Why Colorado Should Evaluate Clean Water Act Section 404 Program Assumption

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INTRODUCTION

"The world hates change, yet it is the only thing that has brought progress."

– Charles Kettering[1]

For over four decades, Colorado, like virtually every other state, has been content to allow the federal government to regulate the discharge of dredged and fill material into the waters within its borders. During this time, the United States Army Corps of Engineers ("Corps") has dutifully navigated the Clean Water Act ("CWA" or "Act") Section 404 program through the ever-intensifying challenges of Colorado's complicated water rights system, its explosive population growth, and its competing interests in a limited resource, all against a background of seemingly constant turmoil over the Act's reach. These challenges certainly help explain Colorado's reluctance to jump into the Section 404 fray, but they also, paradoxically, constitute the very reasons the state may need to do just that.

Colorado has recently been contemplating the creation of a dredge and fill permitting program that would operate in addition to the Corps' program. The effort, intended to fill a gap in federal protection for certain state waters, took most stakeholders by surprise, generating significant confusion and alarm. Despite the lukewarm reception for this limited gap filler program, the state should consider something bolder. This article explains why it is time for Colorado to engage in a comprehensive stakeholder process to reevaluate the merits of taking over full administration of the CWA Section 404 program from the federal government.

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[1] AZ QUOTES, https://www.azquotes.com/author/7948-Charles_Kettering (last visited Sept. 20, 2021).

I. BACKGROUND

Congress passed the "modern-day" CWA[2] in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[3] This iconic piece of environmental legislation grew from decades of gradually increasing federal engagement in efforts to reverse the alarming decline in the quality of the country's water resources.[4] The Act stated ambitious goals, including the complete elimination of the discharge of pollutants by 1985.[5]

The key to achieving this lofty objective was (and remains) the "Discharge Prohibition," which prohibits the discharge of a pollutant by any person except in compliance with a permit.[6] The Act establishes two permitting programs to allow conditional exceptions to this prohibition.

CWA Section 402[7] contains one such program. This section regulates wastewater and stormwater discharges through the National Pollutant Discharge Elimination System ("NPDES"). NPDES permits typically authorize a permittee to discharge pollutants from specific outfalls subject to numeric limitations, monitoring requirements, and other conditions.

The 1972 amendments gave initial NPDES program authority to the newly created United States Environmental Protection Agency ("EPA").[8] However, Congress also acknowledged "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution"[9] within their borders, and authorized states to petition EPA to administer their own programs in lieu of the federal program.[10] Once EPA approves a state's Section 402 program, that state assumes responsibility for administering the

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2 Federal efforts to control water pollution date back to legislation passed in the late 1800s authorizing the Corps to regulate navigational impediments caused by dumping or placing materials in waterways. *See, e.g.*, 33 U.S.C. § 407 (2021) (originally part of the Rivers and Harbors Act of 1899). Congress also passed the Water Pollution Control Act of 1948, which largely supported state and local water pollution control efforts. Congress amended this legislation in 1956, 1961, and 1965. Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1105. The reference here to the "modern-day" Act reflects the complete restructuring of the statutory framework by the amendments of 1972.

3 33 U.S.C. § 1251(a).

4 N. William Hines, *History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform*, 4 GEO. WASH. J. ENERGY & ENV'T L. 80, 80 (2013).

5 33 U.S.C. § 1251(a)(1).

6 § 1311(a).

7 § 1342.

8 President Richard Nixon established the Environmental Protection Agency in Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (Oct. 6, 1970).

9 33 U.S.C. § 1251(b).

10 § 1342(b).

program consistent with federal minimum standards, while EPA retains oversight.[11]

This cooperative federalism approach, common in the major federal environmental statutes,[12] proved popular, and states quickly established their own NPDES programs. Today, forty-seven states (including Colorado) exercise NPDES authority.[13]

Section 404[14] contains the other CWA permitting program. It regulates discharges of dredged[15] or fill material.[16] This program, often referred to as "wetland permitting,"[17] is primarily administered by the Corps with EPA oversight. Congress, through the 1977 CWA amendments, authorized states[18] to obtain approval from EPA to administer their own Section 404 programs.[19] Though state program assumption under Section 404

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11 § 1342(d).

12 *See, e.g.*, Resource Conservation and Recovery Act, 42 U.S.C. § 6926; Clean Air Act, 42 U.S.C. § 7410; Safe Drinking Water Act, 42 U.S.C. § 300g-2.

13 In June 2018, Idaho became the 47th state to obtain NPDES authority. Approval of the Application by the State of Idaho to Administer the National Pollutant Discharge Elimination System (NPDES) and Electronic Reporting, 83 Fed. Reg. 27,769 (June 14, 2018); *NPDES State Program Authority*, EPA, https://www.epa.gov/npdes/npdes-state-program-authority (last visited Dec. 21, 2021).

14 33 U.S.C. § 1344.

15 Federal regulations define "dredged material" as "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c). The CWA does not regulate the act of dredging per se. Dredging is governed under Section 10 of the Rivers and Harbors Act of 1899. 33 U.S.C. § 403; Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1404 (D.C. Cir. 1998).

16 Federal regulations define "fill material" as "material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e).

17 Notwithstanding this common reference, CWA Section 404 regulates discharges to all jurisdictional waters, not just wetlands.

18 For ease of reference, this article discusses Section 404(g) in the context of state assumption. However, under CWA Section 518 (33 U.S.C. § 1377(e)), added by Congress in the 1987 CWA amendments, EPA may treat eligible Indian tribes as states under various CWA provisions, including Section 404. 81 Fed. Reg. 30,183, 30,185 (May 16, 2016). Tribal pursuit of Section 404 program assumption would generally follow the same process as states. States assuming Section 404 permitting authority will generally not assume such authority over waters on tribal lands. EPA, FINAL REPORT OF THE ASSUMABLE WATERS SUBCOMMITTEE 3 (2017), https://www.epa.gov/sites/default/files/2017-06/documents/aw-subcommitteefinalreprort_05-2017_tag508_05312017_508.pdf [hereinafter FINAL REPORT].

19 33 U.S.C. § 1344(g). The process under Sections 402 and 404 is known as "assumption" because the state assumes authority to run its own program under state law, as opposed to being delegated authority to run the federal program within the state. *See* H.R.

is similar in concept and procedure to assumption of NPDES authority, over the ensuing forty years only two states—Michigan (in 1984) and New Jersey (in 1994)—pursued it.[20] In December 2020, Florida broke a quarter-century drought to become the third state to assume the program.[21]

Recent developments suggest the potential for a trend. Other states (for diverse reasons) are considering their own bids for Section 404 program administration.[22] Much has changed since Colorado last evaluated, and declined to pursue, state assumption four decades ago.[23] It is time for Colorado to look again at joining this still exclusive club.

II. DISCUSSION

A. Why Colorado Might Reach a Different Conclusion This Time Around

1. Removal of Certain Barriers to State Section 404 Program Assumption

Since the option became available in 1977, numerous states have evaluated Section 404 program assumption,[24] with most, for various

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Conf. Rep. No. 830, 95th Cong., 1st Sess. 104 (1977) *reprinted in* 1977 U.S.C.C.A.N. 4424, 4479.

20 40 C.F.R. §§ 233.70–233.71.

21 EPA's Approval of Florida's Clean Water Act 404 Assumption Request, 85 Fed. Reg. 83,553, 83,553–54 (Dec. 22, 2020).

22 Hannah Northey, *EPA Water Chief Hoped for 'Mild Disappointment' on WOTUS*, E&E NEWS (Jan. 21, 2021) https://subscriber.politicopro.com/article/eenews/2021/01/21/epa-water-chief-hoped-for-mild-disappointment-on-wotus-006344.

23 *See Final Report on State Assumption of the Dredge & Fill Permit Program Under Section 404 of the Clean Water Act*, Colorado Department of Health, Water Quality Control Division (Nov. 1981). In the early 1990s, the Colorado Department of Natural Resources considered Section 404 program assumption as part of a larger evaluation of how the State could expand its wetlands management role. The effort was largely internal and did not involve public input or generate a report on the state assumption component. Personal conversation on Nov. 3, 2021 with Doug Robotham, former Assistant Director for Water, Colorado Department of Natural Resources, who led the effort. The Association of State Wetland Managers' program summary for Colorado states that Colorado evaluated Section 404 program assumption in 2003 and declined to pursue it. The author was unable to find the basis for this claim. *See Colorado State Wetland Program Summary*, ASWM, https://www.aswm.org/pdf_lib/state_summaries/colorado_state_wetland_program_summary_101315.pdf (last visited Oct. 25, 2021).

24 *See* ASSN. OF STATE WETLAND MANAGERS, STATUS AND TRENDS REPORT ON STATE WETLAND PROGRAMS IN THE UNITED STATES 29 (2015),

reasons, declining to pursue it. These evaluation efforts have identified several barriers to assumption.[25] Recent developments have begun to remove these barriers.

a. The Assumable Waters Barrier

Difficulty in identifying those waters a state can regulate when it assumes Section 404 program authority (known as "assumable waters") has presented a considerable barrier to state assumption.[26] Among other things, it prevents states from effectively assessing the potential benefits of program assumption before committing substantial resources toward the process. This issue arises because Congress did not authorize states to assume CWA Section 404 authority over *all* waters located within their boundaries. The Corps must retain authority over certain non-assumable waters. Congress described these non-assumable waters (i.e., "retained waters") in a parenthetical in CWA Section 404(g):

> (. . . those *waters* which are presently used, or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including *wetlands adjacent* thereto . . .)

(Emphasis added).

Applying this parenthetical to distinguish retained waters from assumable waters proved challenging. Decades of case law and administrative decision making related to navigability interpretations, the Corps'

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https://www.aswm.org/pdf_lib/state_summaries/status_and_trends_report_on_state_wetland_programs_in_the_united_states_102015.pdf (noting that at least 24 states have evaluated assumption to some degree).

25 *See, e.g.*, MINN. DEP'T OF NAT. RES., MINNESOTA FEDERAL CLEAN WATER ACT SECTION 404 PERMIT PROGRAM FEASIBILITY STUDY 96 (2017), https://bwsr.state.mn.us/sites/default/files/2019-01/Wetland_Regulatory_MN_404_Assumption_Feasibility_Study_2017.pdf [hereinafter MINNESOTA FEASIBILITY STUDY] (discussing challenges faced by Oregon). *See also* Mont. Leg. Env't Policy Office, *Issues to Consider for State Administration of Section 404 Clean Water Act Permits*, app. C (Mont. Env't Quality Council 2014), https://leg.mt.gov/content/Committees/Interim/2013-2014/EQC/Meetings/September-2014/404-clean-water-act-issues.pdf. Aileen A. Carlos, The Trouble with Assumptions: An Analysis of the Ongoing Struggles with § 404 Assumption 11 (Sept. 2014) (Graduate Thesis, Univ. of Or. Graduate School), https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/18546/Carlos_oregon_0171N_11129.pdf;jsessionid=1696237D40648F6744D30076E3601021?sequence=1.

26 *See e.g.*, MINNESOTA FEASIBILITY STUDY, *supra* note 25, at v.

implementation of Section 10 of the Rivers and Harbors Act of 1899 ("RHA"),[27] and efforts to define the reach of the CWA have all "clouded the legal terminology" underlying the evaluation.[28]

One precondition of state program approval requires the state to enter into a memorandum of agreement ("MOA") with the Corps that, among other things, identifies those waters to be retained.[29] Over the years, the process generally boiled down to a negotiation between a Corps district and a state.[30] Significantly, applicable regulations give the Corps final say on which waters it retains.[31] Until recently, the Corps applied this authority aggressively.

The Corps' application of the retained waters provision significantly affects which waters are available for state assumption, which in turn influences a state's evaluation of the costs and benefits of assumption.[32] Minnesota's recent experience provides a good example.

In 2015, Minnesota enacted legislation requiring its Department of Natural Resources and Board of Water and Soil Resources to study the feasibility of assuming CWA Section 404 program authority.[33] The effort grew largely out of concern from some in the Minnesota regulated community over the length of time required to obtain Section 404 permits.[34]

The study, among other things, estimated the extent of assumable waters that the state could regulate upon receiving program authority, using Corps Headquarters' then-current approach to identifying retained waters. Minnesota's analysis found that the Corps would retain authority over 91.5 percent of the state's total wetland acreage and 98.7 percent of total lake

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27 33 U.S.C. § 403.

28 *See* Peg Bostwick, *Salameander: Navigable, Adjacent, Assumable Waters? We Need to Distinguish Between Assumable and Jurisdictional Waters of the United States*, ASWM (Oct. 28, 2013).

29 40 C.F.R. § 233.14.

30 FINAL REPORT, *supra* note 18, at 3.

31 40 C.F.R. § 233.14(b)(1).

32 MINNESOTA FEASIBILITY STUDY, *supra* note 25, at 22.

33 Minn. Pollution Control Agency, *State of Minnesota Section 404 Assumption Feasibility Study*, 4 Laws of Minn. Spec. Sess., Chapter 4 § 137 (2015), http://www.nclucb.org/wp-content/uploads/2018/10/404-Assumption-Briefing.pdf.

