of state waters where the status quo of environmental protection would be in jeopardy if the Navigable Waters Protection Rule were to go into effect in Colorado. This white paper provides background information on federal Clean Water Act permitting and a summary of the state’s position on the 2020 Rule.

The department and stakeholders reached consensus on a descriptive tabular approach to describing the differences between the EPA’s *Clean Water Act Jurisdiction Following the Supreme Court Decision in Rapanos v. United States and Carabell v. United States* guidance document and the 2020 Rule. This effort is described in a second white paper. This approach allows for a clearer understanding of what waters may need to be permitted through a Colorado dredge and fill permitting program if the 2020 Rule goes into effect. In addition, the department and stakeholders have further discussed recommendations for agricultural exemptions for any future Colorado dredge and fill permitting program. The department does not plan to pursue legislation in the 2021 Legislative Session if the injunction remains in place. If, however, the injunction is lifted and the 2020 Rule were to come into effect, Colorado would pursue legislation or other legal options.

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## Section 1 Introduction

In 2020, the United States Environmental Protection Agency and the United States Army Corps of Engineers promulgated a new definition of “waters of the United States” (the Navigable Waters Protection Rule or 2020 Rule) that is far more narrow than the previous rule. This new rule articulates a significantly narrower definition of waters of the United States than any prior definition in the history of the Clean Water Act. In May 2020, Colorado filed suit in the District Court of Colorado against the federal government to challenge the Navigable Waters Protection Rule under the federal Administrative Procedure Act, the National Environmental Policy Act, and the Endangered Species Act. On May 28, 2020, Colorado filed a motion for a preliminary injunction, requesting that the federal court enjoin the effectiveness of the 2020 Rule in Colorado. On June 19, 2020, the District Court of Colorado granted the state’s motion and enjoined the rule. That ruling is now on appeal in the Tenth Circuit. As of the publication date of this document, the 1988 regulations and the 2008 Guidance<sup>1</sup> are the controlling legal definition of the waters of the United States (WOTUS) in Colorado.

During May and June of 2020, while the Colorado legislature was still in session and the outcome of the request for preliminary injunction was still unknown, the Colorado Department of Public Health and Environment (department) discussed with stakeholders draft legislation that addressed the state waters that would be left without environmental protection if the Navigable Waters Protection Rule were to go into effect in Colorado. The draft legislation included a proposal to address the permitting and protection of the state waters left behind through a state dredge and fill permit program. This draft legislation was not introduced. The stay of the Navigable Waters Protection Rule in Colorado has allowed the department and stakeholders to continue dialogue on the subset of state waters where the status quo of environmental protection would be in jeopardy if the Navigable Waters Protection Rule were to go into effect in Colorado.

The department has developed two white papers that summarize discussions with stakeholders. These discussions occurred informally while the legislature was in session and in September 2020 the department established a more formal group and maintained a [webpage](#) with meeting information and materials. This white paper was developed by the department to support stakeholder engagement and provides background information on federal Clean Water Act permitting and the department’s analysis of the 2020 Rule. This document can inform stakeholder discussions. Nothing in this paper should be perceived as a consensus among stakeholders. A second document, “Dredge and Fill White Paper No. 2 Summary of ‘Gap Waters’ Stakeholder Discussions” does include information about where stakeholders reached consensus - particularly around how to describe the differences in the categories of waters meeting the WOTUS definition in accordance with the 2008 Guidance versus the 2020 Rule.

This white paper has five sections. Section 2 focuses on federal discharge permitting, the *Rapanos* decision and the 2008 EPA Guidance, an overview of the 2020 Rule, and a summary of state waters and their regulation. Section 3 includes an overview of potential impacts if the 2020 Rule were to go

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<sup>1</sup> EPA’s *Clean Water Act Jurisdiction Following the Supreme Court Decision in Rapanos v. United States and Carabell v. United States* guidance document

into effect in Colorado. Section 4 provides an overview of the stakeholder effort. Section 5 summarizes the department's recommendations based on that stakeholder effort.

## **Section 2 Background**

This section provides an overview of federal discharge permitting, the *Rapanos* decision and subsequent EPA guidance, a summary of the 2020 Rule, and the regulation of Colorado's state waters.

### **2.1 Federal Discharge Permitting: Sections 402 and 404**

The Clean Water Act's central requirement is that pollutants, including dredge and fill materials, may not be discharged from a point source into "navigable waters," defined as "waters of the United States, including the territorial seas," without a permit. 33 U.S.C. §§ 1311(a), 1342(a), 1344(a), 1362(7), 1362(12).

