WATER QUALITY CONTROL DIVISION IMPLEMENTATION POLICY COLORADO DEPARTMENT OF PUBLIC HEALTH AND THE ENVIRONMENT	Implementation Policy Number: CW-17
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ENFORCEMENT OF UNPERMITTED DISCHARGES OF DREDGED AND FILL MATERIAL INTO STATE WATERS	Approved by: Nathan T. Moore Digitally signed by Nathan T. Moore Date: 2023.07.06 07:48:20 -06'00' Nathan Moore, Clean Water Program Manager
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BACKGROUND

The 1972 amendments to the Clean Water Act established federal jurisdiction over "navigable waters," which are defined as the "waters of the United States including the territorial seas." 33 U.S.C. § 1362(7). The Clean Water Act gives the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) the authority to further define "waters of the United States" in regulations, which the agencies have codified at 40 C.F.R. § 120.2 and 33 C.F.R. § 328.3. EPA and the Corps have also issued guidance further interpreting the extent of "waters of the United States." *See Clean Water Act Jurisdiction Following the U.S. Supreme Court Decision in Rapanos v. United States and Carabell v. United States*, Dec. 2, 2008 (the 2008 Guidance). In Colorado (and 47 other states), the Corps issues permits under Section 404 of the Clean Water Act to protect waters of the United States (or "WOTUS") from the impacts of discharges of dredged or fill material.

Colorado's Water Quality Control Act (WQCA) complements the Clean Water Act, defining "state waters" as "any and all surface and subsurface waters which are contained in or flow through the state," along with certain enumerated exclusions. § 25-8-103(19), C.R.S. This state definition has always been broader than the federal definition of "waters of the United States." Notwithstanding the historic protectiveness of the federal Section 404 scheme, this jurisdictional gap has always resulted in a subset of state waters for which the federal government cannot require 404 permits (because they are not subject to federal jurisdiction) and for which the division has not been authorized to issue permits or other form of authorization that would provide Section 404-type protections. Although Section 404 permits have never covered all state waters, Colorado has concluded that the traditional scope of federal WOTUS jurisdiction and associated federal 404 permitting were sufficiently protective of Colorado's water quality such that projects occurring in the small subset of state waters that were outside the scope of federal jurisdiction did not require state oversight or enforcement for impacts of discharges of dredged or fill material. Thus, although there have been some unpermitted discharges of dredged or fill material into the relatively small subset of state waters not covered by federal 404 permits, historically the division has exercised enforcement discretion to allow projects involving this narrow subset of state waters to move forward, rather than pursuing enforcement against such discharges, even though they might violate the WQCA's prohibition against unpermitted discharges. *See* § 25-8-501(1), C.R.S.

On May 25, 2023, the Supreme Court issued a decision in *Sackett v. EPA* that reinterprets the scope of federal jurisdiction under the Clean Water Act (the *Sackett* decision). The Court's decision holds that the significant nexus test, used by EPA and the Corps to determine the scope of federal Clean Water Act jurisdiction since the *Rapanos* decision, is no longer valid. The Court articulated a new jurisdictional test for adjacent wetlands that extends Clean Water Act jurisdiction to only those wetlands that are as a practical matter indistinguishable from waters of the United States. This requires a party asserting jurisdiction over adjacent wetlands to establish first that the adjacent body of water constitutes "waters of the United States," which the Court defines as "a relatively permanent body of water connected to traditional interstate navigable waters." Second, a party asserting jurisdiction must also show that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends, and the "wetland" begins.

Although the Court's decision directly addresses only the scope of "adjacent wetlands," its description of "waters of the United States" as including only relatively permanent bodies of water connected to traditional interstate navigable waters will likely result in all ephemeral and many

intermittent waters, which constitute the majority of Colorado's stream miles, being outside the scope of federal Clean Water Act jurisdiction.

This Supreme Court decision will result in less water quality protections for Colorado. These water quality protections have been in place since the 1980s. The division engaged stakeholders on this policy for enforcement of unpermitted discharges of dredged and fill material into state waters that is intended to continue protecting Colorado's waters to the same extent as they were protected before the *Sackett* decision.