34 MINNESOTA FEASIBILITY STUDY, *supra* note 25, at iv.

acreage.[35] With so little to be gained from assumption, Minnesota declined to move forward.[36]

Of course, this issue extended beyond Minnesota. In June 2015,[37] EPA, responding to a request from groups representing state regulatory interests,[38] formed a stakeholder group, the Assumable Waters Subcommittee ("AWS" or "Subcommittee"), to recommend a way of identifying assumable waters that would remove this barrier to state Section 404 program assumption.[39] The Subcommittee worked from October 2015 through April 2017[40] to interpret the retained waters parenthetical and develop recommendations for EPA.[41]

As to retained "waters," the Subcommittee recommended that when a state assumes the Section 404 program, the Corps should retain authority over waters it regulates under RHA Section 10, with slight modifications. The Corps maintains a list of these waters for every state except Hawaii.[42]

Under this recommended approach, the Corps would identify retained waters by taking its list of RHA Section 10 waters for a state, adding unlisted waters that qualify for the Section 10 list, adding tribal waters (which a state would not assume),[43] and subtracting any waters included on the Section 10 list based solely on historical use (e.g., use by fur traders). The Corps would have sole responsibility to maintain the list, including adding to it to account for subsequent developments, such as a change in the physical condition of a waterbody or RHA case law.[44]

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35 MINN. DEP'T OF NAT. RES., ANALYSIS OF RETAINED AND ASSUMABLE WATERS IN MINNESOTA 3 (2018) https://bwsr.state.mn.us/sites/default/files/2020-10/Wetlands_Regulatory_MN_Assumable_Waters_Analysis_5-3-18.pdf [hereinafter MINNESOTA RETAINED WATERS ANALYSIS]. The analysis showed that Minnesota would gain authority over eighty-eight percent of its total stream miles—mostly streams of the first or second order. *See id.*

36 *Id.* at 4.

37 FINAL REPORT, *supra* note 18, at 6.

38 Letter from Alexandra Dapolito Dunn, ECOS, Sean Rolland, ACWA & Jeanne Christie, ASWM, to Nancy K. Stoner, Acting Assistant Adm'r for Water, EPA (Apr. 30, 2014), https://www.ecos.org/wp-content/uploads/2016/03/Letter-to-EPA-RE-Assumable-Waters-Final-April-30-2014.pdf.

39 Request for Nominations to NACEPT Subcommittee, 80 Fed. Reg. 13,539, 13,539–40 (Mar. 16, 2015).

40 FINAL REPORT, *supra* note 18, at iii.

41 The AWS chose the terms "waters" and "adjacent wetlands," unencumbered by their legal significance under the CWA, to explain its analysis and provide its recommendations for identifying retained and assumable waters. FINAL REPORT, *supra* note 18, at 7.

42 FINAL REPORT, *supra* note 18, at v.

43 *See id.*

44 *Id.* at 14–15.

To identify Corps-retained "adjacent wetlands," the AWS recommended a bright line approach that assumes a 300-foot national administrative boundary, which could shift (shrink or expand) to accommodate state-specific situations, such as existing government programs or the topography or hydrology of a given area.[45] The boundary would be established during negotiation of the required state/Corps MOA. If a state and the Corps cannot agree on state-specific adjustments, the boundary width defaults to 300 feet. This approach largely eliminates the need for case-specific field verification and enables states to easily identify retained adjacent wetlands prior to Section 404 program assumption.

The Subcommittee believed that the simplicity of the recommended approach would encourage Section 404 assumption by allowing states to readily assess its relative benefits.[46] Moreover, the broader scope of assumable waters under this approach (compared to the Corps' practice at the time) would give states greater payback for the considerable undertaking.[47]

The AWS submitted its final report to EPA on June 1, 2017.[48] EPA plans to update its 1988 regulations governing state assumption[49] and further reduce the barriers thereto.[50] This rulemaking, scheduled to be finalized by December 2022,[51] will officially implement EPA's response to the Subcommittee's report. The Corps has already responded. In a memorandum dated July 30, 2018, the Corps stated that it would implement the AWS's recommendations effective immediately.[52]

Notably, the Corps and the state of Florida utilized the AWS approach to identify retained waters for Florida's recent 404 Program

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45 *Id.* at 27–28, 30.

46 *See id.* at 20.

47 *See id.*

48 Letter from William G. Ross Jr., NACEPT Chair, to E. Scott Pruitt, EPA Adm'r (June 1, 2017), https://www.epa.gov/sites/default/files/2017-06/documents/nacepts_aws_transmittal_ltr_revised_br_6-2_with_chair_signature.pdf.

49 40 C.F.R. § 233.1.

50 OFFICE OF MGMT. & BUDGET, EPA, SPRING 2021 UNIFIED AGENDA OF REGULATORY AND DEREGULATORY ACTIONS, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=2040-AF83 (last visited Sept. 19, 2021).

51 *Id.*

52 Memorandum from R.D. James, Assistant Sec'y of the Army (Civil Works) to Commanding Gen., U.S. Army Corps of Eng'rs (July 30, 2018).

assumption.[53] Florida quickly developed a mapping tool[54] that shows the approximate extent of retained waters across the state—an impressive indication of the clarity and efficiency of the new approach. Moreover, in light of the new approach, the Minnesota legislature has again directed state agencies to develop and assemble materials necessary for a Section 404 assumption application.[55]

While the practical effect of applying the new approach to identifying retained waters will vary from state to state, the difference in Colorado is striking. The Corps' prior approach would have captured thousands of miles of Colorado rivers,[56] such as the Taylor, Gunnison, South Platte, Cache la Poudre, Yampa, Arkansas, and Upper Colorado, and even streams as small as St. Vrain Creek. It would also have captured wetlands extending significant distances from these waters.[57] In short, the Corps would have retained authority over a tremendous portion of waters in the state, diminishing the value Colorado would receive from Section 404 program assumption.

The AWS recommendations benefit Colorado perhaps more than any other state in the country. Due to their relatively smaller sizes and flows, Colorado's rivers, though numerous, are not widely used to transport interstate or foreign commerce. Accordingly, the only RHA Section 10 waters currently listed in Colorado are thirty-nine miles of the Colorado River, from Grand Junction downstream to the state line, and the Colorado portion of Navajo Reservoir.[58] Moreover, the Corps would only retain

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53 *See* FLA. DEP'T OF ENV'T PROTECT. & U.S. ARMY CORPS OF ENG., MEMORANDUM OF AGREEMENT BETWEEN THE FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE DEPARTMENT OF THE ARMY 2 n. 1 (Aug. 5, 2020).

54 Fla. Dep't of Env't Prot., *Retained Waters Screening Tool*, https://fdep.maps.arcgis.com/apps/webappviewer/index.html?id=2cb8724cfd18408db80c8f2d7bb68a2e. (last visited Sept. 17, 2021).

55 Laws of Minn. 2019, 1st Spec. Sess., ch. 4, art. 1, § 2, subdiv. 9(a). The legislation required the agencies to report back to the legislature on funding such a program. *Id.*

56 It would have also included reservoirs associated with these streams.

57 The Corps' prior approach to identifying retained waters employed CWA jurisdictional concepts (i.e., concepts in the definition of "waters of the United States" related to "Traditional Navigable Waters" and "adjacency") to identify waters and adjacent wetlands. *See e.g.*, MINNESOTA RETAINED WATERS ANALYSIS, *supra* note 35, at app. B, 30 (Letter from Chad Konickson, Army Corps of Eng'rs to Doug Norris, Minn. Dep't of Nat. Res. (Jan. 25, 2017) (on file with author)). These concepts greatly expanded the universe of retained waters, and, in some states, could give the Corps authority over "adjacent wetlands" extending over 100 miles from the underlying retained water. FINAL REPORT, *supra* note 18, at 31.

58 *See* U.S. Army Corps of Eng'rs, *Navigable Waterways in the Sacramento District*, https://www.spk.usace.army.mil/Missions/Regulatory/Jurisdiction/Navigable-Waters-of-the-US/ (last visited Sept. 19, 2021).

wetlands, or portions thereof, lying between the administrative boundary and the retained water (a presumed distance of 300 feet).

Thus, through lists and bright lines, the Subcommittee's recommendations eliminated the assumable/retained waters quandary and removed a significant barrier to state assumption. Moreover, state assumption would *virtually eliminate* Corps permitting in Colorado,[59] so the State would gain considerable autonomy for its efforts.

b. The Endangered Species Act ("ESA") Barrier

In determining whether to approve a state's application to assume the Section 404 program, EPA must assess the proposed program against eight statutory requirements.[60] Among these requirements is that the state program contain the authority to issue permits that comply with the CWA Section 404(b)(1) Guidelines.[61]

The 404(b)(1) Guidelines are mandatory environmental criteria against which the Corps must evaluate a Section 404 permit application.[62] The Guidelines specifically prohibit the discharge of dredged or fill material that "[j]eopardizes the continued existence of species listed as endangered or threatened under the [ESA], or results in likelihood of the destruction or adverse modification of [their designated critical habitat]."[63]

For its permits, the Corps addresses this prohibition through ESA Section 7(a)(2).[64] This provision requires a federal agency to ensure, through consultation with the United States Fish and Wildlife Service ("USFWS" or "Service") (or the National Marine Fisheries Service for marine species), that any action it authorizes, funds, or carries out is not likely to jeopardize the existence of a listed species or destroy or adversely modify its designated critical habitat. ESA Section 7, by its terms, does not apply to state actions.[65]

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59 In addition to the identified Section 10 waters and wetlands adjacent thereto, the Corps would also retain Section 404 permitting authority on the Southern Ute Indian Tribe Reservation in Southwest Colorado. *See* FINAL REPORT, *supra* note 18, at 31.

60 33 U.S.C. § 1344(h).

61 § 1344(h)(1)(A)(i).

62 33 C.F.R. § 320.4(b)(4).

63 40 C.F.R. § 230.10(b)(3).

64 16 U.S.C. § 1536(a)(2).

65 Nat'l Ass'n of Homebuilders v. Defenders of Wildlife, 551 U.S. 644, 653 n. 4 (2007); *but cf. id.* at 672 n. 11 (where the Court says that exercising the oversight that EPA retains after Section 402 permitting program transfer to a state may trigger Section 7 consultation).

A state-assumed Section 404 program operates in lieu of the federal program.[66] Therefore, permit issuance under an assumed program constitutes state action that does not trigger ESA Section 7 consultation.[67] This does not, however, eliminate a state permittee's ESA compliance obligations. Most significantly, ESA Section 9 broadly prohibits the "tak[ing]" of a listed species of fish or wildlife[68] (which includes, but is not limited to, killing it).[69] State-permitted projects remain subject to this take prohibition.

ESA Section 7 consultation offers a mechanism for complying with Section 9 through USFWS's issuance of a Biological Opinion ("BO") containing an Incidental Take Statement ("ITS").[70] The ITS provides a conditional exemption from the ESA Section 9 take prohibition.[71] Since this compliance mechanism is not available in the context of state-issued permits, certain state-authorized projects could require a separate ESA Section 10 Incidental Take Permit to cover Section 9 concerns.[72]

Project proponents disfavor Section 10 permits because the process to obtain one can be lengthy and expensive and can trigger review under the National Environmental Policy Act ("NEPA"). This, along with general confusion surrounding ESA compliance obligations in the context of state-assumed Section 404 programs, created a barrier to state program assumption.

When a state assumes Section 404 program authority, EPA retains oversight and can review and comment on any permit the state proposes to issue.[73] EPA can waive review of some permit categories, but it cannot

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66 H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 104 (1977) *reprinted in* 1977 U.S.C.C.A.N. 4424, 4479 ("The conferees wish to emphasize that such a State program is one which is established under State law and which functions in lieu of the Federal program.").

67 Lance D. Wood, *The ECOS Proposal For Expanded State Assumption of the CWA §404 Program: Unnecessary, Unwise, and Unworkable*, 39 ENV'T. L. REP. NEWS & ANALYSIS 10209, 10212–13 (2009).

68 16 U.S.C. § 1538(a)(1).

69 The statute defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Service regulations further define "harm" (as included in the definition of take) to cover habitat modification, where it is significant, and actually kills or injures the protected wildlife (directly or indirectly). 50 C.F.R. § 17.3.

70 As a matter of policy, USFWS includes an ITS in all formal consultations. U.S. FISH & WILDLIFE SERVICE AND NAT'L MARINE FISHERIES SERVICE, ENDANGERED SPECIES CONSULTATION HANDBOOK 4–43 (1998) [hereinafter CONSULTATION HANDBOOK].

71 *Id.* at 4–45.

72 *See* 16 U.S.C. § 1539(a) (authorizing permits to allow take that is incidental to, and not the purpose of, performing an otherwise lawful activity).

73 40 C.F.R. § 233.50.

waive review of, among others, those with a reasonable potential to affect threatened or endangered species.[74]

EPA's state assumption regulations address ESA matters by allowing USFWS input when a state proposes to issue a permit that may impact a federally listed species or its designated critical habitat.[75] If EPA has concerns with such a permit (including any concerns the Service identifies), the agency can object to its issuance until the state addresses those concerns. The state cannot issue a permit over EPA's objection.[76] New Jersey and Michigan have different arrangements with the Service for handling this review.[77] In New Jersey, the review process for permits that may impact federally listed species looks very similar to ESA Section 7 consultation.[78]

However, the approach EPA recently took on ESA compliance for Florida's Section 404 assumption application may create a more appealing and definitive path forward for states wishing to pursue assumption. During its processing of Florida's application, EPA requested public comment on whether its decision concerning the State's program transfer request would require ESA Section 7 consultation.[79] EPA had determined in 2010 that such a decision does not, by itself, trigger Section 7.[80]

Following public input, EPA issued a memorandum reversing course and concluding that its CWA Section 404 program approval does trigger ESA Section 7 consultation.[81] EPA's memorandum describes how this

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74 § 233.51.

75 *See* § 233.50(b).

76 § 233.50. For a more detailed evaluation of this issue, see John A. Kolanz, National Association of Homebuilders v. Defenders of Wildlife*: Implications Beyond Clean Water Act Section 402*, 45 ROCKY MT. MIN. L. FDN. J. 37 (2008) [hereinafter *Homebuilders*].

77 *See e.g.*, FINAL REPORT ON THE STATE OF ARIZONA'S PROPOSED ASSUMPTION OF CLEAN WATER ACT SECTION 404 PERMIT AUTHORITY IN COMPLIANCE WITH THE ENDANGERED SPECIES ACT 14 (Mar. 2019) (listing various state approaches).

78 *Homebuilders*, *supra* note 76, at 47–48. *See also* Memorandum of Agreement among the U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, and New Jersey Department of Environmental Protection and Energy Related to the Protection of Federally-Listed Threatened or Endangered Species and Designated Critical Habitat under a New Jersey-Assumed Section 404 Program (Dec. 22, 1993) (updated Mar. 2018).

