

JOINT BUDGET COMMITTEE



INTERIM SUPPLEMENTAL BUDGET REQUEST FY 2023-24

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

JBC WORKING DOCUMENT - SUBJECT TO CHANGE
STAFF RECOMMENDATION DOES NOT REPRESENT COMMITTEE DECISION

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JUNE 20, 2023

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INTERIM SUPPLEMENTAL REQUESTS

ES1 WATERS OF THE UNITED STATES

	REQUEST	RECOMMENDATION
TOTAL	\$214,797	\$214,797
FTE	0.9	0.9
General Fund	214,797	0
Cash Funds	0	214,797
Federal Funds	0	0

Does JBC staff believe the request satisfies the interim supplemental criteria of Section 24-75-111, C.R.S.? **YES**
 [The Controller may authorize an overexpenditure of the existing appropriation if it: (1) Is approved in whole or in part by the JBC; (2) Is necessary due to unforeseen circumstances arising while the General Assembly is not in session; (3) Is approved by the Office of State Planning and Budgeting (except for State, Law, Treasury, Judicial, and Legislative Departments); (4) Is approved by the Capital Development Committee, if a capital request; (5) Is consistent with all statutory provisions applicable to the program, function or purpose for which the overexpenditure is made; and (6) Does not exceed the unencumbered balance of the fund from which the overexpenditure is to be made.]

Does JBC staff believe the request meets the Joint Budget Committee's supplemental criteria? **YES**
 [An emergency or act of God; a technical error in calculating the original appropriation; data that was not available when the original appropriation was made; or an unforeseen contingency.]

Explanation: The United States Supreme Court ruled on this case May 25, 2023 after the 2023 legislative session had ended. The ruling does appear to require action by the State, so for this reason, Staff agrees that the request meets criteria codified in Section 24-75-111 C.R.S., and would also consider this an unforeseen contingency.

DEPARTMENT REQUEST: The Department requests an increase of \$214,797 in General Fund spending authority and 0.9 term-limited FTE for FY 2023-24. This request is to ensure the State is able to provide education on and protection of Colorado’s wetlands after the Sackett v. EPA Supreme Court decision which reduced federal protections of wetlands in Colorado. The Department is seeking this emergency supplemental request to fund outreach and inspection activities through March 2024, as well as support CDPHE in developing a long-term response to the ruling.

STAFF RECOMMENDATION: Staff recommends approval of the Department’s request for \$214,797 in cash fund spending authority from the Construction Sector Cash Fund rather than the requested General Fund, and 0.9 term-limited FTE for FY 2023-24.

STAFF ANALYSIS:

The U.S. Supreme Court has ruled that the previous interpretation of what constitutes federal waters, subject to regulation by the U.S. government, was too broad, and these waters will now be regulated at the discretion of the states. Because the new federal definition is narrower than Colorado’s definition, there is a regulatory gap on dredge and fill activities, and Colorado will now be responsible for regulating state waters previously under federal jurisdiction.

CLEAN WATER ACT (1972)

The Federal Water Pollution Control Act of 1948, as amended in 1972, became commonly known as the Clean Water Act (CWA). The CWA established the structure for regulating discharges of pollutants into “navigable waters”, which is defined as including all “waters of the United States.” The CWA made it unlawful to discharge any pollutant into navigable waters unless a permit was obtained.

Currently, the Environmental Protection Agency (EPA) works with federal, state, and tribal regulatory partners to monitor and ensure compliance with clean water laws and regulations.

RAPANOS V. UNITED STATES (2006)

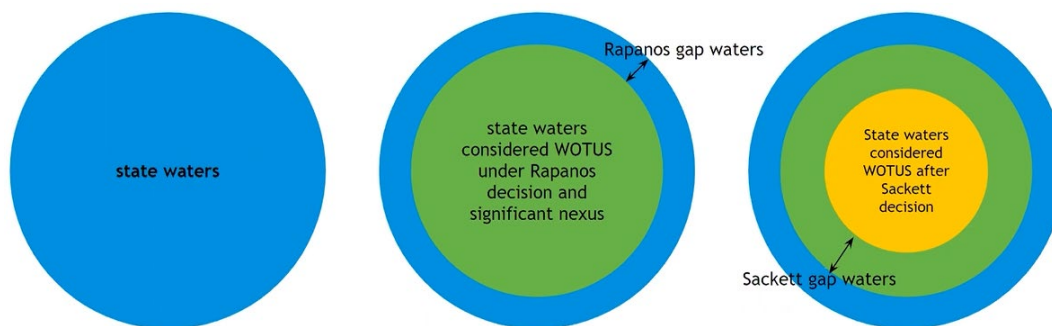
The 2006 case, *Rapanos v. United States*, debated the EPA and Army Corps of Engineers' (Corps) regulatory jurisdiction that included wetlands as waters of the United States as long as they are adjacent to traditionally navigable waters or tributaries of such waters. The U.S. Supreme Court failed to obtain a majority ruling on the case. The opinions written by the justices laid out two competing tests for determining the ability of the CWA to regulate wetlands. Under the first test, only navigable waters and regularly flowing tributaries to those waters, or wetlands with a "continuous surface connection" to a body of water would qualify for regulation under the CWA. Under the second, a wetland falls under the CWA if it bears a "significant nexus" with traditional navigable waters. This means the connection between wetlands and other bodies of water doesn't need to be clearly visible, but falls under the CWA if impacts to the wetland would also impact the other bodies of water.