PURPOSE

This policy addresses the protection of state waters impacted by discharges of dredged or fill material that are outside of federal Clean Water Act jurisdiction as a result of the *Sackett* decision. In the absence of state-level regulatory mechanisms to authorize, administer, and assure compliance with a state program regulating discharges of dredged or fill material into state waters, this policy describes how the division intends to exercise enforcement discretion for discharges of dredged or fill material into state waters that are not subject to federal Section 404 permitting after the *Sackett* decision. The policy describes the steps the division expects dischargers to take when their activities result in unpermitted discharges of dredged or fill material in order to avoid enforcement action. These steps are also intended to protect state waters until a state regulatory program can be developed.

This policy is not intended to, and does not, create any new authority for the division beyond that which exists under current law. Moreover, this policy is not intended, and should not be interpreted, to limit any options that may be considered to address discharges of dredged or fill material into state waters through regulatory or enforcement programs. Therefore, this policy can, and will, be modified over time, and may be revoked in the future if circumstances change. Please refer to the division's web page to review the current version of this policy.

AUTHORITY

In accordance with the Water Quality Control Act (WQCA), 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. § 25-8-501(1), C.R.S. Permits issued under the federal Clean Water Act are recognized under the WQCA. *Id.* The WQCA also includes provisions for oversight and enforcement of the requirements to obtain permit coverage for point source discharges. In addition, the WQCA authorizes the division to issue cease-and-desist orders when it determines there is a violation of the WQCA, and authorizes orders requiring the cleanup of any material deposited in or near state waters that may pollute them. §§ 25-8-605 and -606, C.R.S. However, neither the WQCA nor the implementing regulations for discharge permits (5 CCR 1002-61) compel specific compliance or enforcement responses for discharges that occur without permit coverage. The division's enforcement responses are generally outlined in implementing policies and procedures, including the division's Clean Water Enforcement Management System.

DEFINITIONS

1. **404 Permit**: A permit issued for the discharge of dredged or fill material by the Corps authorized by Section 404 of the Clean Water Act. This includes individual permits, general

permit authorizations issued on a nationwide or regional basis, and Letters of Permission issued in accordance with 33 C.F.R. §325.2.

2. **Colorado Discharge Permit System Permit (CDPS Permit):** A permit issued in accordance with the Colorado Discharge Permit System Regulations, 5 CCR 1002-61.

3. **Discharge of dredged material:**
    a. Except as provided below in paragraph 3.b, the term discharge of dredged material means any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, state waters. The term includes, but is not limited to, the following:
        i. the addition of dredged material to a specified discharge site located in state waters
        ii. the runoff or overflow from a contained land or water disposal area; and
        iii. any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into state waters which is incidental to any activity, including mechanized land-clearing, ditching, channelization, or other excavation.
    b. The term discharge of dredged material does not include the following:
        i. discharges of pollutants into state waters resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill). These discharges are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps, or enforcement discretion for the discharge of dredged or fill materials under this policy.
        ii. activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chain-sawing) where the activity neither substantially disturbs the root system, nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.
        iii. incidental fallback.

4. **Discharge of fill material:** The addition of fill material into state waters. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a state water; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and sub-aqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.
    a. Pilings
        i. Placement of pilings in state waters constitutes a discharge of fill material when such placement has or would have the effect of a discharge of fill

material. Examples of such activities that have the effect of a discharge of fill material include, but are not limited to, the following: projects where the pilings are so closely spaced that sedimentation rates would be increased; projects in which the pilings themselves effectively would replace the bottom of a waterbody; projects involving the placement of pilings that would reduce the reach or impair the flow or circulation of state waters; and projects involving the placement of pilings which would result in the adverse alteration or elimination of aquatic functions.

ii. Placement of pilings for linear projects, such as bridges, elevated walkways, and powerline structures, generally does not have the effect of a discharge of fill material. Furthermore, placement of pilings in state waters for piers, wharves, and an individual house on stilts generally does not have the effect of a discharge of fill material.