79 Request for Comment on Whether EPA's Approval of a Clean Water Act Section 404 Program is Non-Discretionary for Purposes of Endangered Species Act Section 7 Consultation, 85 Fed. Reg. 30,953, 30,955 (May 21, 2020).

80 Letter from Peter S. Silva, EPA Assistant Adm'r to R. Steven Brown Env't Council of the States, and Jeanne Christie, Ass'n of State Wetland Managers, Inc. (Dec. 27, 2010) (on file with author).

81 Memorandum from David P. Ross, EPA Assistant Adm'r, on Endangered Species Act Section 7(a)(2) Consultation for State and Tribal Clean Water Act Section 404 Program Approvals (Aug. 27, 2020).

consultation requirement will actually facilitate subsequent ESA compliance for projects permitted under approved state programs.

Under this new approach, when a state applies for Section 404 program assumption, EPA will engage in a one-time ESA Section 7 programmatic consultation for review of the application. USFWS (and the National Marine Fisheries Service if applicable) will then issue a programmatic BO and ITS for the program transfer itself.[82]

The programmatic BO and ITS may establish additional conditions or measures to help ensure that the state program as implemented, including authorization of individual projects thereunder, protects listed species and their designated critical habitat.[83] EPA's memorandum states that, assuming compliance with applicable permit conditions, this procedure "would extend ESA Section 9 liability protections to individual permits" issued under the state program, "avoiding additional ESA Section 10 processes," and placing state CWA Section 404 permitting "on equal footing with the Corps' permitting program."[84]

EPA notes that states may develop different program structures and coordination mechanisms to ensure permits authorizing individual projects comply with the 404(b)(1) Guidelines and the conditions of the programmatic ITS.[85] This suggests the potential for a more substantive role for state fish and wildlife agencies in both ESA and Section 404 matters.[86]

The new approach clarifies—and greatly simplifies—ESA compliance obligations and thereby eliminates this barrier for states wishing to pursue Section 404 program assumption. EPA notes that this new "streamlined permitting process [will] . . . facilitate more effective and efficient state . . . CWA Section 404 programs."[87]

c. The Program Administration Funding Barrier

States have long pointed to the lack of a dedicated federal funding source as a significant impediment to Section 404 program assumption.[88]

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82 *Id.* at 7.

83 *Id.*

84 *Id.*

85 *Id.*

86 *See id.* For example, an authorized state may task its fish and wildlife agency with reviewing state Section 404 permits and recommending any permit-specific conditions necessary to protect listed species or their designated critical habitat. Such a role could eventually influence other ESA matters, such as federal listing decisions.

87 *Id.*

88 *See, e.g.*, Oliver A. Houck and Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs*

CWA Section 106 provides funds to assist states in administering programs for preventing, reducing, and eliminating water pollution. While states can use these funds for Section 404 program administration, and Michigan has done so to some degree, most states dedicate Section 106 funds to other water programs, such as those related to CWA Section 402.[89]

States can, however, obtain Wetland Program Development Grant ("WPDG") funding[90] for evaluating and developing Section 404 programs.[91] Moreover, Michigan and New Jersey have successfully tapped this source to fund elements of their existing programs that qualify as program development and improvement.[92] Interestingly, in 2005, EPA awarded WPDG funds for demonstration projects to determine whether using such funding for program implementation would deliver beneficial environmental outcomes (for state or tribal wetland programs, but not necessarily assumed programs). Twenty-two states and one tribe participated with positive results, illustrating the potential gains from making this funding source more broadly available.[93]

The resources necessary to fund a Section 404 program will differ from state to state based on various factors, such as population, growth, and hydrology, so apples-to-apples comparisons among programs are difficult. Perhaps most relevant for Colorado, Arizona recently estimated a $2.1 million annual cost for running an assumed Section 404 program with

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to the States, 54 MD. L. REV. 1242, 1280–81 (1995) (referencing funding issues related to efforts by Maryland and North Dakota to pursue Section 404 program assumption).

89 *Forty Years After the Clean Water Act: Is It Time For The States To Implement Section 404 Permitting?: Hearing Before the Subcomm. on Water Res. and Env't of the H. Comm. on Transp. And Infrastructure*, 112th Cong. 102 (2012) [hereinafter *Subcommittee Hearing*] (Testimony of Denise Keehner, Director, Office of Wetlands, Oceans, and Watershed, EPA); *see also* LEAH STETSON, EXPANDING THE STATES' ROLE IN IMPLEMENTING CWA §404 ASSUMPTION, ASS'N OF STATE WETLAND MANAGERS 11 (Nov. 18, 2010) [hereinafter *Expanding the States' Role*].

90 Authorized by CWA § 104(b)(3). 33 U.S.C. § 1254(b)(3).

91 *Id.*; *see also,* MINNESOTA FEASIBILITY STUDY, *supra* note 25, at 93 n. 113 (referencing the availability of CWA Section 104(b)(3) funds for work associated with preparing an assumption application). In 2008, EPA surveyed nine states that considered assumption and found that they had spent an average of $225,000 on their investigations. Six of those nine states utilized EPA grants in their investigations. *Subcommittee Hearing*, *supra* note 89, at 66.

92 *Subcommittee Hearing*, *supra* note 89, at 102.

93 *Id.* This pilot program demonstrates the benefit that could be gained by additional federal funding for state assumed programs.

ten full-time employees, including $220,000 for legal support from the Arizona Attorney General.[94]

Notably, in 2019, Colorado voters approved Proposition DD, which authorized a ten percent tax on sports betting proceeds to be used to fund the Colorado Water Plan ("Water Plan").[95] The tax is expected to raise up to $29 million per year toward Water Plan implementation.[96] This funding source could potentially contribute to Section 404 program implementation since, as explained in detail below,[97] state assumption would directly facilitate attainment of Water Plan goals.

In the end, no one benefits from a program that is not adequately funded.[98] States have informed Congress of their need for Section 404 program funding,[99] and it will be important to continue this messaging. In the meantime, states must look to other funding mechanisms, including: (1) legislative appropriation; (2) fees for applications and other program services (e.g., jurisdictional determinations); and (3) existing WPDG funding, where applicable.

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94 ARIZ. DEP'T OF ENV'T QUALITY, CLEAN WATER ACT §404 PROGRAM TECHNICAL WORKING GROUP – FEES WHITE PAPER 14 (2018). Kentucky, which evaluated state assumption in 2005, estimated that its program would cost $1,019,340 annually for the first five years. ENVIRONMENTAL AND PUBLIC PROTECTION CABINET'S STATUS REPORT TO THE GENERAL ASSEMBLY ON THE KENTUCKY CLEAN WATER ACT SECTION 404 TASK FORCE 13 (2005). Virginia estimated its annual costs for a Section 404 program at $3.4 million. HJR 243, STUDY OF THE COSTS AND BENEFITS OF STATE ASSUMPTION OF THE FEDERAL § 404 CLEAN WATER ACT PERMITTING PROGRAM (2012) (Virginia, in a nod toward state program efficiency, estimated that the Corps' Norfolk District, which administered the program in Virginia, had an annual budget of $7.3 million.). *Id.* at 8.

95 *See* COLORADO'S WATER PLAN: COLLABORATING ON COLORADO'S WATER FUTURE (2015) [hereinafter COLORADO WATER PLAN]. The Colorado Water Plan is a roadmap for addressing Colorado's future water needs. *See infra* notes 115–81 and accompanying text. One of the Colorado Water Plan's objectives is to sustainably fund its implementation at an annual rate of $100 million ($3 billion total by 2050). COLORADO WATER PLAN, *supra* note 95, at xii.

96 *See, e.g.*, 2019 State Ballot Information Booklet, Legislative Council of the Colorado General Assembly, Research Publication No. 724-1, https://leg.colorado.gov/sites/default/files/images/lcs/2019_blue_book_english_for_web.pdf.

97 *See infra* notes 115–81 and accompanying text.

98 *See, e.g.*, ENVIRONMENTAL AND PUBLIC PROTECTION CABINET'S STATUS REPORT TO THE GENERAL ASSEMBLY ON THE KENTUCKY CLEAN WATER ACT SECTION 404 TASK FORCE 17 (Dec. 2005) ("benefits of process streamlining and improved environmental protection will be forfeited if no provision is made for adequate, sustainable funding and staffing support for the program").

99 *See, e.g.*, *Subcommittee Hearing*, *supra* note 89, at 10–16 (Testimony of witnesses from Virginia, Florida, Ohio, and Michigan); MINNESOTA FEASIBILITY STUDY, *supra* note 25, at app. C; Letter from John Jaschke, Exec. Dir., Minn. Bd. of Water and Soil Res., to U.S. Rep. Bob Gibbs (Sept. 27, 2012) (on file with author).

d. Other Barriers

i. Political Will and Public Desires[100]

This potential barrier is certainly not unique to Section 404 program assumption. All substantial legislation—state assumption would require legislative authorization in Colorado—faces the same challenge.

Regulated interests typically favor state-run over federally run programs, largely because they consider state administrators more responsive to the concerns of the state's regulated community. Moreover, many view state programs as more efficient than their federal counterparts.[101]

Environmental interests, however, may view "responsiveness" and "efficiency" as euphemisms for less protection for the resource. Many remain understandably wary of state Section 404 program assumption. Congress passed the "modern day" CWA for a reason. The state-centric approach to water pollution control that prevailed prior to 1972 failed at the most basic level. It did not even manage to keep some rivers from catching fire—a modest goal by any measure.[102] Concern that state-assumed programs are more susceptible to local political influence stokes fears of a return to the "bad old days."

These fears seem largely unfounded, however, primarily because EPA maintains state program oversight. Indeed, state-run Section 402 programs have delivered much of the substantial water quality improvements achieved since the Act's passage. As these and other state-run environmental programs have matured, states have developed significantly more capacity to implement a sophisticated regulatory program than they had fifty years ago. And in Colorado, where outdoor recreation and tourism are multi-billion-dollar industries,[103] one would expect the state to maintain robust protection of its resources.

While some may deem it unlikely that the regulated and environmental communities could find sufficient common ground to support a new Colorado Section 404 program, examples of similar efforts abound. The

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100 *Subcommittee Hearing*, *supra* note 89, at xiii.

101 *See id.* at xi (listing increased program efficiency as a benefit of state assumption). It is important to recognize that the regulated community in the CWA Section 404 context includes not only private entities, but also governmental entities, such as municipalities, counties, and state agencies (such as the Colorado Department of Transportation).

102 The Cuyahoga River in Cleveland, Ohio is most closely associated with this inglorious distinction, but it is not the only river to have caught fire. Others include the Buffalo River in Buffalo, New York; the Schuylkill River in Philadelphia, Pennsylvania; and the Rogue River in Detroit, Michigan.

103 *See* U.S. DEP'T OF COM., COLO. OUTDOOR RECREATION SATELLITE ACCT. (2019), https://apps.bea.gov/data/special-topics/orsa/summary-sheets/ORSA%20-%20Colorado.pdf.

Upper Colorado River Endangered Fish Recovery Program[104] and the Platte River Recovery Implementation Program[105] both challenged water, power, and national environmental interests (as well as federal, state, and local agencies) with markedly divergent views to find solutions to sticky resource allocation problems.

More recently, Colorado environmental and regulated interests found common ground on an alternative to national Wild and Scenic River designation for the Upper Colorado River,[106] as well as construction of the Windy Gap Firming Project.[107] Stakeholders involved with these matters recognized that they had something to gain by collaboration, (which admittedly remains an elusive epiphany in the current political environment).

Notably, in 2009, to save money during lean budget times, Michigan's governor proposed returning the Section 404 program to the federal government. The regulated and environmental communities in Michigan, each recognizing benefits from the state-run program, both opposed the move and prevented it from happening.[108]

ii. Partial Program Implementation[109]

Current EPA regulations require a state to assume all components of the Section 404 program for all assumable waters within the state.[110] This prevents a state from "easing into" assumption by phasing in discrete components of the program (e.g., nationwide permits) or by administering it in limited geographic areas of the state.

The CWA explicitly allows partial assumption of the Section 402 program.[111] Congress included no similar provision for the Section 404 program, however, and EPA interpreted this omission as an express

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104 UPPER COLO. ENDANGERED FISH RECOVERY PROGRAM, https://coloradoriverrecovery.org/.

105 *Platte River Recovery Implementation Program Components*, PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM, https://platteriverprogram.org/about/program-components (last visited Oct. 25, 2021).

106 Ken Neubecker, *A Win for Collaboration in the Upper Colorado*, AM. RIVERS (June 30, 2020), https://www.americanrivers.org/2020/06/a-win-for-collaboration-in-the-upper-colorado/.

107 Chris Wood & Brad Wind, *Opinion: When We Work Together, All of Colorado can Benefit*, WATER EDUC. COLO.: FRESH WATER NEWS (Aug. 26, 2020), https://www.watereducationcolorado.org/fresh-water-news/opinion-when-we-work-together-all-of-colorado-can-benefit/.

108 *Subcommittee Hearing*, *supra* note 89, at 16.

109 *Id.* at xiii.

110 40 C.F.R. § 233.1(b).

111 33 U.S.C. § 1342(n).

prohibition on partial assumption when promulgating its 1988 state assumption regulations.[112]

In fact, the Act contains no such express prohibition, and EPA could amend its Section 404 assumption regulations to accommodate partial programs based on a new interpretation of the statute.[113] Absent that, partial 404 program assumption must await legislative action. Regardless, lack of a partial assumption option should not be a barrier for most states. Pursuing partial assumption raises many of the same challenges as full program assumption but could create more confusion among the public as to which agency is responsible for a given activity. States interested in assuming the Section 404 program will likely find a way to do so even absent a partial program assumption option.

iii. Lack of Guidance

Some states have identified the lack of guidance from EPA regarding how to prepare an application package as an obstacle to state assumption.[114] Specific guidance on this issue from EPA could be helpful, and the agency's recent experience with Florida's application could provide the foundation for such guidance. In the meantime, Florida's application package and overall experience would still provide valuable assistance to other states wishing to take a similar path.