The Clean Water Act has two primary programs to permit the discharge of pollutants from point sources: Section 404, which authorizes dredge and fill projects that result in discharges to waters under federal jurisdiction; and Section 402, which authorizes discharges of pollutants not already permitted under Section 404. The United States Army Corps of Engineers (the Corps) administers the Section 404 program in Colorado; the department has delegated authority to administer the Section 402 program in Colorado with the United States Environmental Protection Agency (EPA) oversight.

Under the federal Section 404 permitting program, federal waters may be filled in as long as several requirements are met, including that the fill is the least environmentally damaging practicable alternative. Typically, permit applicants must show that they have taken steps to avoid impacts to aquatic ecosystems, potential impacts have been minimized, and compensatory mitigation will be provided for all remaining unavoidable impacts. See 40 C.F.R. §§ 230.10(a) and (d), 230.70-77, 230.91-98. Smaller impacts and temporary impacts to federal waters are often covered under general "Nationwide" 404 permits with set mitigation and control measures.

In contrast, a federal Section 402 permit (and the Colorado equivalent, a Colorado Discharge Permit System permit) may only be issued if the permitted discharges comply with state water quality standards and do not compromise the water body's classified uses. Establishing limitations, standards, and other permit conditions are based on the state National Pollutant Discharge Elimination System or NPDES programs, 40 C.F.R. § 122.44; Water Quality Control Act, § 25-8-503(4), C.R.S.; Colorado Discharge Permitting System Regulations, 5 C.C.R. 1002-61, and Reg. 61.8(1)(e).

Under Section 401 of the Clean Water Act, the department certifies, conditionally certifies, or denies certification of federal licenses and permits. Section 401 water quality certifications require that there is reasonable assurance that the project for which a federal license or permit is required will comply with all applicable requirements if constructed, operated, and maintained as designed. Pursuant to section 25-8-302(1)(f) C.R.S., General or Nationwide permits under Section 404 of the Clean Water Act are certified without the imposition of any additional state conditions, and no further action on such permits by the applicant or the Water Quality Control Division (division) is required.

## **2.2 Rapanos Decision and 2008 EPA Guidance**

The Clean Water Act does not define “waters of the United States,” or WOTUS. The Corps and EPA have defined WOTUS through guidance and rulemaking since 1977. Regulations issued in 1977 and the 1980s defined WOTUS to cover: (1) waters used or susceptible to use in interstate and foreign commerce; (2) interstate waters; (3) the territorial seas; and (4) other waters having a nexus with interstate commerce.

Several Supreme Court opinions have examined the meaning of WOTUS. In *Rapanos v. United States*, the Court issued five separate opinions concerning the Corps’ interpretation of “waters of the United States” to include wetlands connected to traditional navigable waters by drains, none of which secured a majority of the justices. However, five justices agreed that waters that impact the quality of navigable water is the determining factor in defining the jurisdictional reach of the Clean Water Act. 547 U.S. 715, 779-80 (Kennedy, J., concurring) and 793-94 (Stevens, J. et al., dissenting) (2006). In his concurring opinion in *Rapanos*, which rejected the plurality’s “relatively permanent waters” test as “inconsistent with the Act’s text, structure, and purpose,” Justice Kennedy adopted a water quality-based definition of “waters of the United States,” holding that wetlands fall within the scope of the Clean Water Act if, either alone or in combination with “similarly situated lands in the region,” they have a “significant nexus” to traditional navigable waters. 547 U.S. at 776, 779. Wetlands possess the required significant nexus if they “significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Id.* at 780. After *Rapanos*, EPA and the Corps established guidance implementing Justice Kennedy’s “significant nexus” standard. *Clean Water Act Jurisdiction Following the Supreme Court Decision in Rapanos v. United States and Carabell v. United States* (Dec. 2, 2008). Under the 2008 Guidance, the determination of significant nexus is based on the ecological relationship between tributaries and their adjacent wetlands documented in scientific literature and reflected by physical proximity as well as shared hydrological and biological characteristics. EPA and the Corps consider the flow and functions of the tributary together with the functions performed by all wetlands adjacent to that tributary in evaluating whether a significant nexus is present.