5. **Dredged or Fill Material** includes:
    a. The term “dredged material" means material that is excavated or dredged from state waters.
    b. Except as specified in sub-paragraph 5.d below, the term “fill material” means material placed in state waters where the material has the effect of:
        i. Replacing any portion of state waters with dry land; or
        ii. Changing the bottom elevation of any portion of any state waters.
    c. Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in state waters.
    d. The term fill material does not include trash or garbage.

6. **Sackett Gap Waters**: State waters that were under the jurisdiction of the federal 404 permitting program as WOTUS pursuant to the pre-2015 federal regulations and the 2008 Guidance, but that are no longer considered WOTUS because of the change in the scope of federal jurisdiction resulting from the *Sackett v. EPA* decision. Sackett Gap Waters do not include the subset of state waters that were outside the scope of federal jurisdiction under the pre-2015 federal regulations and the 2008 Guidance.

7. **Loss (of state waters)**: State waters that are permanently adversely affected by filling, flooding, excavation, or drainage because of the discharge of dredged or fill material. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of the state waters is calculated without considering compensatory mitigation that may be used to offset losses of aquatic functions and services; it is *not* a net calculation based on the difference between lost waters and compensatory mitigation. The loss of stream bed includes the acres or linear feet of stream bed that are filled or excavated as a result of the regulated activity. When calculating the loss, the following are not included:
    a. Waters temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction.
    b. Impacts resulting from activities that are exempt from 404 permit coverage by Clean Water Act Section 404(f)(1), as restated in Section 5.1.

c. Impacts resulting from discharges to water features excluded from the pre-2015 definition of WOTUS, as listed in Section 5.2.

8. **Nationwide and General Permit Conditions**: The conditions applicable in Colorado under nationwide or general permits issued by the Corps prior to the date of this policy.

9. **Operator**: The party that has operational control over day-to-day activities at a project site which are necessary to ensure compliance with the permit or activities subject to permitting. This party is authorized to direct individuals at a site to carry out day-to-day activities (i.e. the general contractor).

10. **Owner:** The party that has overall control of the activities and that has funded the implementation of the projects plans and specifications. This is the party that may have ownership of, a long term lease of, or easements on the property on which the project is occurring (e.g. the developer).

11. **Project**: The total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. For example, if construction of a residential development affects several different areas of a headwater or isolated water, or several different headwaters or isolated waters, permitting decisions should be based on the cumulative total of all filled areas. For linear projects, each crossing of a separate state water, other than water features excluded in Section 5.2, will be considered a single project at that location; except that for linear projects crossing a single waterbody several times at separate and distant locations, each crossing is considered a single project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly-shaped wetland or lake, etc., are not separate waterbodies.

12. **State Waters**: Any and all surface and subsurface waters which are contained in or flow in or through Colorado, but does not include waters in sewage systems, waters in treatment works of disposal systems, waters in potable water distribution systems, and all water withdrawn for use until use and treatment have been completed. § 25-8-103(19), C.R.S. and 5 C.C.R. 1002-61.2(102).

APPLICABILITY

This policy applies to unpermitted point source discharges of dredged or fill material into state waters that occur on or after the date of the *Sackett* decision. Discharges of dredged or fill material include both the direct placement of materials into state waters (e.g., stream crossings, realignment, and filling wetlands) and the redeposit of materials in state waters that may result from excavation and other activities that can move pollutants within state waters (e.g., excavations or dredging, driving construction equipment in a channel, and bank stabilization). Dredged and fill materials are pollutants, and their discharge into state waters is subject to oversight under the WQCA.

The notification and protective conditions sections of this policy (Sections 2 and 4) ***do not*** apply to discharges of dredged or fill material associated with the activities that are *exempted* from regulation under Section 404(f) of the Clean Water Act as restated in Section 5.1 of this policy.

The notification and protective conditions sections of this policy (Sections 2 and 4) ***do not*** apply to discharges of dredged or fill material into water features described in Section 5.2 of this policy that were *excluded* from the pre-2015 definition of WOTUS, including "prior converted cropland" as that term is defined in Section 5.2.