2. Colorado's Increasingly Urgent Need to Comprehensively Manage Its Most Critical Natural Resource

In an early brochure, EPA promoted Section 404 program assumption by stating that it would give a state "more direct control over the use of its own waters and land," allowing it to "become the focal point for natural resource management within its borders."[115] EPA touted this as an important reward for the substantial task of taking on the program.

Water, in some way, shapes every aspect of life in Colorado. The extreme drought in 2002–2003 brought a growing water crisis into focus and gave rise to the Colorado Water Conservation Board's ("CWCB")

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112 Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations, 53 Fed. Reg. 20,764, 20,766 (June 6, 1988) ("While specific authorization for partial programs under section 402 was enacted in the Water Quality Act of 1987, no similar provision was added for section 404. Accordingly, partial 404 programs are not approvable.").

113 *See* F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515–16 (2009) (agency change of policy requires reasoned explanation).

114 *Subcommittee Hearing*, *supra* note 89, at 14 (Testimony by George Elmaraghy, State of Ohio).

115 EPA, THE STATES' CHOICE: 404 PERMIT PROGRAM 1 (1980).

Statewide Water Supply Initiative ("SWSI").[116] SWSI, published in 2004, spotlighted Colorado's looming water supply gap.[117] Russell George, then Director of the Department of Natural Resources (which houses CWCB), could see that addressing this growing challenge would require more collaboration than that traditionally employed under Colorado's prior appropriation system of allocating water.

In 2005, Director George led efforts to pass the "Colorado Water for the 21st Century Act,"[118] which created ten stakeholder bodies, comprised of one Interbasin Compact Committee[119] ("IBCC") and nine river basin roundtables.[120] The law established a collaborative framework for these stakeholder groups to help address Colorado's future water challenges by assessing consumptive and nonconsumptive water needs, quantifying water supplies, and identifying projects and methods to address anticipated water demands.[121]

In 2013, Governor John Hickenlooper tapped into the framework George helped establish by issuing an executive order ("Executive Order D 2013-005") directing CWCB to create the state's first water plan.[122] The Colorado Water Plan[123] was to provide a collaborative and balanced response to Colorado's water supply challenge, which was growing more

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116 REBECCA MITCHELL, THE COLORADO WATER PLAN PAST, PRESENT, AND FUTURE 26 (Colo. Water Center, Colo. State Univ. 2021).

117 *Id.*; COLORADO WATER PLAN, *supra* note 95, at 1–6.

118 COLO. REV. STAT. §§ 37-75-101 to 37-75-106 (West 2017) (also known as House Bill 1177).

119 § 37-75-105.

120 § 37-75-104.

121 COLO. DEP'T OF NAT. RES., BASIN IMPLEMENTATION PLANNING OVERVIEW (2012), https://dnrweblink.state.co.us/cwcb/0/doc/174027/Electronic.aspx?searchid=a2a35f09-93f1-4946-a58a-213fcb217d11; *see also* MITCHELL, *supra* note 116, at 27 ("The [Basin Implementation Plans] used data to examine each basin's future water needs. They also identified projects and strategies for addressing those needs. The grassroots approach of the basin roundtables and the IBCC, combined with CWCB's commitment to collaboration, engaged hundreds of stakeholders across diverse sectors and regions, enabling citizens in each basin to share their vision for Colorado's water future.").

122 Exec. Order No. D 2013-005 Directing the Colorado Water Conservation Board to Commence Work on the Colorado Water Plan [hereinafter Exec. Order D 2013-005]; *see id.* at 4 ("In drafting the Colorado Water Plan, the CWCB is directed to utilize the Interbasin Compact Committee and the Basin Roundtables. The CWCB is also directed to review and build upon discussions and points of consensus that have emerged as part of the Interbasin Compact Committee and Basin Roundtable processes so as to capitalize on the momentum generated by these grassroots efforts.").

123 *See* COLORADO WATER PLAN, *supra* note 95.

urgent due to drought, wildfire, flooding, climate change, and unprecedented population growth.[124]

The Water Plan, described as the "largest civic engagement process" in the state's history,[125] was finalized in 2015. It creates a living roadmap for addressing water supply issues in a way "that leads to a productive economy, vibrant and sustainable cities, productive agriculture, a strong environment, and a robust recreation industry."[126] The Water Plan acknowledges that a major component of addressing Colorado's future water supply gap, which could potentially exceed 500,000 acre feet by 2050,[127] will be new storage.[128] This, of course (along with many other aspects of water management), frequently implicates CWA Section 404 permitting.

Recognizing the significant influence permitting would have on Colorado's water challenges, Governor Hickenlooper directed the CWCB to "align the state's role in water project permitting and review processes with the water values included in the [Water Plan] and to streamline the state role in the approval and regulatory processes regarding water projects."[129] CWCB addressed this directive in Section 9.4 of the Water Plan, which is entitled "Framework for a More Efficient Permitting Process."

Section 9.4 sought to "explore how permitting in Colorado can be more effective and efficient."[130] Implicit in both goals is consistency. The following addresses these Water Plan components.

a. Consistency

For more than forty years, three separate Corps regulatory districts (Albuquerque, Sacramento, and Omaha) administered the CWA Section 404 program in separate geographic areas across Colorado.[131] This segmentation can create inconsistencies and confusion across the state in the permitting process and associated program administration. Recognizing this, in December 2020 the Corps announced its intention to eliminate the

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124 *Id.* at 1-1. The Plan notes that Colorado's population grew from 1 million in 1930 to more than 5 million in 2015 and could almost double by 2050. *Id.* at xvii.

125 *Id.* at xvii.

126 *Id.*

127 *Id.* at 1-9.

128 *See, e.g.*, *id.* at 6-145.

129 Exec. Order D 2013-005, *supra* note 122, at 3.

130 COLORADO WATER PLAN, *supra* note 95, at 9–34.

131 U.S. Army Corps of Eng'rs, SPK-2020-00005, U.S. Army Corps of Engineers Regulatory Program in the State of Colorado (Dec. 17, 2020), https://www.spk.usace.army.mil/Media/Regulatory-Public-Notices/Article/2451036/spk-2020-00005-us-army-corps-of-engineers-regulatory-program-in-the-state-of-co/.

Sacramento District's Section 404 mission in Colorado and consolidate administration of the program in the Albuquerque and Omaha Districts, effective May 16, 2021.[132]

While an improvement, two separate Corps districts—both located outside the state—continue to administer the Section 404 program in Colorado. Colorado's assumption of the Section 404 program would eliminate this segmentation and facilitate clear and consistent program administration across the state.

b. Efficiency

Commenters often identify increased program efficiency, and resulting time and cost savings for permit applicants, as a primary benefit of state assumption.[133] This would be a more obvious result, however, in a state that already has an extensive wetland regulatory program in place that effectively creates a double layer of regulation.[134] Colorado does not currently have such a program.

Nonetheless, when a state assumes authority under CWA Section 404(g), it administers all program elements in lieu of the Corps program. This includes issuing permits, making jurisdictional determinations, processing permitting exemptions, enforcing the program, and managing mitigation requirements (including creating mitigation banks and in-lieu fee programs).[135] So, while state assumption would not eliminate a duplicative permitting process in Colorado, these program components provide significant opportunities to create process efficiencies.

For example, assumption would create the opportunity to more efficiently address the complexities that Colorado's water rights administration system often injects into Section 404 matters. These issues can be particularly challenging in the context of assessing the impacts of proposed water infrastructure projects, which typically trigger Section 404 and are contemplated by the Water Plan.[136] Assessing such impacts typically requires a deep understanding of the underlying project water rights

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132 *Id.*

133 *See* AILEEN A. CARLOS, THE TROUBLE WITH ASSUMPTIONS: AN ANALYSIS OF THE ONGOING STRUGGLES WITH §404 ASSUMPTION 7 (Sept. 2014) (M.S. Thesis, University of Oregon).

134 *See* THE ASS'N OF STATE WETLAND MANAGERS, INC. AND THE ENV'T COUNCIL OF THE STATES, CLEAN WATER ACT SECTION 404 PROGRAM ASSUMPTION, A HANDBOOK FOR STATES AND TRIBES 2 (2011) [hereinafter ASSUMPTION HANDBOOK]; MINNESOTA FEASIBILITY STUDY, *supra* note 25, at 2.

135 *See Subcommittee Hearing*, *supra* note 89, at 5; ASSUMPTION HANDBOOK, *supra* note 134, at 5.

136 *See* COLORADO WATER PLAN, *supra* note 95, at 6-145 to 6-152.

(which can be numerous), project operations, how and when available water rights will be used in the project, and how the project will interact with other water management efforts in the basin.

Water rights issues can also complicate compensatory mitigation efforts, both with respect to permittee-responsible mitigation, and in the establishment of mitigation banks or in-lieu fee programs.[137] For example, creating compensatory wetlands in any of these contexts can deplete or retime flows in adjacent streams and thereby injure downstream water rights.

To be sure, state assumption would not remove water rights issues from Section 404 program administration, but it would enable the Colorado Office of the State Engineer to work directly with sister state agencies to help resolve them. The State Engineer, among other things, administers water rights, monitors streamflow and water use, approves construction and repair of dams, and maintains numerous databases of Colorado water information.[138] While the Corps, often with the assistance of third-party consultants or project proponents, can work its way through state water rights issues, coordination between expert state agencies, at least in theory, should provide a more efficient avenue.

State assumption would also significantly change permitting requirements, creating additional opportunities for procedural efficiencies. Perhaps most notably, assumption would eliminate certain elements of the federal Section 404 permitting process that often consume considerable time and resources. For instance, state Section 404 permits would not require CWA Section 401[139] water quality certification, since that process applies only to federally issued permits. (CWA Section 401 empowers a state to ensure that federally issued permits comply with state water quality requirements through a certification process that allows the state to approve, conditionally approve, or even reject a proposed federal permit.)[140]

The state would still require some mechanism to ensure that permitted activities meet water quality standards, but that process would be coordinated within or among state agencies. For larger projects, this coordination should make it easier to perform the certification analysis

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137 Corps regulations generally require a project proponent to mitigate unavoidable impacts to jurisdictional aquatic resources by creating or improving similar resources. The regulations establish three compensatory mitigation mechanisms: (1) mitigation provided by the permittee; (2) acquisition of credits from mitigation banks; or (3) acquisition of credits from in-lieu fee programs. 33 C.F.R. § 332.1.

138 *See* COLO. DEP'T OF NAT. RES., DIVISION OF WATER RES., https://dnr.colorado.gov/divisions/division-of-water-resources (last visited Oct. 4, 2021).

139 *See* 33 U.S.C. § 1341(a)(1).

140 *Id.; see also infra* notes 202–08 and accompanying text.

concurrently with other aspects of the permitting process, saving considerable time for the permittee while also giving the state ample time to complete its water quality analysis.[141]

Similarly, only federal actions trigger review under NEPA.[142] Congress passed NEPA, in part, to eliminate or curb environmental degradation and integrate environmental considerations into agency decision making.[143] Among other things, NEPA requires federal agencies to analyze the environmental impacts of certain projects they authorize, and to identify potential alternatives to such projects.[144] While Corps-issued permits can trigger NEPA review, NEPA would not capture a Section 404 permit issued by an authorized state.

However, for EPA to approve a state's Section 404 assumption application, the state must establish its ability to comply with[145] the CWA Section 404(b)(1) Guidelines.[146] The Guidelines include a detailed alternatives analysis and effects review that varies in intensity based on the nature of the proposed project.[147] So, despite the absence of NEPA review, the state permitting process would retain an alternatives analysis component. Coordination among state agencies, however, should make this analysis more efficient.

Commenters also note that state program assumption would eliminate consultation under ESA Section 7 for proposed projects.[148] As discussed above, while it is true that state-issued permits do not trigger ESA Section 7 consultation,[149] state assumption does not eliminate threatened and endangered species considerations for a given project. However, the

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141 Courts have recently restricted a state's ability to extend the period for completing its Section 401 certification reviews. *See* Hoopa Valley Tribe v. Fed. Energy Regul. Comm'n, 913 F.3d 1099, 1103-06 (D.C. Cir. 2019), *cert. denied* 140 S. Ct. 650 (2019). Moreover, EPA finalized a rule that, among other things, reinforced the underlying statutory timeline for review. 85 Fed. Reg. 42,210 (July 13, 2020) (to be codified at 40 C.F.R. pt. 121).

142 *See* 42 U.S.C. § 4332(C).

143 *See* NICHOLAS C. YOST, NEPA DESKBOOK, ENVIRONMENTAL LAW INSTITUTE 5 (2nd ed. 1995).

144 *See* 42 U.S.C. §§ 4332(C)(i)–(iii).

145 33 U.S.C. § 1344(h)(1)(A)(i).

146 40 C.F.R. § 230.2.

147 *See* § 230.10.

148 *See*, *e.g.*, Lance D. Wood, *The ECOS Proposal for Expanded State Assumption of the CWA §404 Program: Unnecessary, Unwise, and Unworkable*, 31 NAT'L WETLANDS NEWSLETTER 13–17 (Env't L. Inst., May–June 2009), https://elr.info/sites/default/files/wood.pdf.

149 *Id.* at 17. *See also Subcommittee Hearing*, *supra* note 89, at 160; Letter from Peter S. Silva, EPA Assistant Adm'r to R. Stephen Brown, ECOS, and Jeanne Christie, ASWM (Dec. 27, 2010) (on file with author).

approach EPA took on ESA matters for Florida's recent program assumption creates significant potential for permitting efficiencies for projects potentially impacting threatened and endangered species.[150]

Like the forgoing ancillary federal requirements, an application for a Corps Section 404 permit in Colorado can also trigger an important state requirement. Colorado law requires the applicant for certain water diversion, delivery, or storage projects to provide CWCB, the Parks and Wildlife Commission, and the Division of Parks and Wildlife a proposal for mitigating anticipated impacts to fish and wildlife resources.[151] Only an application for a federal permit, license, or other approval, however, triggers this provision.[152]

The plan that eventually results from this requirement becomes the official state position on mitigation for the project, which the state then communicates to each governmental agency required to approve the project.[153] As such, the mitigation plan, along with the process required to develop it, comprises a substantial component of the current Section 404 permitting process for certain projects in Colorado.[154] Under a Colorado assumed program, an amended version of this statute could provide a useful vehicle for integrating mitigation and enhancement requirements into a coordinated permitting process.