## **2.3 2020 Navigable Waters Protection Rule**

In 2020, EPA and the Corps promulgated a new definition of WOTUS (the Navigable Waters Protection Rule or 2020 Rule) that is far more narrow than the previous rule. The 2020 Rule articulates a significantly narrower definition of WOTUS than any prior definition in the history of the Clean Water Act. Under the 2020 Rule, WOTUS means: (1) The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide; (2) tributaries; (3) lakes and ponds, and impoundments of jurisdictional waters; and (4) adjacent wetlands. 33 C.F.R. § 328.3(a); 40 C.F.R. § 120.2(1).

The 2020 Rule categorically excludes from the definition of “waters of the United States,” among other things, ephemeral features, including ephemeral streams, swales, gullies, rills, and pools. 33 C.F.R. § 328.3(b); 40 C.F.R. § 120.2(2). Some of these features were covered under the 2008 Guidance as WOTUS under the significant nexus analysis.

The 2020 Rule also includes several definitions that further limit how EPA and the Corps will define WOTUS in contrast to the existing regulatory framework. First, it restricts the definition of protected “adjacent wetlands” to those that “abut” or have a direct hydrological surface connection to another jurisdictional water “in a typical year.” 33 C.F.R. § 328.3(c)(1); 40 C.F.R. § 120.3(3)(i). Wetlands are not considered adjacent if they are physically separated from jurisdictional waters by an artificial structure and do not have a direct hydrological surface connection. Furthermore, a significant nexus analysis cannot bring non-adjacent wetlands under federal jurisdiction. The 2020 Rule also limits protections for tributaries to those that contribute perennial or uncertain levels of “intermittent” flow to traditional navigable waters in a “typical year,” a term whose definition leads to additional uncertainty. 33 C.F.R. § 328.3(c)(12); 40 C.F.R. § 120.2(3)(xii); 33 C.F.R. § 328.3(c)(13); 40 C.F.R. § 120.2(3)(xiii).

Collectively, these new definitions in the 2020 Rule will reduce the scope of waters subject to federal jurisdiction in Colorado far below that of the 2008 Guidance. The state waters that were considered “waters of the United States” under the 2008 Guidance but would no longer be considered “waters of the United States” under the 2020 Rule have been referred to as “gap waters.” Historically, not all of Colorado’s state waters have been considered WOTUS. However, the department has maintained that the number of state waters considered WOTUS under the 2008 Guidance is far more than would be considered WOTUS under the 2020 Rule.

## **2.4 State Waters and State Regulation of Discharges**

Colorado defines its “state waters” more broadly than “waters of the United States.” Under Colorado’s definition, state waters are “any and all surface and subsurface waters which are contained in or flow in or through this state,” with minor exceptions for waters in treatment systems. § 25-8-103(19), C.R.S. The Colorado Water Quality Control Act bars discharges of pollutants to state waters without a federal permit or a Colorado Discharge Permit System permit. § 25-8-501(1), C.R.S.

As described above in section 2.1, the division may only issue permits for discharges of pollutants under the Water Quality Control Act if such discharges comply with state water quality standards and do not compromise the water body’s classified uses. Colorado has no separate allowance for dredge and fill permits with considerations of mitigation. Because discharges of large quantities of fill, by their nature, are likely to result in exceedances of state water quality standards and compromise the classified uses of these waters, the division could not allow almost any of them under a state discharge permit, resulting in vulnerable state waters as well as the inability for development and infrastructure projects to get permitted and move forward.

## **Section 3 Potential Impacts of the Navigable Waters Protection Rule to Colorado**

The United States Geological Survey’s National Hydrography Dataset (NHD) indicates that 24 percent of Colorado’s streams are ephemeral and 45 percent are intermittent. Although the NHD provides the best available estimate of ephemeral and intermittent stream mileage statewide, it likely underestimates the true extent of these waters. The 2020 Rule declares all ephemeral waters non-jurisdictional and restricts the intermittent waters considered jurisdictional to those that flow in

a “typical year.” Under the 2008 Guidance, neither ephemeral nor intermittent streams are unilaterally excluded from federal protections; such waters are considered non-jurisdictional only if they are non-navigable, not relatively permanent, and do not have a significant nexus to traditional navigable waters. A significant nexus is identified based on consideration of a broad range of hydrologic and ecological factors, including, but not limited to, the “volume, duration, and frequency of flow,” the potential “to carry pollutants and flood waters to traditional navigable waters,” and the “provision of aquatic habitat that supports traditional navigable waters.” Given the extensive scientific evidence available indicating that intermittent and ephemeral streams usually provide these services to downstream waters, the department estimates that the 2020 Rule would leave a significant gap in federal protection relative to the 2008 Guidance, including all ephemeral streams and most, if not all, intermittent streams.