Nothing in this policy is intended to apply to the activities of federally recognized Indian tribes, Indians, their political subdivisions, or tribally controlled affiliates, undertaken or to be undertaken, on lands within the exterior boundaries of an Indian reservation located within the State. Additionally, nothing in this policy is intended to apply to the activities of third-party non-Indian owners and operators undertaken, or to be undertaken with respect to Reservation waters on Indian trust lands within the exterior boundaries of an Indian reservation located within the State. On privately-owned fee lands within the exterior boundaries of an Indian reservation located within the State, this policy will apply to the discharge of dredge or fill materials of only non-Indians.

POLICY

This policy outlines the division's determination that it does not intend to take enforcement action for the unpermitted discharge of dredged or fill material if the activity causing the discharge is conducted in a manner that provides for protection of state waters consistent with the protections that would have occurred through compliance with federal 404 permitting requirements for such discharges prior to the *Sackett* decision. The policy also discusses, in Section 1, discharges of dredged or fill material that are authorized by federal permits recognized under the WQCA.

This policy explains that the division does not intend to take enforcement action for unpermitted discharges of dredged or fill material into state waters if:

- notification is provided to the division as set forth in Section 2;
- the discharges would have been eligible for coverage under a Corps nationwide or general permit in effect, and based on the scope of federal jurisdiction, prior to the date of the *Sackett* decision, as set forth in Section 3;
- the division is able to conduct effective oversight of the project as set forth in Section 4.2.; and
- the activities resulting in the discharge of dredged or fill materials are undertaken in accordance with the protective conditions set forth in Section 4.1, including the condition that either:
    - the project will not result in a combined loss of Sackett Gap Waters and WOTUS that exceed 0.1 acres of wetlands or 0.03 acres of streambed; or
    - the project would have not required pre-constitution notification prior to the date of the *Sackett* decision.

Section 5 of this policy also explains that the division does not intend to take enforcement action for unpermitted discharges of dredged or fill material into state waters resulting from activities that have historically been exempted by federal law or for discharges to water features excluded from the pre-2015 definition of WOTUS. Lists of the federal exemptions and exclusions recognized by the division are set forth in Section 5.

SECTION 1 - DISCHARGES AUTHORIZED BY FEDERAL 404 PERMITS CONTINUE TO BE PERMISSIBLE UNDER WQCA

Permits issued under the federal Clean Water Act are recognized under the WQCA. § 25-8-501(1), C.R.S. Consistent with the division's practice prior to the *Sackett* decision, the division will continue to recognize the effectiveness of federal 404 permits so long as they remain valid and enforceable under federal law. The division also expects to communicate directly with the Corps regarding their permitting and enforcement policies following the *Sackett* decision.

Discharges of dredged or fill material that proceed in accordance with the terms of valid 404 permits (including nationwide and general permits that do not require pre-construction notifications) will be recognized as being in compliance with the WQCA and not be targeted for enforcement and do not need to take additional steps under this policy. Dischargers are encouraged to obtain written verification of their continued federal 404 permit coverage from the Corps for projects that required pre-construction notification to the Corps prior to the *Sackett* decision. Valid 404 permit coverage includes permits that explicitly provide authorization and are enforceable for the discharge of dredged or fill material to waters that are no longer considered WOTUS after the *Sackett* decision. This includes 404 permits issued after the date of this policy where the scope and terms of the 404 permit are based on a Corps preliminary jurisdictional determination that addresses all aquatic resources on a site regardless of federal jurisdiction.

SECTION 2 - NOTIFICATION TO THE DIVISION FOR UNPERMITTED DISCHARGES

The division strongly encourages owners and operators to notify the division of any unpermitted discharge of dredged or fill material into state waters for which, as of July 6, 2023, a federal 404 permit is not required, as further described below.

In order to receive the benefit of enforcement discretion under this policy, owners and operators of any activity that will result in an unpermitted discharge of dredged or fill material into state waters should provide notification to the division using the online notification form on the division's website or submitting the requested information to cdphe_df_wqcd@state.co.us. The entity providing notification is not expected to wait for division review or response prior to the discharge. Entities that expect to provide notification multiple times a month can submit a spreadsheet with multiple projects in a single submittal (each item listed above should be a separate column in the spreadsheet).