Finally, Section 9.4 of the Water Plan contains a lengthy discussion about how to achieve a more efficient permitting process. It concludes with a list of common concepts identified by the IBCC and basin roundtables for permitting process improvements, including: (1) improving coordination of review efforts by various state agencies; (2) increasing early involvement by the state in the permitting process; (3) coordinating technical methods among state agencies; (4) increasing state resources necessary to complete environmental reviews; and (5) encouraging multipurpose projects.[155] Section 404 program assumption would give Colorado procedural control over the permitting process, allowing the state to facilitate or establish all the foregoing concepts.

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150 *See supra* notes 60–87 and accompanying text.

151 COLO. REV. STAT. § 37-60-122.2.

152 *Id.*

153 *Id.*

154 *See generally* NORTHERN WATER, NORTHERN INTEGRATED SUPPLY PROJECT FISH AND WILDLIFE MITIGATION AND ENHANCEMENT PLAN (2017), https://www.northernwater.org/getattachment/7bed97a0-4a1c-45fa-8c6c-b5374f1c0eb3/2017_State_Fish_and_Wildlife_Mitigation_and_Enhancement_Plan.pdf; DENVER WATER, MOFFAT COLLECTION SYSTEM PROJECT FISH AND WILDLIFE MITIGATION PLAN (2011), https://www.yumpu.com/en/document/read/19421644/moffat-collection-system-project-mitigation-plan-6-9-11-colorado-.

155 COLORADO WATER PLAN, *supra* note 95, at 9-39 to 9-43.

Finally, Colorado could achieve additional efficiencies in overall program administration by establishing timelines for things like jurisdictional determinations and enforcement protocols. Many such efficiencies would, of course, relate directly to the level of resources the state commits to the task.

c. Effective—More Colorado Centric

A state program need not be identical to the federal program. It must simply assure an equivalent level of protection of the resource.[156] This provides some flexibility for Colorado to create a program more suited to its specific needs—more "Colorado centric." It also creates an opportunity for all stakeholders—the state, environmental interests, and the regulated community—to gain something by collaborating on program assumption.

For example, the state may wish to exercise more autonomy in developing functional assessment methods specific to Colorado's aquatic resources.[157] The state may likewise wish to customize a wetlands delineation manual for Colorado's climate and topography. Colorado could also explore general permits that allow quicker and more effective responses to damage caused by flood or wildfire. Such steps could help focus resources more effectively and better tailor the program to the needs of the aquatic resources and the people of Colorado.

The environmental community may wish to see increased protection for certain aquatic resources that provide significant ecological benefits,

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156 *See* ASSUMPTION HANDBOOK, *supra* note 134, at 21–24.

157 Functional assessment in this context refers to a method of measuring the ecological function of a wetland, stream, or other aquatic feature to determine, for example, the mitigation required to compensate for a project's impact, or to determine the number of credits generated by a mitigation bank or in lieu fee program. *See, e.g.*, 33 C.F.R. § 332.8(o). In a notice dated Sept. 29, 2020, the Corps announced its approval of the Colorado Stream Quantification Tool v1.0 for the functional assessment of streams in Colorado. U.S. Army Corps of Eng'rs, *Albuquerque, Omaha, and Sacramento Districts, Special Public Notice: Colorado Stream Quantification Tool v1 Approved for Use* (Sept. 29, 2020), https://www.spa.usace.army.mil/Missions/Regulatory-Program-and-Permits/Public-Notices/Article/2365078/special-public-notice-colorado-stream-quantification-tool-v1-approved-for-use/; Anecdotally, many in the mitigation community have questioned the suitability of this tool for Colorado streams. Moreover, this tool reduces the number of stream credits available to mitigation banks compared to prior quantification tools. COLO. STATE LAND BD. FY 2019-20 ECOSYSTEM SERVICES BUSINESS PLAN READOUT (Sept. 2020). On the other hand, the Colorado Department of Transportation was active in developing the Functional Assessment of Colorado Wetlands (FACWet) Method User Manual – Version 3.0 (Apr. 2013), which the Corps uses for Section 404 permitting in Colorado. COLO. DEP'T. OF TRANSP., FUNCTIONAL ASSESSMENT OF COLORADO WETLANDS (FACWET) METHOD: USER MANUAL – VERSION 3.0 (2013), https://codot.gov/programs/environmental/wetlands/assets/facwet-version-3-manual.

but which are not currently protected under the Corps' program. For instance, irrigation practices and related infrastructure have created numerous wetlands in Colorado. Some of these areas are quite extensive. One study found that water from irrigation practices and related infrastructure sustains about ninety percent of the wetlands existing within the service area of a large Front Range irrigation company.[158] Longstanding Corps practice has excluded such areas from CWA coverage.[159]

Colorado may wish to consider providing incentives for (as opposed to imposing regulatory mandates on) landowners to protect these wetlands. It may make similar sense to protect other high-value aquatic features such as isolated fens, which can also lack protection under the current Corps Section 404 program.[160]

Regulated interests, particularly the agricultural sector, could gain more efficiency and certainty in the context of the permitting exemptions contained in CWA Section 404(f).[161] These permitting exemptions, added by Congress in the 1977 amendments,[162] apply to narrowly defined activities that, individually and cumulatively, cause little or no adverse effect on aquatic resources.[163] Section 404(f) contains a recapture provision that, under certain circumstances, requires a permit for an otherwise exempt activity.[164]

Determining whether a given activity qualifies for a permitting exemption (and escapes recapture) can be tricky and time-consuming. Guessing wrong can subject one to enforcement. The state could clarify and streamline the process by establishing standard practices that, if

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158 Jeremy P. Sueltenfuss et al., *The Creation and Maintenance of Wetland Ecosystems from Irrigation Canal and Reservoir Seepage in a Semi-Arid Landscape*, 33 WETLANDS 799, 799–809 (2013), https://doi.org/10.1007/s13157-013-0437-6.

159 Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,205, 41,217 (Nov. 13, 1986).

160 *See* Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 194–96 (2001) (regarding the lack of CWA jurisdiction over isolated wetlands).

161 *See* 33 U.S.C. § 1344(f).

162 Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566.

163 *See* U.S. v. Akers, 785 F.2d 814, 819 (9th Cir. 1986) (quoting Senator Muskie during the Senate debate: "New subsection 404(f) provides that Federal permits will not be required for those narrowly defined activities that cause little or no adverse effects either individually or cumulatively. While it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.").

164 33 U.S.C. § 1344(f)(2).

followed, would ensure that a project qualifies for a given exemption.[165] This would also help focus resources on activities of most concern.

Perhaps most significantly for all stakeholders, the Colorado Water Plan identifies certain values that will drive Plan implementation. Broadly stated, these values encompass: (1) a productive economy that supports cities, agriculture, recreation, and tourism; (2) efficient and effective water infrastructure; and (3) a strong and healthy environment.[166] Executive Order D 2013-005 directed CWCB to align the state's water project permitting role with these values and to "place an emphasis on expediting permitting processes for projects" that promote such values.[167]

Section 9.4 of the Water Plan provides a framework for how the state would support a proposed water project.[168] An assumed Section 404 program would facilitate implementation of this framework and empower Colorado to encourage projects that align with Water Plan values.

State assumption might even allow Colorado to push program customization a step further. Under the Section 404(b)(1) Guidelines as applied in the individual permitting context,[169] the Corps must not only evaluate the impact of a proposed project, but also the impacts of practicable alternatives to that project. In the end, the Corps can only permit the least environmentally damaging practicable alternative[170] (commonly referred to as the "LEDPA"), which may not be the proposed project.

It was once the Corps' practice to consider compensatory mitigation offered by a project proponent when deciding which alternative constitutes the LEDPA.[171] This allowed the project proponent to tilt the LEDPA analysis in favor of its preferred alternative.

In contrast, EPA interpreted the 404(b)(1) Guidelines to require "sequencing." Sequencing compels a project proponent to first avoid impacts to aquatic resources, then to minimize any unavoidable impacts, and

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165 Notably, EPA and the Corps tried something similar through an "Interpretive Rule" that sought to clarify application of the agricultural permitting exemptions based on certain Natural Resources Conservation Service practice standards. 79 Fed. Reg. 22,276 (Apr. 21, 2014). Following objections from the agricultural community, the agencies withdrew the rule. 80 Fed. Reg. 6705 (Feb. 6, 2015). Obviously, any similar effort by Colorado would need to understand and address the agricultural community's concerns.

166 COLORADO WATER PLAN, *supra* note 95, at 10-3 to 10-4.

167 Exec. Order D 2013-005, *supra* note 122, at 3–4.

168 COLORADO WATER PLAN, *supra* note 95, at 9-34 to 9-52.

169 The CWA also authorizes the Corps to issue permits of general applicability for projects having minimal cumulative adverse effects on the environment. 33 U.S.C. § 1344(e).

170 40 C.F.R. § 230.10(a).

171 Margot Zallen, *The Mitigation Agreement – A Major Development in Wetland Regulation*, 7 NAT. RES. & ENV'T 1, 19–20 (Summer 1992).

finally, to address unavoidable impacts through compensatory mitigation.[172] Sequencing focuses the LEDPA analysis on avoiding impacts to aquatic resources.

This interagency dispute played out in the 1980s during the Corps' permitting of Denver Water's proposed Two Forks Dam, and EPA's subsequent veto of the Corps' permit for that project.[173] The agencies ultimately resolved their differences in a memorandum of agreement that established the sequencing requirement[174] and the related principle that a project proponent cannot "mitigate its way to the LEDPA" ("Mitigation MOA").[175] A federal district court subsequently upheld this approach in a challenge to EPA's veto of the Two Forks Dam permit.[176]

Notwithstanding, the Mitigation MOA "does not have the force and effect of law,"[177] and Colorado would likely have some flexibility in applying sequencing within its own assumed program. The state may wish to allow certain innovative multipurpose projects to use compensatory mitigation to achieve LEDPA status—for example, those that can demonstrate significant functional lift through proposed mitigation and enhancement, further the principles of the Water Plan, and increase municipal, industrial, agricultural, environmental, and recreational values.[178]

While some may question whether Colorado will see the construction of many more large water infrastructure projects in the coming years, the benefits of state assumption would extend well beyond the universe of new

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172 *See id.* at 21.

173 *See* Alameda Water & Sanitation Dist. v. Reilly, 930 F. Supp 486, 488–90 (D. Colo. 1996); Zallen, *supra* note 171, at 19.

174 *See* EPA AND U.S. DEP'T OF THE ARMY, MEMORANDUM OF AGREEMENT BETWEEN THE ENVIRONMENTAL PROTECTION AGENCY AND THE DEPARTMENT OF THE ARMY CONCERNING THE DETERMINATION OF MITIGATION UNDER THE CLEAN WATER ACT SECTION 404(B)(1) GUIDELINES 1 (1990).

175 *Id.* at 4.

176 Alameda Water, 930 F. Supp. at 492–93.

177 Coeur D'Alene Lake v. Kiebert, 790 F. Supp. 998, 1009 (1992). The court further characterized the Mitigation MOA as "simply a statement of goals for the agencies to strive for in the interpretation and administration of the Clean Water Act and the administrative guidelines under Section 404."

178 *See e.g.*, COLORADO WATER PLAN, *supra* note 95, at 9-42 (referencing the encouragement of multi-benefit projects). Basin Implementation Plan suggestions for improving the effectiveness of the permitting process specifically included revising the Mitigation MOA to allow a project proponent to mitigate its way to the LEDPA. *Id.* at 9-52. *See also* Caitlin Coleman, *Shaped by Storage: The How and Why of Storing Water in Colorado*, HEADWATERS (Spring 2021), https://www.watereducationcolorado.org/publications-and-radio/headwaters-magazine/spring-2021-storage/shaped-by-storage-the-how-and-why-of-storing-water-in-colorado/ (comments by Russ Sands, Chief, CWCB Water Supply Section, regarding the need for smart, multipurpose storage projects).

projects. Colorado could also apply these principles to Section 404 permitting required to enlarge, repurpose, reconstruct, reoperate, and maintain existing projects.

d. Integration of Water Quality and Quantity

Executive Order D 2013-005 recognizes the interconnectedness of water quality and quantity, declaring that these issues "can no longer be thought of separately," and that Colorado's "water policy should address them conjunctively."[179] The Water Plan addresses this issue in Section 7.3, where it proclaims that better integration of water quality and quantity planning and management will be "critical" and will require "on-going dialogue with all Coloradans and collaboration at all levels of government."[180]

Where Section 404 permitting involves water quantity management activities, a state assumed program would help integrate water quality concerns by bringing the "on-going dialogue" and the "collaboration at all levels of government" wholly within the province of the state government. This coordination would have the added benefit of occurring outside of the CWA Section 401 water quality certification process, which, as recently demonstrated, is subject to disruption by case law and changing political winds at the federal level.[181]

3. A Desire for Increased Regulatory Program Stability

State program assumption offers a measure of program stability in the face of federal program oscillation resulting from administration changes and evolving case law. For example, Michigan's Section 404 program requirements have remained somewhat more stable and predictable than the Corps-administered program since the Michigan program relies on state, rather than federal law. Thus, changes at the federal level do not impact Michigan's program unless they render the state program less protective than the federal program.[182] Conversely, Michigan must also ensure that any change to state law maintains consistency with federal requirements. This tension tends to curb changes at the state level, which also promotes program stability.[183]

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179 Exec. Order D 2013-005, *supra* note 122, at 3.

180 COLORADO WATER PLAN, *supra* note 95, at 7-17.

181 *See* Hoopa Valley Tribe v. Fed. Energy Regul. Comm'n, 913 F.3d 1099, 1100–101 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 650 (2019); Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210, 42,210 (July 13, 2020).