Many of Colorado’s wetlands covered under the 2008 Guidance could also lose federal protection, and the ability for development and infrastructure projects to move forward with a permit would be lost, largely due to the exclusion of ephemeral and at least some intermittent waters from federal jurisdiction. St. Mary’s University of Minnesota and the Colorado Natural Heritage Program developed a geospatial model to estimate the extent of jurisdictional and non-jurisdictional wetlands in the South Platte Headwaters under several potential regulatory scenarios. For example, under the scenario most similar to the 2008 Guidance, 97 percent of wetlands in this watershed were identified as likely jurisdictional. In scenarios more closely resembling the 2020 Rule, only 46 to 85 percent of wetlands in the South Platte Headwaters were likely jurisdictional. Thus, the 2020 Rule could leave 12 to 51 percent of wetlands in this watershed unprotected or undevelopable that would otherwise be considered jurisdictional under the 2008 Guidance. This amounts to between 8,400 and 35,000 acres of unprotected or undevelopable wetlands in just one of Colorado’s watersheds.<sup>2</sup> While these are preliminary estimates that have not been validated, they offer an initial understanding of the range of wetland acres that could lose protection or be undevelopable under the 2020 Rule.

If the final rule goes into effect without a state program to address the gap waters that would no longer be considered WOTUS and would not have federal permits available for dredge and fill activities, the department would expect to have significant and unacceptable impacts to the state’s ability to protect state waters and to provide a permitting program to effectively authorize and regulate activities essential to Colorado’s economy and infrastructure.

### **3.1 Impacts to Beneficial Uses, the Environment, and Public Health**

While many permittees recognize the need for a state dredge and fill permitting system, without such a system unauthorized and illegal fills of wetlands and streams without mitigation are a probable result. At this point, unlike the federal government, Colorado has no resources dedicated to preventing or tracking such illegal fill activities.

The current federal Section 404 permitting program and associated state 401 water quality certification program allows for the authorization of stream stabilization and other related projects,

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<sup>2</sup>Meyer, R. and A. Robertson. 2019. Clean Water Rule spatial analysis: A GIS-based scenario model for comparative analysis of the potential spatial extent of jurisdictional and non-jurisdictional wetlands. Saint Mary’s University of Minnesota, Winona, Minnesota at 6-7, 25.

while also requiring mitigation for project impacts to wetlands. Furthermore, Section 82.6(B)(1) of 5 C.C.R. 1002-82 requires all projects receiving Section 401 certifications to implement best management practices to ensure that the potential for adverse water quality impacts due to construction activities are minimized.

Illegally filling in ephemeral and intermittent streams and wetlands excluded by the 2020 Rule from federal jurisdiction is likely to cause damage to habitat, refuge, and breeding grounds for several Colorado species. The damage from illegal fills will be compounded by less federal Section 7 consultation under the Endangered Species Act (ESA) for other activities that will affect these waters. Species that are likely to be harmed include the following:<sup>3</sup>

- The fish species Arkansas darter occupies intermittent streams through much of their range in Colorado. This species was a candidate for federal ESA listings until determined not warranted in 2016. It remains a Tier 1 Species of Greatest Conservation Need (SGCN) in Colorado.
- Intermittent and ephemeral waters are vital for other eastern plains fish species such as southern redbelly dace (Tier 1 SGCN), northern redbelly dace (Tier 1 SGCN; state endangered), and plains topminnow (Tier 1 SGCN; evaluated for ESA).
- Several Tier 1 SGCN fish species spawn in ephemeral streams, including roundtail chub, flannelmouth sucker, and bluehead sucker.
- Federally endangered fish species including razorback sucker, Colorado pikeminnow, and bonytail chub have been found in intermittent streams.
- Boreal toads (Tier 1 SGCN; evaluated for ESA) breed in montane wetlands, including beaver ponds, intermittent streams, wet meadows, and emergent marshes. Toads return to the same breeding spots year-after-year.
- Plains and northern leopard frogs (Tier 2 SGCN; evaluated for ESA) utilize ephemeral and intermittent stream habitats and associated wetlands throughout Colorado's eastern plains.
- Over 250 invertebrate taxa inhabit intermittent streams in Colorado. They are an important food supply to fish and other aquatic organisms as they wash downstream. They also help recolonize downstream populations after floods or other disturbance events.
- ESA "endangered" mice in Colorado including preble's meadow jumping mouse and New Mexico jumping mouse depend on riparian vegetation, including ephemeral streams. Degradation of riparian vegetation is a primary factor in the population decline of the New Mexico jumping mouse. Habitat protection and restoration are included in the preble's recovery plan.