Notification should be submitted by August 7, 2023, or as follows, whichever is later:

- For projects that **would not have** required pre-construction notification to the Corps prior to the *Sackett* decision: No later than 30 days following the commencement of the discharge.
- For projects that **would have** required pre-construction notification to the Corps prior to the *Sackett* decision: At least 10 days prior to the commencement of the discharge.

Consistent with prior federal practice, the division is not requesting this notification for activities subject to the 404 permitting exemption as listed in Section 5.1 or for projects resulting in discharges to water features that are excluded from the definition of WOTUS listed in Section 5.2.

Notification to the division should include the following information:

- Description and purpose of the activities conducted by the applicant which result in the discharge of dredged or fill material into state waters
- The date the discharge of dredge and fill is anticipated to begin or did begin

- The project name
- The owner(s) and the operator(s) name, mailing address, telephone number, and email address.
- Name of state water(s) to which dredged or fill material is being discharged.
- To the extent known, whether some or all of the state waters are within the subset of waters that historically have not required a 404 permit (as discussed in Section 6 of this policy).
- Latitude and Longitude of the project (to 5 decimal places).
- Street address (or general location) of the project.
- The Corps nationwide or general permit(s) that would have applied to the project prior to the *Sackett* decision.

For projects that would have required pre-construction notification to the Corps prior to the *Sackett* decision, this additional information from the pre-construction notification should also be provided as part of the notification to the division. Providing information to the division equivalent to the information that would otherwise be submitted to the Corps in a Section 404 pre-construction notification, and based on the scope of federal jurisdiction that was in effect prior to the *Sackett* decision, will be sufficient under this policy. Note that there are several parts of the Corps pre-construction notification related to other federal laws, including information relevant to the Endangered Species Act, historic properties, and 408 permission request to the Corps. The division is not requesting that information be provided as part of the notification.

SECTION 3 - SCOPE OF UNPERMITTED DISCHARGES INTO SACKETT GAP WATERS ELIGIBLE FOR ENFORCEMENT DISCRETION UNDER THIS POLICY

The division does not intend to take enforcement action for unpermitted discharges of dredged or fill material into state waters if the discharge would have been eligible for coverage under a Corps nationwide or general permit that was in effect prior to the date of the *Sackett* decision, and was included in the scope of federal jurisdiction that was in effect prior to the date of the *Sackett* decision. Where the activities resulting in the discharge of dredged or fill material are undertaken in accordance with the conditions and best management practices set forth in the applicable pre-*Sackett* nationwide or general permit, the division intends to exercise enforcement discretion. Additional information on the division's expectations for protective conditions is set forth in Section 4.

If a project resulting in discharges of dredged or fill material to state waters is no longer under Corps jurisdiction as a result of the *Sackett* decision and would have required an *individual* Section 404 permit from the Corps prior to the *Sackett* decision, it is *not* eligible for enforcement discretion under this policy. Owners and operators of such projects should contact the division to discuss an individualized path forward.

SECTION 4 - PROJECTS SHOULD COMPLY WITH PROTECTIVE CONDITIONS FROM FEDERAL NATIONWIDE AND GENERAL PERMITS

In general, the division intends to exercise enforcement discretion where projects resulting in unpermitted discharges of dredged or fill material into Sackett gap waters are conducted in accordance with the conditions set forth in the Corps 404 permit that would have applied to the project prior to the *Sackett* decision. The division notes that some Corps 404 nationwide and general permits include conditions unrelated to water quality protection, such as protecting navigation and historic structures, that are outside the scope of the division's oversight authority under the WQCA.

The division does not intend to review aspects of the project or discharges associated with those unrelated conditions. It remains the owner or operator's responsibility to comply with any local, state, and federal rules that may apply outside of this policy.

The following protective conditions do not apply to projects or activities that are subject to any of the federal Section 404 exemptions, nor do these conditions apply to the discharge of dredged or fill material into the categories of water features excluded from the definition of WOTUS, as discussed in Section 5 of this policy. Additionally, the following conditions do not apply to projects involving the discharge of dredged or fill material into the relatively small subset of state waters that have historically not required a federal 404 permit, as discussed in Section 6 of this policy.

