

Good afternoon, Madam Chair, and Members of the Committee.

I am Dr. Libby Samaras and here today as a ***board member for the Audubon Society's Arkansas Valley Chapter and its Colorado Council's Public Policy Committee.***

Thank you for the opportunity to testify in support of **HB24-1379**.

1) This bill is preventative in dealing with dredge and fill issues that could threaten our state's water resources. As a Nurse Practitioner, I know that preventing illness, when possible, is always more successful than treating it. When a person falls ill, it is more costly to them and society.

So, it is with our state waterways – **we must prevent their loss and preserve them.**

2) I live in rural Pueblo County in the Pinyon-Juniper woodland.

Wildlife (and humans) love pinon nuts --but I estimate that drought recently killed over fifty pinyon trees on our small ranch alone. The population of Pinyon Jays, birds once common here, has declined overall by 85 per cent since 1970. It is very arid and most of the waterways here are seasonal, or ones that "come and go" known as

“ephemeral” . I live on Soda Creek Rd. named for the ephemeral “Soda Creek”, now effectively dry.

This bill would protect **All** state waterways, including the more than eighty per cent that are “intermittent” or “ephemeral.” Its’ Senate counterpart, SB24-127, would leave most of Colorado’s vulnerable waterways unprotected!

The story of the canaries in the coal mine has always held meaning for me. Before there were gas detection devices, miners brought canaries into the mines. Canaries were early warning systems. Colorado has seen its own canaries in the drastic decrease in Pinyon Jays! Let us heed their warning and support the expanded definition of “State Waters” in this bill.

Please support HB24-1379. Thank you for your time and service to our great State.

Comments for HB24-1379 Regulate Dredge & Fill Activities in State Waters
Scott Hudson
April 8, 2024

Agriculture, Water & Natural Resources Committee:

The Supreme Court's *Sackett* ruling has undermined environmental protections for Colorado wetlands. However, it also provides an unprecedented opportunity to craft a regulatory framework that not only fills the gap created by the Court's ruling, but is also more effective and responsive to state needs. I believe HB24-1379 accomplishes these objectives. I would like to point out the following advantages of this bill:

1. As the bill states, water is Colorado's most valuable resource.¹ Climate change, the ongoing drought in western states and continued development threaten the long term viability of Colorado waters. Colorado wetlands and ephemeral streams are particularly vulnerable to these stresses, yet are essential features of our water system.² Therefore, Colorado's dredge and fill program must focus on "avoiding" impacts to wetlands and ephemeral streams. HB24-1379 recognizes this and provides the necessary framework through a prohibition against discharge of dredge and fill material where there is a practicable alternative,³ and direction to the Colorado Department of Public Health and the Environment (CDPHE) to focus regulations on avoiding, minimizing and compensating for impacts to wetlands.⁴ These provisions provide an essential framework and guidance to CDPHE for issuing permits.
2. It is important that the bill designates CDPHE as the action agency for the dredge and fill program. Wetlands are an essential feature in the hydrologic cycle, providing important filtering and storing functions that directly impact surface and groundwater.⁵ Since wetlands are intimately interrelated with surface waters, they should be regulated as a whole. CDPHE already regulates and issues permits for the state's surface waters, therefore it is logical, efficient and more effective for it to also regulate wetlands.
3. Another advantage of the bill is that it maintains the same level and extent of protections for state waters as under the pre-*Sackett* federal program. In particular, the bill includes protections not only for wetlands but also ephemeral streams, which are key, unique features of our state. Additionally, it requires the permitting regulations to be at least as protective as the guidelines developed pursuant to section 404(b)(1) of the federal "Clean Water Act (CWA)".⁶ The bill also includes consideration of cumulative impacts when considering permits.⁷
4. A final key component of the bill is a requirement for compensatory mitigation.⁸ In the bill, compensatory mitigation is required "for all individual authorizations and for general authorizations where unavoidable adverse impacts will affect over one-tenth of an acre or, for streams, where unavoidable adverse impacts greater than a threshold set by regulation will occur".⁹ Compensating for damage to wetlands and other waters that cannot be avoided is essential to maintaining ecosystem services that these features provide.

Although I support the bill, there are several ways in which it falls short of providing the protections of the federal program or does not address the weaknesses and inadequacies in the federal Section 404 program. Specific shortfalls include:

1. The bill does not provide the same level of coverage for state and local communities as the pre-*Sackett* federal program did due to a failure to include a civil suit provision. Civil suits have proven an effective and efficient means of monitoring and enforcing federal programs such as the CWA and Comprehensive Environmental Response, Compensation and Liability Act. Additionally, they provide a means for local communities to enforce and protect water resources in their area. Another consideration is the increased monitoring and enforcement burden placed on CDPHE. The *Sackett* decision effectively shifted responsibility for a wider range of waters to the state of Colorado. This will significantly increase the number of permits that CDPHE will have to review and enforce, which can be mitigated by a civil suit provision.
2. Although the bill includes a requirement for compensatory mitigation, it has not incorporated some of the lessons learned from the federal program. In particular, the federal compensatory mitigation program has had significant issues and has not fulfilled the goal of “no net loss.” Although there are several reasons for this failure, a primary cause is the inability of EPA or the U.S. Army Corps of Engineers (Corps) to enforce the statute against third party mitigation organizations.¹⁰ Compensatory mitigation is often performed by third party organizations like mitigation banks. Since compensatory mitigation liability for third party organizations is not written into the CWA, there is no statutory “hook” for EPA and the Corps to hold these groups liable for not fulfilling their obligations. This is not something that either EPA or the Corps can remedy through regulations, since courts have held that agencies can’t define the scope of their own enforcement authority; only the legislature has that authority. Therefore, I strongly recommend that you provide state agencies with compensatory mitigation enforcement authority in the statute.
3. A final shortcoming is evident with linear projects. The bill provides an exclusion from the statute for the pilings for linear projects, such as bridges, elevated walkways, powerlines, and innumerable other structures.¹¹ The bill states that pilings for linear projects “generally do not have the effect of a discharge of fill material.” I do not believe this is accurate, since installing pilings involves drilling holes for the pilings and installing the casing and concrete necessary to insure a stable structure. This exclusion is not in the pre-*Sackett* federal statute, and is not based on sound scientific or engineering data.

Thank you for the opportunity to comment,

Scott Hudson

¹ § 25-8-205.1(1)(b)(I).

² See Marshall, S., and J. Lemly. Colorado Wetland Program Plan: 2020-2024. Colorado Natural Heritage Program, Colorado State University, Fort Collins, Colorado.

³ § 25-8-205.1(4)(b)(II).

⁴ § 25-8-205.1(4)(a).

⁵ William J. Mitsch and James G. Gosselink, Wetlands (2d ed. Van Nostrand Reinhold 1993).

⁶ See Bill Summary.

⁷ § 25-8-205.1(5)(b)(I).

⁸ See Bill Summary; also see § 25-8-205.1(4)(b)(II).

⁹ § 25-8-205.1(5)(c).

¹⁰ See Royal C. Gardner, Lawyers Swamps, and Money U.S. Wetland Law, Policy, and Politics, 192 (2011) Island Press.

¹¹ § 25-8-205.1(3)(e)(II)(B).