



COLORADO  
**WATER CONGRESS**  
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# Wetlands, WOTUS, and Colorado's Role + Water Demand Planning and Affordability

March 20, 2024







# The Epic of WOTUS

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# Beginnings: A Hero Born of ... Congress?

- Clean Water Act requires a permit for **discharge** of **pollutants** from a **point source** to **navigable waters**
- Clean Water Act defined “navigable waters” as “Waters of the United States”
- Two permitting programs:
  - Section 402: Discharge permit required for the point source discharge of pollutants to navigable waters
  - Section 404: Dredge and fill permit authorized for discharge of dredged or fill material into navigable waters
- 1980s EPA and USACE rules

# Trials

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- *Riverside Bayview Homes* (1985) **wetlands adjacent to navigable waters**
- *SWANCC* (2001) invalidated **migratory bird rule**
- *Rapanos* (2006)
  - 4-1-4 Decision
  - “Relatively permanent” (Scalia)
  - “Significant Nexus” (Kennedy)
  - Defer to USACE (Stevens diss.)
  - If I only had a rule (Roberts)
- *Sackett v. EPA* (2023)





# Kennedy Concurrence and “Significant Nexus”

- wetland in Michigan adjacent to a drain, which flowed to a creek, then to a navigable-in-fact river
- “Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries.”
- “mere hydrologic connection should not suffice in all cases”
- wetlands possess the requisite nexus, and thus come within the statutory phrase “navigable waters,” if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as “navigable.”



AP / John Flesher



# Rulemaking

- 2008 post-*Rapanos* Guidance
- 2015 Clean Water Rule
- 2020 Navigable Waters Protection Rule
- 2023 Revised Definition of “Waters of the United States”





# *Sackett v. EPA*

- Property near Priest Lake, Idaho
- Wetlands located on property
- Wetlands across a paved road connected by ditch and creek to Priest Lake
- Although property is about 300 feet from the lake, assertion that no water flows from the property to the lake
- EPA determined the wetland was WOTUS based on significant nexus test





## *Sackett* ruling and defeat of “significant nexus”

- Held: CWA extends only to those wetlands that are “indistinguishable from waters of the United States” with a two-part test:
  - Continuous surface connection to a water body so that it is difficult to tell where the water ends and wetland begins, and
  - That water body is a relatively permanent body of water connected to traditional interstate navigable waters;
- Rejected extension of jurisdiction based on:
  - use of Rapanos concurrence test whether a wetland has a “significant nexus” to traditionally navigable waters to determine whether a wetland is a “water of the U.S.”
  - wetlands that are adjacent but lack a continuous surface connection because of a natural or human-made barrier (such as a road)



# Sackett rationale

- All 9 justices held not WOTUS
- Four justices disagreed with the “adjacency” test
- Rationale of the majority
  - Use of term “navigable”
  - “waters” traditionally referring to bodies of open water
  - State primacy
  - Vagueness concerns – meaning “hopelessly indeterminate”
  - But “waters” could include adjacent wetlands
- Concurrence: disagreed with exclusion of wetlands separated from other WOTUS by a barrier







**COLORADO**  
Department of Public  
Health & Environment

# Wetlands, WOTUS, and Colorado's Role

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Water Resources and Agriculture Review Committee



# Overview



Wetlands and ephemeral streams



Other state approaches



Colorado response to *Sackett vs. EPA*



Options





# Wetlands and ephemeral streams

## Wetlands

- Nature's filters
- Resiliency and adaptability
- Wildlife
- Carbon storage



Colorado Natural Heritage Program



## Ephemeral streams

- Connectivity
- Resiliency and adaptability
- Water quality and quantity
- Nutrient cycling