4.1 PROTECTIVE CONDITIONS

The division intends to exercise enforcement discretion under this policy for the unpermitted discharge of dredged or fill material into Sackett gap waters if the owner or operator:

- Designs and constructs the project to avoid and minimize loss of Sackett gap waters so that either:
    - the project will not result in a combined loss of Sackett gap waters and WOTUS that exceed 0.1 acres of wetlands or 0.03 acres of streambed; or
    - the project would not have required pre-construction notification under a Corps nationwide or general permit in effect, and based on the scope of federal jurisdiction, prior to the date of the *Sackett* decision.

  When determining loss and the applicability of pre-construction notification requirements, the division will consider the entire cumulative impact of the project, including any parts of the project that are covered by a Corps 404 permit.
- Designs and constructs the project to minimize adverse effects, both temporary and permanent, to Sackett gap waters to the maximum extent practicable.
- Complies with the general conditions and the Colorado regional conditions that would have been required of a nationwide 404 permit or general 404 permit for the project prior to the *Sackett* decision, based on the scope of federal jurisdiction that was in effect prior to the date of the *Sackett* decision.
- Maintains all documentation required by a condition that would normally be required by the applicable nationwide 404 permit or general 404 permit until three years after the end of the discharge. If the project is covered by a CDPS construction general permit for discharges of stormwater associated with construction activity, the owner or operator is encouraged to include such documentation with the stormwater management plan.

4.2 ADDITIONAL OVERSIGHT CONSIDERATIONS

In order to implement this policy, the division must be able to assess whether the conditions set forth in this policy to protect state waters from the impacts of unpermitted discharges of dredged or fill material have been met. To facilitate the division's oversight and continued exercise of enforcement discretion under this policy, the owner/operator should:

- Within a reasonable time of a request from the division, furnish the division with requested information to allow the division to determine whether the unpermitted discharges are eligible for the exercise of enforcement discretion under this policy.
- Notify the division if the unpermitted discharge does not meet or can no longer meet the conditions set forth in the Corps 404 permit that would have applied to the project prior to

the *Sackett* decision. The owner or operator should notify the division within 30 days of becoming aware of such circumstances, unless the circumstances may endanger public health or the environment, in which case the owner or operator should notify the division within twenty-four (24) hours of becoming aware of the circumstances.
    - 30-day notifications may be provided to cdphe_df_wqcd@state.co.us
    - 24-hour notifications may be provided to the division's Clean Water Compliance and Enforcement Section at (303) 692-3500 or cdphe_df_wqcd@state.co.us
- Allow for reasonable division oversight and inspection of the project as necessary to assess whether the conditions for enforcement discretion provided under this policy have been met.

SECTION 5 - CONTINUED RECOGNITION OF FEDERAL SECTION 404 EXEMPTIONS AND EXCLUSIONS

The division will continue to exercise enforcement discretion for activities involving discharges of dredged or fill material to state waters that have traditionally been exempted from the requirement to obtain a 404 permit. Similarly, the division will continue to exercise enforcement discretion for discharges of dredged or fill material to the features excluded from the pre-2015 definition of WOTUS. Lists of the federal exemptions and exclusions recognized by the division are set forth below.

5.1 EXEMPTIONS

The Clean Water Act at Section 404(f)(1) establishes exemptions from 404 permitting requirements for certain activities. 33 U.S.C. § 1344(f)(1). Consistent with this, the division will continue to exercise enforcement discretion for discharges of dredged or fill material into state waters resulting from the following activities:

- Normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices. "Upland soil and water conservation practices" means any discharge of dredged or fill material to state waters incidental to soil and water conservation practices for the purpose of improving, maintaining, or restoring uplands including, but not limited to, rangeland management practices, erosion control practices, and vegetation management practices.
- Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures.
- Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches.
- Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters.
- Construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the state waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized.

