



Doug Benevento

Partner
303.293.5248
Denver
dhbenevento@hollandhart.com



Ann Prouty

Partner
303.290.1628
Denver
aeprouy@hollandhart.com



Natalie Cristo

Associate
303.293.5965
Denver
NPCristo@hollandhart.com

Colorado Launches State Dredge-and-Fill Program (Regulation 87)

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Colorado has adopted Regulation 87 to create a state-run dredge-and-fill authorization program administered by CDPHE's Water Quality Control Division (the "Division"). The policy driver is straightforward: after the U.S. Supreme Court's *Sackett v. EPA* decision narrowed federal "waters of the United States" ("WOTUS") jurisdiction, many Colorado wetlands and seasonal/ephemeral streams that historically could have been regulated under Clean Water Act §404 may no longer be covered under the federal program. Regulation 87 is Colorado's mechanism to fill that regulatory gap for "state waters."

At a high level, Regulation 87 establishes a default prohibition: No person may discharge dredged or fill material into state waters without authorization, unless a specific exemption or exclusion applies. The program is structured around the familiar Section 404 framework—prioritizing avoidance and minimization of impacts first and requiring compensatory mitigation for unavoidable impacts.

The implications of Colorado's Regulation 87 are meaningful for project planning and risk management. At many projects where there are no federal jurisdictional waters post-*Sackett*, state authorization may be required and could trigger mitigation obligations, monitoring/reporting, and compliance conditions. Regulation 87 also makes clear that the Division will not make WOTUS determinations; proponents are still expected to determine whether there is federal jurisdiction. In addition, Colorado may assert "dual jurisdiction" requirements in some circumstances where a federal permit covers a project but does not require mitigation for certain non-WOTUS state waters within the project area. In that case, Colorado would assert its jurisdiction.

Colorado is phasing in its general-permit structure. Currently, Temporary Authorizations are available through August 31, 2026. There is a 45-day review mandate for a Temporary Authorization, or Notice of Coverage—where a project can automatically proceed if the Division fails to act on the Temporary Authorization request within that time. CDPHE's published implementation schedule anticipates issuing final Colorado General Conditions and General Authorizations, effective September 1, 2026; at which point, applicable projects will proceed through an application for Notice of Coverage under the relevant General Authorization. The Division will not issue Temporary Authorizations after that date.

For proponents seeking certainty on whether they are covered by the program at all, Regulation 87 provides options for regulatory certainty by requesting an optional "official determination" from the Division. This

official determination would confirm the applicability of exemptions, exclusions, or the recapture provision. That confirmation step can be a practical way to reduce enforcement and schedule risks where site conditions are ambiguous or where exclusions (e.g., certain upland-constructed features or ditch/canal-adjacent wetlands supported by the ditch/canal) may be implicated.

Colorado's new program will ensure that there are no dredge-and-fill permitting gaps post-Sackett, but the process is still in flux. Even after September 1, 2026, there will likely be implementation issues that may have to be addressed. This new program, combined with the Division's current workload, could make it difficult to obtain approvals. Ensuring that the Notice of Coverage is thoroughly prepared, and being able to work with the Division on prioritization of the Notice of Coverage, will be crucial to receiving an approval in a timely manner. Holland & Hart's environmental team regularly assists clients with regulatory compliance and permitting.

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