Since 2006, the lower courts have appeared to pretty consistently rule that wetlands satisfying the significant nexus test fell under the CWA, however, the definition of what constitutes waters of the United States has changed between federal administrations.

SACKETT V. ENVIRONMENTAL PROTECTION AGENCY (2023)

Sackett v. EPA considered a similar question of whether certain wetlands constituted waters of the United States and are thus protected under the CWA. On May 25, 2023, the Supreme Court issued a decision in *Sackett v. EPA* that reinterpreted the scope of federal jurisdiction under the CWA. The Court's decision holds that the significant nexus test, used by the EPA and the Corps to determine the scope of federal CWA jurisdiction since the *Rapanos* decision, is no longer valid.

The Court articulated a new jurisdictional test for adjacent wetlands that extends CWA jurisdiction to wetlands only if they are "indistinguishable from waters of the United States". This means the wetlands must have a continuous surface connection to bodies that are waters of the United States in their own right, with no clear demarcation between the waters and the wetlands. The *Sackett v. EPA* decision restricts the EPA and the Corps from issuing new regulations on wetlands no longer under the purview of the CWA. With the decision, an estimated 51.0 percent of wetlands in the United States are no longer federally protected.



COLORADO

Historically in Colorado (and 47 other states), the Corps issues 404 permits and takes enforcement actions to protect waters of the United States from dredge and fill activities. Because of the Supreme Court ruling, the Corps will now designate fewer of Colorado's wetlands as waters of the United States, and will not have the ability to issue permits on these wetlands. This means Colorado will have to address the loss of regulation of many waters previously under Corps and the EPA jurisdiction. The Department estimates that the Sackett v. EPA decision will leave an estimated 25.0 to 50.0 percent of state waters previously protected by federal regulations without those protections.

COLORADO WATER QUALITY CONTROL ACT

The Colorado Water Quality Control Act states “No person shall discharge any pollutant into any state water from a point source without first having obtained a permit from the division for such discharge”. The Act also defines "state waters" as “any and all surface and subsurface waters which are contained in or flow in or through this state”. This definition has always been broader than the federal definition of waters of the United States, however federal jurisdiction has superseded the State's authority. The Department's Water Quality Control Division has relatively broad statutory authority in Sections 25-8-101 through Section 25-8-803, C.R.S., to classify state waters, promulgate regulations related to water quality standards, and administer and enforce programs adopted by the Water Quality Control Commission.

REQUEST

The SCOTUS ruling requires the Department to work with stakeholders, the Water Quality Control Commission, and the Corps and EPA to determine next steps to continue to provide regulation of Colorado's wetlands. CDPHE is proposing this short-term solution which allows continued protection of Colorado's waters while also beginning immediate work with stakeholders to identify a framework for permitting, compliance, and enforcement to address the gap in federal and state water protections. The request includes:

ENVIRONMENTAL PROTECTION SPECIALIST (0.9 TEMPORARY FTE)

- Manage the current enforcement policy while the contractor takes the time to evaluate the dredge and fill permit options;
- Perform direct outreach to the regulated community;
- Conduct two field inspections per month and develop an estimated 2-3 enforcement actions annually; and
- Provide project management oversight of consultant and coordinate efforts between EPA, Corps, and stakeholders.

CONSULTANT (500 HOURS)

- Develop educational materials for regulated community;
- Research and formulate dredge and fill permit options and assist in coordinating long-term options with Corps and EPA; and
- Provide technical support to CDPHE on enforcement policy implementation.

This request will provide term-limited FTE and a contractor to implement an interim dredge and fill enforcement policy. The Department will utilize this funding to conduct education on this issue with the regulated community, coordinate with the Army and EPA, and work with stakeholders to identify options for addressing this issue in the long-term. This request will enable the Department to utilize

an expert consultant and hire term-limited FTE that have expertise in wetlands, and dredge and fill regulatory regimes, to inform future Department actions. It is staff's interpretation that the Construction Sector Fund created in Section 25-8-502 (1.5)(a)(II), C.R.S., allows for the execution of activities outlined in this request under Section 25-8-502 (1.1)(c), C.R.S., and thus the Department does not need additional General Fund to fund this request.