However, any discharge of dredged or fill material into state waters incidental to any activity having as its purpose bringing an area of the state waters into a use to which it was not previously subject, where the flow or circulation of state waters may be impaired, or the reach of such waters be reduced are not included within these exemptions, consistent with Section 404(f)(2). *See* 33 U.S.C. § 1344(f)(2) (the "Recapture Provision").

5.2 EXCLUSIONS

The preamble to the WOTUS definition at 51 Fed. Reg. 41217 (Nov. 13, 1986) discusses several water features that the EPA and the Corps generally do not consider to be "waters of the United States." Consistent with this preamble discussion, the division will continue to exercise enforcement discretion for unpermitted discharges of dredged or fill material to the following features:

- Non-tidal drainage and irrigation ditches excavated on dry land.
- Artificially irrigated areas which would revert to upland if the irrigation ceased.
- Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
- Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
- Water-filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of WOTUS pursuant to the pre-2015 federal regulations and the 2008 Guidance.

In addition, the division does not plan to take enforcement action for discharges of dredged or fill material to prior converted cropland. The division considers prior converted cropland to be any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. An area is no longer considered prior converted cropland when the area is abandoned and has reverted to wetlands. 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. Agricultural purposes include land use that makes the production of an agricultural product possible, including grazing and haying. Cropland that is left idle or fallow for conservation or agricultural purposes for any period of time remains in agricultural use, and, therefore, maintains the prior converted cropland.

SECTION 6 - CONTINUED ENFORCEMENT DISCRETION FOR PROJECTS IN STATE WATERS THAT WERE NEVER SUBJECT TO FEDERAL 404 PERMITTING

As stated in Section 2, owners or operators of projects discharging dredged or fill material into the relatively small subset of state waters that were not within the Corps' jurisdiction under the pre-2015 federal definition of WOTUS and 2008 Guidance should provide notification to the division prior to discharge, *except that* notification is not expected for the *exempted* activities (listed in Section 5.1) and projects involving discharges to *excluded* water features (listed in Section 5.2). The purpose of the notification is for the division to gain a better understanding of the number of projects impacting this subset of state waters as it considers developing a dredge and fill regulatory program. Projects involving this subset of state waters are not subject to the protective conditions and additional oversight described in Section 4 of this policy, and the division intends to continue exercising its historic enforcement discretion with respect to projects involving this subset of state

waters. Projects involving this subset of state waters continue to be subject to other applicable state requirements such as construction stormwater permitting.

SECTION 7 - ADDITIONAL LIMITATIONS OF THIS POLICY

1. The issuance of this policy does not limit or preclude the division from pursuing its enforcement options concerning any violation(s) of the WQCA. The division will evaluate the facts associated with a violation(s), and if a formal enforcement action is deemed necessary, the owner(s) and operator(s) may be subject to enforcement actions as allowed by state law, including but not limited to the issuance of a Notice of Violation/Cease and Desist Order/ Clean Up Order that may include the assessment of penalties.
2. The approach to enforcement identified in this policy will not apply to criminal violations or in situations where there are egregious circumstances, such as those resulting in serious environmental harm, adverse impacts to the beneficial uses of state waters, or which pose an imminent or substantial endangerment to public health and/or the environment.
3. With the sole exception of discharges of dredge or fill, this policy in no way limits the requirements to obtain and to comply with the conditions of a CDPS permit for discharges to state waters, including but not limited to stormwater discharge permits for construction activities. The implementation of this policy makes no changes to the expectation for CDPS permit applications and compliance with all other applicable requirements administered by the division.
4. The issuance of this policy does not convey any property or water rights in either real or personal property, or stream flows, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights. All discharges must comply with the lawful requirements of federal agencies, municipalities, counties, drainage districts, and other local agencies regarding any discharges to stormwater conveyances, or other water courses under their jurisdiction.
5. This policy in no way limits the division's authority to enter and inspect premises and records, as provided in the WQCA at section 25-8-306, C.R.S.
6. This policy is intended to provide operational direction to the division. Nothing in this policy shall be construed to preclude or limit the authority of the division pursuant to any applicable state law or regulation under authority granted by Section 510 of the Clean Water Act.