182 *Expanding the States' Role*, *supra* note 89, at 9.

183 *Id.*

Perhaps no issue better illustrates federal program instability resulting from regulatory changes and evolving case law than that created by the continual attempts to articulate the CWA's jurisdictional reach. Congress declared that the CWA applies to "waters of the United States," and left EPA, the Corps, and the courts to decipher exactly what that means. Almost fifty years later, it remains in dispute.

United States Supreme Court opinions in 1985 ("*Riverside Bayview Homes*"),[184] 2001 ("*SWANCC*"),[185] and 2006 ("*Rapanos*")[186] did disappointingly little to solve the problem. In fact, *Rapanos*, a 4-1-4 plurality opinion, simply added to the confusion.[187]

In 2008, EPA and the Corps issued guidance to EPA regions and Corps districts on how to apply *Rapanos* in the field.[188] Applying the guidance was often a cumbersome process involving case-by-case jurisdictional determinations that were time-consuming and inconsistent across the country. This prompted requests by diverse interests for a new regulation defining CWA jurisdiction.[189]

The Obama administration responded with its Clean Water Rule,[190] which largely implemented the "significant nexus" principles from Justice Kennedy's *Rapanos* opinion.[191] The Clean Water Rule was decried as an

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184 U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 139 (1985) (addressing the jurisdictional status of wetlands abutting navigable waters).

185 Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs**,** 531 U.S. 159, 168–69 (2001) (addressing the jurisdictional status of isolated wetlands).

186 Rapanos v. U.S., 547 U.S. 715, 746–55 (2006) (addressing the jurisdictional status of wetlands abutting waters that are not navigable-in-fact).

187 *See e.g.*, Helen Thigpen, *The Plurality Paradox*: Rapanos v. U.S*. and the Uncertain Future of Federal Wetlands Protection*, 28 PUB. LAND & RES. L. REV. 89, 90 (2007) ("the Court's complicated 4-1-4 split decision in *Rapanos* did not, by any measure, end the debate over the scope of the CWA.").

188 E.P.A., CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN RAPANOS V. UNITED STATES & CARRABELLE V. UNITED STATES 1 (Dec. 2, 2008).

189 Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12,532, 12532 (Mar. 6, 2017).

190 Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37,054, 37,054 (June 29, 2015).

191 *See id.* at 37,056.

egregious federal overreach[192] and immediately challenged in court.[193] As a result, the rule never went into effect in many states.[194]

President Trump wasted no time entering the fray, issuing an executive order weeks after taking office that directed EPA and the Corps to, among other things, rescind or revise the Clean Water Rule.[195] The agencies ultimately responded by issuing the Navigable Waters Protection Rule ("NWPR") in April 2020,[196] which was based on Justice Scalia's opinion in *Rapanos*. Many states[197] and environmental interests[198] quickly challenged the NWPR for reducing CWA jurisdiction to levels not seen in decades.

On his first day in office, President Biden rescinded the Trump executive order with one of his own.[199] The Biden administration will be the third consecutive administration to pursue a rulemaking to define the CWA's reach.[200]

With little chance of a legislative fix in today's political climate, it seems this regulatory whiplash will continue indefinitely. In the meantime, a regulated entity must base its planning on a crystal ball reading of what its obligations might be at the time of project implementation.

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192 Former Speaker of the House John Boehner summed up how many opponents viewed the final rule:

> The administration's decree to unilaterally expand federal authority is a raw and tyrannical power grab that will crush jobs. . . . [T]he rule is being shoved down the throats of hardworking people with no input, and places landowners, small businesses, farmers and manufacturers on the road to a regulatory and economic hell.

Jenny Hopkinson, *Obama's Water War*, POLITICO (May 27, 2015), https://www.politico.com/story/2015/05/epa-waterways-wetlands-rule-118319.

193 *See, e.g.*, North Dakota v. EPA, 127 F. Supp. 3d 1047, 1051–52 (D.N.D. Aug. 27, 2015).

194 *Id.* at 1060.

195 Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ''Waters of the United States'' Rule, Exec. Order 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017).

196 The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020).

197 *See* Cal. v. Wheeler, 467 F. Supp. 3d. 864, 869–71 (N.D. Cal. 2020).

198 *See* S.C. Coastal Conservancy League v. Regan, No. 2:20-CV-01687 (D. S.C. July 15, 2021).

199 Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Exec. Order 13,990, 86 Fed. Reg. 7037, 7041 (Jan. 25, 2021).

200 *See* 86 Fed. Reg. 41,911, 41,911 (Aug. 4, 2021). *See also EPA, Army Announce Intent to Revise Definition of WOTUS*, EPA (June 9, 2021), https://www.epa.gov/news-releases/epa-army-announce-intent-revise-definition-wotus [hereinafter *WOTUS Press Release*].

Similar regulatory uncertainty does not extend to Colorado entities subject to the CWA Section 402 program. Colorado administers its own Section 402 program and applies it to "State Waters," as opposed to "waters of the United States." Colorado defines "State Waters" as:

> . . . any and all surface and subsurface waters which are contained in or flow in or through this state, 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.[201]

This definition extends jurisdictional coverage for Colorado's Section 402 program to essentially every water in the State—including groundwater. Thus, changes in federal CWA jurisdiction have no impact on this program.

A Colorado-administered Section 404 program would not have quite the same stabilizing effect, since its jurisdictional reach would almost certainly be less than all State Waters. For example, it would make little sense to apply Section 404 program requirements to groundwater. To exclude groundwater (as well as certain other waters), a Colorado Section 404 program could use something other than State Waters to define its reach, or it could carve exclusions from the term as it applies to the state's 404 program. In doing so, Colorado could better tailor its program to meet specific state needs while still providing some buffer to volatility at the federal level.

A state Section 404 program can also provide stability in the context of CWA Section 401 water quality certification. Section 401[202] provides states an important tool for ensuring the quality of federally protected waters within their borders. It prohibits a federal agency from issuing a license or permit for any discharge into waters of the United States absent certification by the state within which the discharge originates that the activity will comply with that state's water quality standards (unless the state waives its right to issue the certification).[203]

Courts have recently restricted a state's ability to extend the period for completing its Section 401 certification review.[204] Moreover, in July

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201 COLO. REV. STAT. § 25-8-103(19).

202 33 U.S.C. § 1301.

203 §1301(a)(1).

204 *See* Hoopa Valley Tribe v. Fed. Energy Regul. Comm'n, 913 F.3d 1099, 1101 (D.C. Cir. 2019), *cert. denied* 140 S. Ct. 650 (2019); *but cf.* North Carolina Dep't of Env't Quality v. Fed. Energy Regul. Comm'n, 3 F.4th 655, 667 (4th Cir., July 2, 2021) (distinguishing *Hoopa Valley* and holding that a review period extension by the North Carolina Department of Environmental Quality did not waive the state's 401 certification rights).

2020, EPA finalized a rule intended to check a state's Section 401 authority by limiting the scope of, and timeline for, Section 401 review.[205] Colorado joined several other states in a lawsuit challenging the final rule.[206] Section 404 program assumption would greatly reduce Colorado's concerns about Section 401 rule amendments since Section 401 does not apply to state-issued permits,[207] and Colorado issues most 401 certifications in the Section 404 context.[208]

4. The Steady Influence of Cooperative Federalism

Many of the country's environmental statutes employ a cooperative federalism approach.[209] Under this approach, Congress passes a law, a federal agency implements the law through minimum standards, and states can seek authorization or delegation to administer programs to achieve and maintain such standards.[210]

States have enthusiastically embraced this role, assuming over ninety-six percent of the delegable authorities under federal law.[211] In this respect, the CWA Section 404 program is an outlier, though not for lack of interest. At least twenty-four states have evaluated assumption to some degree.[212] Some have done so multiple times.[213]

Congress' declaration in the CWA that it intends for states to assume the Section 404 program establishes significant incentive to remove

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205 Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020). To continue the theme of dueling rules, the Biden administration has announced its intent to reconsider and revise the Trump administration CWA Section 401 Certification Rule. Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 Fed. Reg. 29,541, 29,543 (June 2, 2021).

206 Cal. v. Wheeler, No. 3:20-cv-4869 (N.D. Cal., July 21, 2020).

207 *See supra* notes 139–41 and accompanying text.

208 *See* COLO. DEP'T OF PUB. HEALTH & ENV'T, INTEGRATED WATER QUALITY MONITORING & ASSESSMENT REPORT 62–63 (2020), https://static1.squarespace.com/static/53f664ede4b032c1fade347d/t/5f10a908c10dc827fe58e949/1594927381446/2020+Integrated+Water+Quality+Monitoring+and+Assessment+Report_03.02.2020.pdf.

209 *See supra* note 12.

210 ENVIRONMENTAL COUNCIL OF STATES, COOPERATIVE FEDERALISM 2.0: ACHIEVING AND MAINTAINING A CLEAN ENVIRONMENT AND PROTECTING PUBLIC HEALTH 2 (June 2017), https://www.ecos.org/wp-content/uploads/2017/06/ECOS-Cooperative-Federalism-2.0-June-17-FINAL.pdf [hereinafter COOPERATIVE FEDERALISM 2.0].

211 *Id.*

212 STATUS AND TRENDS REPORT ON STATE WETLAND PROGRAMS IN THE UNITED STATES, *supra* note 24, at 29.

213 MINNESOTA FEASIBILITY STUDY, *supra* note 25, at iv.

remaining barriers to assumption. As long-standing barriers disappear, states will show renewed interest.

Florida is a good example, and its recent action will inspire others. A former EPA official noted that "another five to 10 states . . . are extremely interested in taking on the [Section 404] program now that [the] path has been laid down for them."[214]

While it may be tempting to view this renewed interest as a soon-to-fade vestige of the former Trump administration, it was the Obama administration that established the Assumable Waters Subcommittee, whose recommendations removed one of the most problematic barriers to Section 404 program assumption. In fact, interest in Section 404 program assumption may be further energized by state-driven evolution in the state-federal relationship.[215]

In 2017, the Environmental Council of States, a national nonpartisan association of state environmental agency leaders, issued a paper calling for "Cooperative Federalism 2.0," based on the belief that a "recalibration of state and federal roles can lead to more effective environmental management at lower cost."[216] (Martha Rudolph, then Director of Environmental Programs at the Colorado Department of Public Health & Environment, signed the paper.) In part, this call reflects an enhanced state competency—one gained by almost fifty years of experience administering complicated environmental regulatory programs.

The recalibrated relationship, among other things, would recognize that states have taken on the primary environmental protection responsibilities for the country, and that the federal government's role should, accordingly, be more supportive and less prescriptive. Specifically, the federal government should, through technical and financial support, encourage states to seek innovative ways to achieve national minimum standards through methods that account for their "unique geophysical, ecological, social, and economic conditions."[217]

This recalibration request clearly recognizes that the next fifty years of environmental regulation in this country will differ considerably from the past fifty years. A more tailored and efficient approach should not only

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214 Hannah Northey, *EPA Water Chief Hoped for 'Mild Disappointment' on WOTUS*, E&E NEWS (Jan. 21, 2021), https://subscriber.politicopro.com/article/eenews/2021/01/21/epa-water-chief-hoped-for-mild-disappointment-on-wotus-006344.

215 *See* ENV'T LAW INST., THE MACBETH REPORT: COOPERATIVE FEDERALISM IN THE MODERN ERA 10 (Oct. 2018), https://www.eli.org/sites/default/files/eli-pubs/macbeth-report.pdf.

216 COOPERATIVE FEDERALISM 2.0, *supra* note 210, at 2.

217 *Id.* at 3–4.

be more effective in addressing today's environmental challenges, it should also generate broader public support.

B. How a Potential Colorado "Gap Filler" Dredge and Fill Program Relates to State Section 404 Program Assumption

Of course, the best time to effect change is before it is needed. That may not be possible for Colorado in the context of Section 404 program assumption. Recent developments have made things a bit messy.

As noted above, the Trump administration issued its NWPR on April 21, 2020.[218] Many see the rule as a significant rollback of federal protection for waters across the country,[219] particularly due to its exclusion of ephemeral waters.[220] Moreover, this reduction may be more pronounced in Southwestern states like Colorado that have numerous ephemeral and intermittent streams.[221]

Concerned about its potential impact on the state's aquatic resources, Colorado filed suit on May 22, 2020 in the Federal District Court of Colorado to overturn the new rule.[222] The court granted a stay of the rule on June 19, 2020, preventing it from taking effect in Colorado three days before it was scheduled to do so.[223] Less than a year later, however, the United States Court of Appeals for the Tenth Circuit vacated the stay.[224] Until then, Colorado was the only state in the country in which the NWPR did not apply.[225]

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218 *See supra* note 196 and accompanying text.

219 *See, e.g.*, Colo. v. EPA, 989 F.3d 874, 882 (10th Cir. 2021) ("the rule undisputedly represents a significant reduction in the scope of jurisdiction the Agencies have asserted in the past"); *WOTUS Press Release*, *supra* note 200 ("the [NWPR] has resulted in a 25 percentage point reduction in determinations of waters that would otherwise be afforded protection").

220 *See, e.g.*, Ariel Wittenberg, *Where EPA Saw No Data, Trout Unlimited Crunched the Numbers*, E&E NEWS (Apr. 1, 2019), https://subscriber.politicopro.com/article/eenews/2019/04/01/where-epa-saw-no-data-trout-unlimited-crunched-the-numbers-030810 (noting that "for every mile of stream mapped in the National Hydrography Dataset, another 1.5 miles of ephemeral streams exist.").

221 *Id.*; *see also WOTUS Press Release*, *supra* note 200 (a reduction in federal jurisdiction "is particularly significant in arid states, like New Mexico and Arizona, where nearly every one of over 1,500 streams assessed has been found to be non-jurisdictional.").