If there were a large number of illegal fills, such fills could also harm larger or perennial streams by reducing flows to those streams. Based on the prevailing science, wetlands are often connected by subsurface flows to adjacent streams and though they may not be connected by surface flows, the subsurface flows are intrinsic to the hydrologic connectivity to runoff and specifically to maintaining base flow in perennial streams.<sup>4</sup> Specifically, wetlands contribute to downstream flows during the summer months by filling during spring rainfall, recharging the groundwater, and slowly discharging over an extended period. Loss of these wetlands can compromise the flow duration and timing in

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<sup>3</sup> Water Quality Control Division and Colorado Parks and Wildlife, *Appendix 1 to WOTUS Comments, [Biological Importance of Ephemeral and Intermittent Streams and Non-Adjacent Wetlands in Colorado](#)* (March 2019).

<sup>4</sup> Water Quality Control Division, *Appendix 2 to WOTUS Comments, [More Information Regarding The Science Of Tributaries](#)* (March 2019).



perennial streams. This in turn can harm those streams' aquatic life. Fish and macroinvertebrates utilize and depend on the exports from these systems for food, nutrients, and carbon inputs. A wide diversity of macroinvertebrates inhabit these systems and are specifically adapted to the unique physical and chemical conditions and flow regimes. Multiple threatened and endangered species rely on these systems as predator and invasive species refuge and seasonal spawning habitat.

Illegal fills in the gap waters could also harm Colorado's drinking and agricultural waters and remedying these harms could have economic impacts. Within Colorado, 10,510 miles of intermittent and ephemeral streams provide water for surface water intakes supplying public drinking water systems. Headwater and wetlands fills upstream of those intakes may degrade the quality of the water used by those systems by increasing the quantity of sediment or other pollutants in those waters. If the quality of these headwaters declines, public health could be jeopardized and downstream drinking water plants will incur greater costs to treat their water. Private well users whose wells are close to surface water bodies may also find their drinking water degraded and health impacted.

Degraded water quality can also compromise downstream recreational opportunities, especially fishing. Healthy aquatic and wetland habitats and good water quality are critical for preserving Colorado's native species and for providing outstanding recreational fishing and its significant economic contributions. Degraded water quality could also negatively impact the popularity of rafting, kayaking, and other non-motorized boating in Colorado, which would also hurt Colorado's economy.

In addition to these impacts on the beneficial uses, state and local agencies charged with protecting these beneficial uses may be faced with increased costs to react to these harms such as compliance and enforcement resources. These reactionary costs could be lessened if a state permitting program to proactively address discharges from dredge and fill activity existed in Colorado.

### **3.2 Permit Availability for "Gap Waters"**

Under the Colorado Water Quality Control Act, persons are prohibited from discharging pollutants (including fill) into state waters without a federal or state permit. Colorado does not have a dredge and fill or 404-type permitting program. Because the 2020 Rule excludes a large swath of state waters from federal jurisdiction, entities may not be able to get federal 404 fill permits to add dredge and fill materials to those state waters.

Currently, the Corps can issue a federal 404 permit without making a determination that the discharge of dredge and fill material will potentially impact a WOTUS (i.e., permitting based on a "preliminary jurisdictional determination"). This process may allow for some federal permit coverage for gap waters if the 2020 Rule were to go into effect in Colorado. However, the Corps has stated that they would not issue permits using this preliminary jurisdictional determination process in cases where they reasonably expect that the water in question is not a WOTUS. Also, the Corps and EPA have communicated that they do not have authority under federal statutes to regulate waters no longer considered WOTUS under the 2020 Rule. The federal agencies have communicated they are uncertain if a permit issued for a water no longer considered WOTUS under the 2020 Rule would be

enforceable. If these federal government agencies do not regulate these 404 permits through compliance or enforcement, these discharges would effectively become unpermitted.