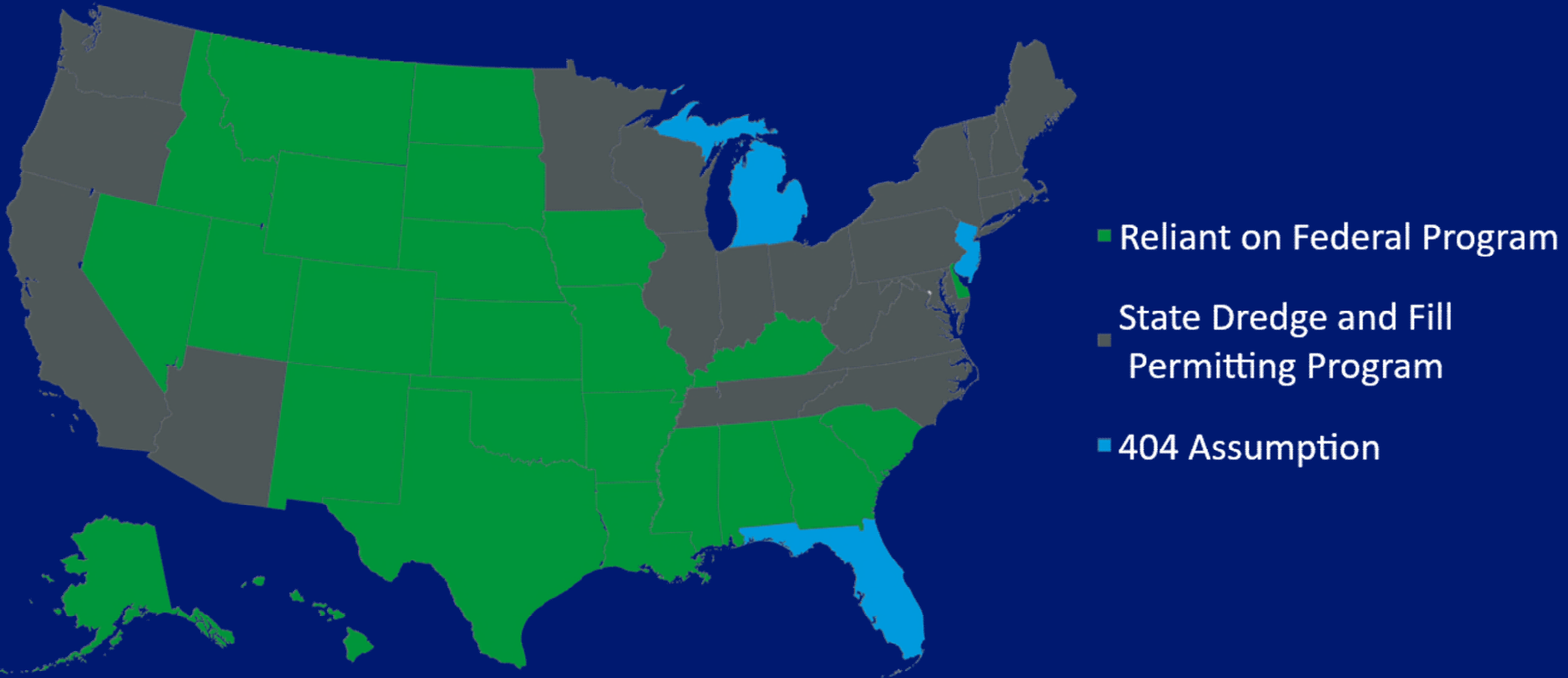




# Other state approaches



# Status of State Dredge and Fill Permitting





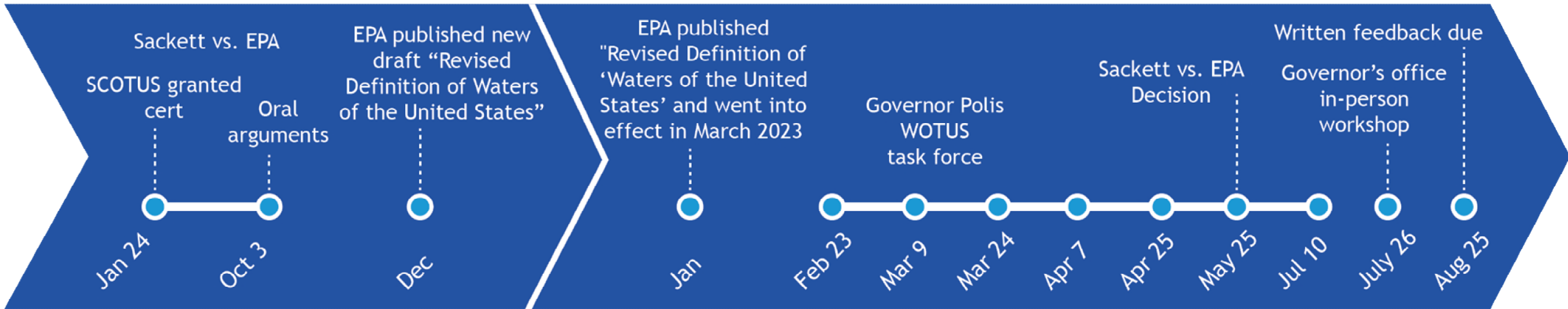
# Colorado response to *Sackett* *vs. EPA*



# Stakeholder Engagement

## 2022

## 2023





# Options



# Options discussed by WOTUS Task Force

Enforcement  
Discretion

Assumption  
of 404  
Program

Gap Waters  
Program

Colorado  
Program



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**Please join us on April 3 back in HCR0112 for another educational legislative water workshop focused on three interstate compacts: Colorado River, Rio Grande and South Platte.**

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