222 Compl. for Declaratory and Injunctive Relief at 1, State v. EPA, No. 20-cv-1461 (D. Colo. May 22, 2020).

223 State v. EPA, 445 F. Supp. 3d 1295, 1313 (D. Colo. 2020).

224 Colo. v. EPA, 989 F.3d 874, 890 (10th Cir. 2021).

225 Notably, the Federal District Court for the Northern District of California denied a preliminary injunction request in a similar challenge to the rule brought by numerous states in that court. Cal. v. Wheeler, 467 F. Supp. 3d 864, 877 (N.D. Cal. 2020).

In tandem with this suit, the Colorado Department of Public Health & Environment ("CDPHE" or "Department") announced its intention to introduce a bill in the 2020 Colorado legislative session to authorize a state dredge and fill permitting program ("2020 Bill"). This new program, to be administered by the Water Quality Control Division ("WQCD" or "Division"), would be a "gap filler" that applies only to waters losing federal protection under the NWPR (i.e., "gap waters").[226] It would not constitute Section 404 program assumption and thus would not supplant the federal program in the state but rather operate *in addition to* it.

As noted above, Colorado defines its "State Waters" far more broadly than the federal government defines "waters of the United States."[227] The state contends the gap filler program is necessary because the Colorado Water Quality Control Act[228] broadly prohibits the discharge of pollutants to State Waters that would cause or contribute to exceedances of state water quality standards, and the discharge of a large quantity of dredged or fill material would, by its nature, typically do so.[229]

With no permitting program through which to impose conditions on such a discharge to protect water quality standards, the state believes placing dredged or fill material into gap waters would be illegal.[230] (The state contends, however, that discharges authorized by Corps-issued CWA Section 404 permits, including into gap waters, are legal under the Colorado Water Quality Control Act.)[231] According to the state, this would leave most projects occurring in gap waters with no legal means of moving

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226 *See* Bill to Establish State Dredge & Fill Water Permit Program, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020) (unedited unrevised draft, May 22, 2020).

227 *See supra* note 202 and accompanying text.

228 COLO. REV. STAT. §§ 25-8-101 to 25-8-803.

229 Motion for Preliminary Injunction at 13–15, State v. EPA, No. 20-cv-1461-REB (D. Colo., May 28, 2020); *see also* STATE OF COLO., COMMENT LETTER ON REVISED DEFINITION OF WATERS OF THE UNITED STATES 8–9 (Apr. 15, 2019), https://coag.gov/app/uploads/2020/05/CO-WOTUS-Comments.pdf.

230 Colo. v. EPA, 445 F.Supp.3d 1295, 1302–3 (D. Colo. 2020).

231 Supplemental Brief in Support of Amended Motion for Preliminary Injunction at 3, State v. EPA, No. 20-cv-01461-WJM-NRN (D. Colo. June 18, 2020) [hereinafter Supplemental Brief]. During stakeholder discussions, the State asserted that the Corps would no longer issue Section 404 permits for discharges into State Waters that are not also waters of the United States. *See, e.g.*, Audiotape: Dredge and Fill Permit Program Stakeholder Meeting, held by Colo. Dep't. of Pub. Health & Env't, at 2:30–4:25 (May 3, 2021), (https://drive.google.com/drive/folders/1uqxuu1j_8iubHFaM0RtIArTEAh166Jj5.) This would, however, run counter to a long time Corps practice that the Obama administration specifically reaffirmed in 2016. *See* REGULATORY GUIDANCE LETTER NO. 16-01, U.S. ARMY CORPS OF ENG'RS, JURISDICTIONAL DETERMINATIONS 1–3 (Oct. 2016).

forward, halting development and infrastructure projects critical to Colorado's economy.[232]

The state's position does not exactly square with its past practice. Given the all-encompassing scope of State Waters, projects discharging dredged or fill material into State Waters lying outside of federal jurisdiction have proceeded without a permit for decades. That is, the Corps' authority to require Section 404 permits has never extended to all State Waters—there has always been a gap.[233] In response, the state contends that it has exercised its enforcement discretion over the decades regarding such projects.[234]

CDPHE's release of the draft 2020 Bill late in the legislative session took the regulated community by surprise. The Colorado Water Congress,[235] in a letter to the Colorado House Speaker, explained that late introduction of a bill in a pandemic-compromised session left insufficient time to work through the important issues raised by the bill. The letter questioned the urgency of the situation and requested the Speaker to hold consideration of the legislation until the 2021 legislative session.[236]

The 2020 legislative session ended without introduction of the 2020 Bill. CDPHE followed up with six stakeholder sessions from June 30, 2020 to February 4, 2021 that were limited to developing a table broadly describing the gap waters a new program would cover and assessing whether these waters could be effectively shown on maps.[237] The

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232 Supplemental Brief, *supra* note 231, at 3. Regulated interests have challenged the State's position. Amended Brief of Colorado Water Congress as Amicus Curiae Urging Reversal at 10–19, Colo. v. EPA, No. 20-cv-01461-WJM-NRN (10th Cir. Aug. 3, 2020).

233 Changing regulations and evolving case law have caused federal CWA jurisdiction to fluctuate significantly since the Act's passage in 1972. This, in turn, has caused the universe of state gap waters to fluctuate. It appears that the state, without the benefit of a legislative determination or a rulemaking, decided that this shifting federal jurisdictional line appropriately defined the State Waters in which state water quality standards would apply in the dredge and fill context for over four decades. The NWPR apparently crossed an undefined threshold where the state no longer considered the federal jurisdictional line to be adequate in this context.

234 Supplemental Brief, *supra* note 231, at 4.

235 The Colorado Water Congress was established in 1958 "to initiate and advance programs to conserve, develop, administer, and protect the water resources of the State of Colorado." Colo. Water Cong., *Mission, Purpose, Core Beliefs and Values* https://www.cowatercongress.org/mission.html (last visited Sept. 18, 2021).

236 Letter from Colorado Water Congress to KC Becker, Colorado House Speaker (June 8, 2020) (on file with author).

237 The Department determined that current data and technology would not adequately support jurisdictional level mapping. COLO. DEP'T OF PUB. HEALTH & ENV'T, DREDGE & FILL WHITE PAPER NO. 2, at 1 (2021) [hereinafter DREDGE & FILL WHITE PAPER NO. 2].

stakeholder sessions concluded with CDPHE issuing two white papers, one that reiterates the Department's position on the NWPR and the need for a gap filler program,[238] and one that summarizes the limited stakeholder efforts.[239]

Characterizing the new program as a "gap filler" suggests that it would be small and relatively simple to create. However, WQCD has estimated that it would constitute up to fifty percent of the program the Corps has historically run in Colorado.[240] Moreover, the 2020 Bill raised many difficult issues about the new program, such as its funding, its proper scope, and how it would interface jurisdictionally and procedurally with the existing federal program. The stakeholder process did little to address these issues or allay the concerns of the regulated community.

At the end of the stakeholder process, CDPHE indicated that it would pursue legislation or other legal options only if the Tenth Circuit vacated the injunction preventing the NWPR from applying in Colorado.[241] Shortly after the Tenth Circuit did so, CDPHE, again claiming an urgent need, revived its public pursuit of legislation to authorize a new gap filler program.[242] Rather than recirculating the latest draft of the 2020 Bill,[243] the Department floated a bill concept outline ("2021 Outline")[244] that differed in certain respects from the 2020 Bill.

For regulated interests, one particularly troubling difference was the elimination of the sunset provision in the 2020 Bill.[245] The Biden administration plans its own CWA jurisdictional rule—one it hopes will

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238 COLO. DEP'T OF PUB. HEALTH & ENV'T, DREDGE & FILL WHITE PAPER NO. 1, at 1 (2021) [hereinafter DREDGE & FILL WHITE PAPER NO. 1].

239 DREDGE & FILL WHITE PAPER NO. 2, *supra* note 237, at 1.

240 Motion for Preliminary Injunction at 15, State v. United EPA, No. 20-cv-1461-REB (D. Colo. May 28, 2020) ("the Division estimates that up to 50 percent of 404 permits and jurisdictional determinations completed by the Corps in Colorado each year will no longer be in federal waters."); Letter from Lauren Larson, Director, Office of State Planning & Budgeting to Senator Dominick Moreno, Chair, Joint Budget Committee (June 7, 2021) (on file with author) (the NWPR "removed federal regulations and oversight for up to 50% of the waters in Colorado").

241 DREDGE & FILL WHITE PAPER NO. 1, *supra* note 238 at 1.

242 The Department did not seriously pursue a non-legislative solution.

243 Bill to Establish State Dredge & Fill Water Permit Program, 72d Gen. Assemb., 2d Red. Sess. (Colo. 2020) (redraft, June 5, 2020) [hereinafter June 5, 2020 Redraft].

244 COLO. DEP'T OF PUB. HEALTH & ENV'T, DREDGE & FILL PERMITTING PROGRAM OUTLINE (Mar. 15, 2021), https://drive.google.com/drive/folders/1Zy1qPXiRKwZ6GhHpgqjM_zHfUFxLTqdP.

245 June 5, 2020 Redraft, *supra* note 243, at 9.

withstand future administration changes.[246] (The process will involve an interim rule that reinstates the pre-2015 CWA jurisdictional regime as a temporary measure, prior to issuing a final revised jurisdictional rule.)[247]

Assuming a new Biden administration rule sufficiently decreases or eliminates the gap in federal protection for State Waters attributable to the Trump NWPR, a Colorado gap filler program would no longer be necessary. In such case, Department staff indicated that the state program would simply "go dormant" and be revived if a subsequent administration issued a CWA jurisdictional rule that again reduced the scope of federal protection.[248] While the full implications of a program going "dormant" remain unclear, at minimum it would complicate staffing efforts for a critical regulatory regime.[249] This does not suggest a promising path to an enlightened program with broad public support.

The Department eventually floated a draft bill based on the 2021 Outline[250] but could not find a sponsor. With little support for a programmatic bill, the Department circulated a very limited draft bill that specifically identified "unpermitted dredge or fill activity in State Waters" as illegal.[251] This draft enforcement bill did not create a permitting program to authorize such activity.[252]

Like the 2020 legislative session, the 2021 session ended without introduction of dredge and fill legislation. The Department's efforts over the last two Colorado legislative sessions, however, have created great uncertainty for regulated interests with projects planned for gap waters. The state has made clear its belief that such projects are illegal absent a permit but maintains that it has no authority to permit such projects. This has left

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246 *WOTUS Press Release*, *supra* note 200; *see also* Zack Budryk, *EPA Water Nominee Commits to 'Enduring Solutions' in Confirmation Hearing*, THE HILL (May 12, 2021), https://thehill.com/policy/energy-environment/553131-epa-water-nominee-commits-to-enduring-solutions-in-confirmation?rl=1.

247 86 Fed. Reg. 41,911 (Aug. 4, 2021). The Trump administration took a similar approach. 84 Fed. Reg. 56,626 (Oct. 22, 2019).

248 *See, e.g.*, Audiotape: Dredge & Fill Stakeholder Meeting, held by Colo. Dep't. of Pub. Health & Env't, at 3:35–6:35 (Mar. 17, 2021), https://drive.google.com/drive/folders/1mPdCRYn63ViPxl_e_dyetrgX2tj7U6XW.

249 *See, e.g.*, Audiotape: Dredge & Fill Permit Program Stakeholder Meeting, held by Colo. Dep't. of Pub. Health & Env't, at 19:00–20:10 (Mar. 22, 2021), https://drive.google.com/drive/folders/1QtsDWzpFRHj2DVIf4CE3ZBt4NBPDc5D8 (discussing dormancy issue and program staffing).

250 Bill to Establish State Dredge & Fill Water Permit Program, 73d Gen. Assemb., 1st Reg. Sess. (Colo. 2020) (unedited unrevised redraft, Apr. 9, 2021).

251 Bill to Specify Violation Unpermitted Dredge Fill Activity, 73d Gen. Assemb., 1st Reg. Sess. (Colo. 2020) (unedited unrevised redraft, May 14, 2021).

252 *Id.*

regulated interests, including some governmental entities, with no clear direction on how to proceed with such projects.[253]

Shortly after the end of the 2021 legislative session, a federal district court in Arizona vacated the NWPR, leaving CWA jurisdiction to be defined by the pre-2015 regulatory regime, and temporarily reducing Colorado's urgency in addressing the gap water issue.[254] However, unpredictable regulatory and judicial developments will almost certainly ensure continued volatility and confusion regarding the scope of CWA jurisdiction, which, in turn, will bring the gap water issue back to the forefront for the state to address, perhaps once again, in "crisis" mode. This situation, though challenging, also presents an opportunity to rethink how the state manages its most valuable natural resource.

C. Finding the Appropriate Path Forward

While often confusing in the best of times, dredge and fill permitting in Colorado has never seemed more muddled. Many regulated interests acknowledge that the state raised legitimate concerns about the potential impact of the NWPR in Colorado.[255] The challenge is finding the appropriate path forward. Creating a permanent permitting program to operate alongside a fluctuating federal program seems an inefficient use of resources destined to create further confusion, angst, and resentment among regulated interests. The stakeholder process to this point has been exclusively focused on a gap filler program. The discussion should be broadened to include full Section 404 Program assumption.

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253 While the Division has acknowledged its authority to utilize enforcement discretion to allow some gap water projects to move forward, the Division has been unable or unwilling to explain how it would exercise such enforcement discretion. *See generally*, Audiotape: Dredge & Fill Stakeholder Meeting, held by Colo. Dep't. of Pub. Health & Env't (May 17, 2021), https://drive.google.com/drive/folders/1BElf4pXqH0O4fNSsZ550UM0t4wreFKRe.

254 Pasqua Yaqui Tribe v. EPA, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021). Following this decision, EPA and the Corps announced that they would halt implementation of the NWPR nationwide and interpret CWA jurisdiction consistent with the pre-2015 regulatory regime until further notice. *Current Implementation of Waters of the United States*, EPA, https://www.epa.gov/wotus/current-implementation-waters-united-states (last visited Nov. 14, 2021). WQCD then announced that it would not pursue a gap water program "*as long as*" CWA jurisdiction "protects . . . state waters." *Waters of the United States and the Navigable Waters Protection Rule*, EPA, https://cdphe.colorado.gov/water-quality-waters-united-states (last visited Nov. 14, 2021) (emphasis added).