There is currently no mechanism under state law to allow the filling in of state waters. Under the Colorado Discharge Permit System framework, the division may only issue permits for discharges of pollutants if such discharges comply with state water quality standards and do not compromise the water body's classified uses. C.R.S. § 25-8-503(4). Discharges of large quantities of fill will result in exceedances of state water quality standards and compromise the classified uses of these waters. Thus, these activities cannot occur under current law because the conditions for a state discharge permit could never be satisfied. 5 C.C.R. 1002-61:61.8(1)(iii) (division cannot issue a permit when "the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States"). Without a permit, these discharges would be illegal under § 25-8-501(1), C.R.S. As a result, if the 2020 Rule becomes effective in Colorado, potentially thousands of currently legal fill activities, including projects that are directly related to Colorado's infrastructure and economy, would not be able to get permits and could not legally proceed.

If the 2020 Rule goes into effect in Colorado, these illegal fill activities will create an immediate compliance and enforcement burden for the department. First, to provide protection of state waters and their uses in accordance with the Water Quality Control Act, Colorado will need to take enforcement action against illegal fill activity in state waters. These actions would need to be initiated as soon as the 2020 Rule goes into effect, since the Corps will presumably be notifying project sponsors who seek 404 permits that federal permits are no longer required in non-jurisdictional waters. The department does not currently have dedicated funding or staffing resources to undertake this enforcement effort, so will need to pull enforcement resources currently dedicated to other clean water activities. This will threaten the environmental protection provided by compliance and enforcement activities across clean water programs. If Colorado is able to develop and fund its own regulatory program to address the 404 permitting gap, the program will need to include both permitting and compliance assurance activities such as inspection, assistance, and enforcement. On an annual basis, the department estimates it will need to inspect 20 percent of projects that were previously subject to 404 permitting and oversight from the Corps to provide adequate oversight for these activities. In addition, EPA has historically completed between three and five enforcement cases in Colorado per year for 404 permit violations. If the 2020 Rule were in effect, Colorado would need to assume some of this burden in the future.

### **3.3 Litigation of Navigable Waters Protection Rule and Stay in Colorado**

In May 2020, Colorado filed suit in the District Court of Colorado against the federal government to challenge the 2020 Rule under the federal Administrative Procedure Act, the National Environmental Policy Act, and, in a claim added later, the Endangered Species Act. On May 28, 2020, Colorado filed a motion for a preliminary injunction, requesting that the federal court enjoin the effectiveness of the 2020 Rule in Colorado. On June 19, 2020, the District Court of Colorado granted the state's motion and enjoined the rule. That ruling is now on appeal in the Tenth Circuit. As of the publication date of this white paper, the 1988 regulations and the 2008 Guidance are the controlling legal definition of the waters of the United States in Colorado.

The litigation is expected to continue for several months, if not years.

## **Section 4 Summary of Stakeholder Engagement**

The department has engaged in significant stakeholder outreach, in addition to the outreach conducted during the 2020 Legislative Session. The department conducted 4 stakeholder meetings focused on continuing the dialogue from the 2020 Legislative Session about options for a Colorado dredge and fill permit program. The department's focus during the stakeholder effort was on protecting waters in Colorado that were historically protected by the 2008 Guidance, but that will no longer have protection if the Navigable Water Protection Rule goes into effect in Colorado. The stakeholders met on:

- August 25, 2020
- September 20, 2020
- November 5, 2020
- January 7, 2021

There is an additional meeting scheduled for February 4, 2021. The department summarized these discussions in two white papers. This white paper is focused on the department's position related to the 2020 Rule and summarizes key points that the department has provided to stakeholders over the past year. Nothing in this document should be perceived as the consensus of or a recommendation from the stakeholder group. The document "Dredge and Fill White Paper No. 2 Summary of "Gap Waters" Stakeholder Discussions" does include consensus by stakeholders. That white paper includes:

- The consensus gap waters table that describes the subset of state waters that may no longer have federal dredge and fill permitting protection if the 2020 Rule were implemented in Colorado.
- The definition of prior converted cropland from the 2020 Rule.
- A summary of stakeholder discussions regarding mapping of "waters of the United States."

## **Section 5 Recommendations**

Based on discussions with stakeholders throughout this stakeholder effort, the department recommends the following:

- Referencing the descriptions of gap waters in the descriptive table in future discussions about legislative and regulatory proposals if the stay of the 2020 Rule is lifted in Colorado.
- That any proposed legislation about dredge and fill permitting should include the prior converted cropland definition from the 2020 Rule.

The department appreciates the efforts of stakeholders to have a collaborative and productive dialogue about these issues and knows that this work will be helpful in future discussions. The department thanks stakeholders for their time and participation.