255 *See, e.g.*, Letter from Colorado Water Congress to KC Becker, Colorado House Speaker (June 8, 2020) (on file with author) (acknowledging that the state should consider how to protect State Waters in light of the Trump administration's NWPR).

Though it had the opportunity to do so well before this gap water "crisis" developed, CDPHE declined to evaluate Section 404 program assumption, citing cost concerns and lack of need for a new approach.[256] The Department has instead opted for a more "limited" foray into dredge and fill regulation, characterizing its preferred approach as simply maintaining the pre-NWPR *status quo*.[257]

This gap filler program, however, should be recognized for what it is—a large and complex program that would present many of the same challenges as full Section 404 program assumption, with little opportunity to create a more efficient overall program tailored to Colorado's unique needs. It could also lock Colorado onto a path that effectively precludes honest evaluation of the merits of Section 404 program assumption or inhibits a subsequently assumed program from reaching its full potential.

Any legislative response to the gap water issue should recognize that it will likely set the course for years to come. This counsels for a deliberate and comprehensive evaluation of the positives and negatives of potential responses. Since the state considers these waters currently protected, there is time for deliberation without the pressure of an impending crisis for the resource.

The stakeholder process should take a step back to a more fundamental level, and better articulate the actual extent of the threat to the resource than has been done thus far. It should then evaluate potential ways to address the threat, including full program assumption.

To avoid economic disruption in the interim, the state should articulate a clear basis upon which it will continue exercising enforcement discretion for projects in gap waters that proceed without a permit. For example, the state could encourage Corps offices in Colorado to continue issuing Section 404 permits based on preliminary jurisdictional determinations ("PJD") in accordance with existing Corps guidance.[258] PJDs identify all aquatic resources in a project area without distinguishing those

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256 *See* Colo. Dep't. of Pub. Health & Env't, *Water Quality Control Commission March 11, 2019 Meeting*, YOUTUBE, at 2:20:35 (Mar. 11, 2019), https://www.youtube.com/watch?v=InenyMcm1Lw (discussion relating to Section 404 program assumption). Notably, the WQCD director expressed the belief that such a program would cost "tens of millions of dollars" to administer and questioned whether any valid concern existed with the *status quo*. *Id.* The cost estimate appears significantly overstated. *See supra* note 94 and accompanying text.

257 *See, e.g.*, Bill to Establish State Dredge & Fill Water Permit Program, 73d Gen. Assemb., 1st Reg. Sess. § 1(c)(I) (Colo. 2020) (unedited unrevised redraft, Apr. 9, 2021).

258 REGULATORY GUIDANCE LETTER NO. 16-01, U.S. ARMY CORPS OF ENG'RS, JURISDICTIONAL DETERMINATIONS (Oct. 2016). *But cf.* Supplemental Brief, *supra* note 231, at 2–3.

that are jurisdictional from those that are not.[259] Project proponents can elect to permit their activities based on a PJD, though they risk incurring a larger mitigation burden than they might otherwise face based solely on jurisdictional features. The state could continue to exercise its enforcement discretion for such projects, provided the permittee complies with its Corps permit.

As a complementary approach, the state could issue a policy under which it would forgo enforcement for projects in gap waters that comply with defined best management practices ("BMPs").[260] The Division already has a policy for certain discharges that similarly conditions Division enforcement discretion on BMP compliance, so this approach would not break new ground.[261]

A comprehensive review of the gap water issue should necessarily include an important consideration that has received no attention in the stakeholder process to this point—designating the proper agency home for a dredge and fill program (whether a gap filler or fully assumed). [262] This issue is critical to a broadly supported and well-functioning program.

Notably, Colorado has been down this road before. The state last comprehensively evaluated Section 404 program assumption shortly after Congress made it available through the 1977 CWA amendments. Due to inconsistencies across the state under the Corps-run Section 404 program and the desire for more local accountability, Governor Richard Lamm encouraged the Colorado Department of Health to seek federal funding to develop the authority needed to assume the Section 404 program.[263]

Colorado was one of three states to receive such funding and was expected to serve as a model for Section 404 program assumption by other Western states.[264] As part of the process, the Department of Health developed legislation to achieve program assumption, with the program to be

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259 *Id.* at 3. The Corps uses an approved jurisdictional determination to definitively identify jurisdictional aquatic resources. *Id.* at 2.

260 BMPs in this context may not be limited to practices that merely minimize impacts to the resource. They could, for example, include mitigation.

261 COLO. WATER QUALITY CONTROL DIV., WATER QUALITY PERMITS: POLICIES AND PROCEDURES NO. WQP-27 (June 13, 2008).

262 As a practical matter, the state agency charged with administering a gap filler program (if the stakeholder process determines this is the desired path forward) would, by default, likely be the agency assigned to administer a fully assumed Section 404 program in the future.

263 *Final Report on State Assumption of the Dredge & Fill Permit Program Under Section 404 of the Clean Water Act*, Colorado Department of Health, Water Quality Control Division at 5 (Nov. 1981).

264 *Id.* at 6.

housed in WQCD.[265] However, the Senate sponsor advanced legislation that put the program within the authority of the State Engineer's Office ("SEO"). Legislative debate and testimony failed to convince the Senate sponsor that WQCD was the proper home.[266]

Before the bill could become law, EPA informed the Senate sponsor that the bill would not meet statutory requirements for state assumption.[267] Instead of addressing the alleged shortcomings with EPA, supporters of the bill decided to wait for anticipated CWA amendments in 1982,[268] which never materialized. The assumption issue appears to have been put on hold until DNR briefly considered it again in the early 1990s.[269]

In fact, DNR may provide the best opportunity to realize the full potential of a Colorado-run Section 404 program. A vast degree of relevant institutional expertise already resides within this department, which houses many of the agencies[270] that would be integral to program implementation:

> CWCB: As detailed above, CWCB developed the Colorado Water Plan, and Section 404 program assumption would help advance the Water Plan's values and achieve its goals.[271] Moreover, as Colorado's most comprehensive water information resource,[272] CWCB maintains expertise on a broad range of topics relevant to implementation of a Section 404 program, including watershed health,[273] instream flows,[274] endangered

265 *Id.* at 34.

266 *Id.* at 34–35.

267 *Id.* at 35–36.

268 *Id.* at 36.

269 *See supra* note 23 and accompanying text.

270 Where to place a dredge and fill program within DNR would also be a part of the stakeholder discussions. It may be best, for example, to place it within a newly created division that could tap the broad array of existing departmental expertise while minimizing bias that may flow from an existing agency with an established institutional mission.

271 *See supra* notes 115–81 and accompanying text.

272 *About Us*, COLO. WATER CONSERVATION BD., https://cwcb.colorado.gov/about-us (last visited Sept. 16, 2021).

273 *Watershed Protection and Restoration*, COLO. WATER CONSERVATION BD., https://cwcb.colorado.gov/focus-areas/ecosystem-health/watershed-protection-and-restoration (last visited Sept. 16, 2021).

274 *Instream Flow Program*, COLO. WATER CONSERVATION BD., https://cwcb.colorado.gov/focus-areas/ecosystem-health/instream-flow-program (last visited Sept. 16, 2021).

species,[275] land use,[276] and climate change.[277] CWCB also administers the State floodplain management program,[278] which is often implicated by projects requiring Section 404 permits.[279]

Colorado Parks and Wildlife ("CPW"): Among other things, CPW manages Colorado's fish and wildlife resources, and its expertise could assist projects impacting such resources, particularly federal or state listed threatened and endangered species. CPW's role could take on even greater importance under EPA's new programmatic approach to ESA compliance for state assumed Section 404 programs.[280] The agency also has experience in wetland and riparian mapping and conservation.[281] Finally, CPW has long played an integral role under 37-60-122.2 C.R.S. in developing mitigation and enhancement plans for projects requiring Section 404 permits from the Corps.[282]

SEO: The SEO, among other things, administers water rights, monitors streamflow and water use, approves construction and repair of dams, and maintains numerous databases of Colorado water information.[283] Projects requiring Section 404 permits or other program authorization (such as the creation of mitigation banks) often raise issues requiring direct input on these areas of expertise.

State Land Board ("SLB"): The SLB manages 2.8 million acres of land in trust to earn money for Colorado public schools.[284]

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275 *Endangered Species*, COLO. WATER CONSERVATION BD., https://cwcb.colorado.gov/focus-areas/ecosystem-health/endangered-species (last visited Sept. 16, 2021).

276 *Land Use*, COLO. WATER CONSERVATION BD., https://cwcb.colorado.gov/focus-areas/supply/land-use (last visited Sept. 16, 2021).

277 *Climate*, COLO. WATER CONSERVATION BD., https://cwcb.colorado.gov/climate (last visited Sept. 16, 2021).

278 *Flood Information & Resources*, COLO. WATER CONSERVATION BD., https://cwcb.colorado.gov/focus-areas/hazards/flood-information-resources (last visited Sept. 16, 2021).

279 *See, e.g.*, 2 COLO. CODE REGS. § 408-1, Rule 12 (2011) (addressing the effects of stream alteration activities on regulatory floodplains).

280 *See supra* notes 60–87 and accompanying text.

281 Colo. State Parks, *Statewide Strategies for Wetland and Riparian Conservation: Strategic Plan for the Wetland Wildlife Conservation Program*, (2nd ed. 2011), https://cpw.state.co.us/Documents/LandWater/WetlandsProgram/CDOWWetlandsProgramStrategicPlan110804.pdf.

282 *See supra* notes 151–54 and accompanying text.

283 Colo. Dep't of Nat. Res., *Division of Water Resources*, https://dnr.colorado.gov/divisions/division-of-water-resources (last visited Sept. 16, 2021).

284 Colo. Dep't of Nat. Res., *State Land Board*, https://dnr.colorado.gov/divisions/state-land-board (last visited Sept. 16, 2021).

> One means of achieving its mission is to lease out trust lands for ecosystem services, which the SLB began doing in 2013.[285] As part of its ecosystems services program, the SLB is actively pursuing[286] mitigation banks (to provide mitigation credits for impacts to wetlands and streams) and conservation banks (to provide mitigation credits for impacts to threatened and endangered species) as a source of revenue.[287] While a relatively new effort, the SLB currently has nine banking projects in various stages of development.[288] This program creates a platform to efficiently advance state, environmental, and regulated community interests in the Section 404 context.[289] Notably, the SEO, CWCB, and CPW all participate on the Interagency Review Team that provides comment to the Corps on bank project proposals.[290] Thus, DNR is already integrally involved in mitigation banking efforts.
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> Colorado Division of Reclamation, Mining and Safety: While this agency's mission does not directly implicate the Corps' Section 404 permitting process, the mining activities it authorizes often require Section 404 permits. Moreover, reclaimed sand and gravel mines can provide relatively low impact and affordable water storage options. Housing a state Section 404 program in DNR could better integrate the overall permitting and reclamation process for mines.

CDPHE implements the CWA Section 402 program through WQCD. The Division has historically participated in the Corps' Section 404 program in Colorado through the Section 401 water quality certification process. WQCD's administration of the Section 402 program and water quality expertise may also qualify it as a legitimate host for a dredge and fill program. This fundamental issue, however, deserves detailed discussion in the stakeholder process.

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285 *Mitigation Banking on State Trust Lands*, Colorado State Land Board, at 3 (May 2021) [hereinafter *Mitigation Banking on State Trust Lands*].

286 Seventy-five percent of pending commercial mitigation banks in Colorado lie on SLB property. COLO. STATE LAND BD. FY 2019-20 ECOSYSTEM SERVICES BUSINESS PLAN READOUT (Sept. 2020).

287 *See Mitigation Banking on State Trust Lands*, *supra* note 285.

288 *Id.* at 3–5.

289 Moreover, to the extent it does not adversely impact a bank's functional condition, a bank can support multiple uses, such as hunting or subsurface development. *Id.* at 8.

290 *Id.* at 6. Corps staffing changes and budget cuts have delayed timely review and approval of mitigation bank projects. COLO. STATE LAND BD. FY 2019-20 ECOSYSTEM SERVICES BUSINESS PLAN READOUT (Sept. 2020).

CONCLUSION

"There is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things."

– Niccolo Machiavelli[291]

As various forces combine to remove the historical inertia impeding Section 404 program assumption, states across the country will revisit past assessments of its relative costs and benefits. States who choose to pursue it will show the path forward for others, potentially creating momentum for significant change.

Colorado should not willfully ignore these developments and blindly expect decisions it made four decades ago to adequately address the resource challenges it faces today. Section 404 program assumption could provide the autonomy to meet these challenges in a more efficient manner and in a way that accounts more effectively for Colorado's unique interests. The Water Plan acknowledges that "moving beyond the status quo can be both difficult and complex, [but] it is our responsibility as Coloradans to . . . ensure that our state remains a vibrant place to live, work, and play. . . ."[292]

The state should take this opportunity, however challenging, to reassess its authority over its most critical natural resource. The evaluation process (which can be funded by federal grants) should ask whether potential synergies among state agencies can reduce or eliminate compartmentalization, increase process efficiencies, and encourage creative approaches that advance state, environmental, and regulated community interests.

Section 404 program assumption would mean significant change for Colorado, and to be successful, would require support from a broad range of stakeholders. If a comprehensive evaluation does not indicate potential benefits for diverse interests, then program assumption is not the correct path forward. It is easy, however, to dismiss Section 404 program assumption as too difficult, risky, or expensive without a detailed reassessment of costs and benefits that considers recent favorable program assumption developments against the backdrop of issues the state faces today. Congress crafted the CWA with the intent that states would fully administer it. While

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291 *Niccolo Machiavelli Quotes About Change*, A-Z QUOTES, https://www.azquotes.com/author/9242-Niccolo_Machiavelli/tag/change (last visited Sept. 16, 2021).

292 COLORADO WATER PLAN, *supra* note 95, at 1-12.

administering the Section 404 program would not be easy, Colorado should not shrink from the challenge before even evaluating it.