



**Comments on WQCD's Draft Policy on
Enforcement of Unpermitted Dredge & Fill Material into State Waters**

Submitted on May 31, 2023

The Colorado Mining Association (CMA), established in 1876, is the oldest professional mining industry trade association in the U.S. The CMA membership is comprised of companies who are actively engaged in the exploration, production, and refining of metals, coal, and industrial minerals. Membership also includes businesses and individuals that offer services and supplies to the mining industry.

CMA and its members have participated in the development of the comments of the Colorado Water Congress on the Draft Enforcement Policy and hereby endorses them.

As the Division is aware, the Colorado Mining Association (CMA) does not concur in the underlying assumption of the Draft Enforcement Policy (Policy) that the Division has existing authority to penalize citizens for unpermitted dredge and fill activities. One example of concern is how the Policy conflates regulatory authority over point source discharges with the claimed authority over Dredge & Fill (D&F) activities, yet the definitions involved are distinct. The State Statute regulates point sources of pollution and is silent on D&F. Nevertheless, CMA provides these comments in the spirit of cooperation in an effort to improve a Policy the Division intends to issue. By providing these comments CMA is not waiving its right to raise legal arguments as to the Division's authority in any forum.

CMA appreciates the opportunity to comment on the Policy. However, given two short weeks of time in which to evaluate the Policy and to communicate with its members, and given that the US Supreme Court issued its *Sackett* decision only a week ago, CMA respectfully requests additional time in which to comment on the Policy in light of the contents of the *Sackett* decision, and after review of the Division's potential changes to this Policy (after considering the impact of the *Sackett* decision).

CMA urges the Division to have a dialogue with stakeholders and to clarify "what state waters the Division wants to regulate." Clearly informing citizens of the actions the State intends to regulate is fundamental to having a functioning program as well as providing citizens fair notice as to what actions may be subject to penalty. The *Sackett* ruling also focused on the duty to inform citizens of what actions may be unlawful. The Policy falls short in fulfilling this duty. It is not ascertainable what state waters are subject to the policy; it is not feasible to determine from the Policy as to the scope of gap waters; given the immediate effectiveness of the Policy and the Division's limited resources to implement it, it is not likely that one can even ascertain this information from the Division.

With the *Sackett* decision only days old, and without the views of the Army Corps of Engineers (COE) and Environmental Protection Agency (EPA) as to how they may intend to alter the scope of the federal 404 Permitting Program, one cannot understand the scope of State Waters subject to this Enforcement Policy. Under the Policy, identification of gap waters is unclear - even with the *Sackett* decision in hand. In the Policy the how/who would determine if a water is a gap water (apparently not the Division) is not clear. This task is complicated by seeking notifications on D&F for non-gap waters. (see Section 3, page 7 and Section 6, page 10) Identifying "gap waters" is challenging at this time. In short, CMA urges the Division to be clear as to what activities this Policy intends to regulate.

- The Policy says it seeks to preserve the status quo of resource protection prior to the *Sackett* Decision. However, it is more burdensome than the existing COE regulations, therefore, it would change the status quo. For example, notification is required for all projects, whether or not required by the COE. (see page 7 and page 10)
- Section 2, bullet 5 requires notification whether the state waters are within the subset of waters that historically have not required a 404 permit, and Section 6 goes on to describe that notifications are required for projects discharging dredged or fill material into the relatively small subset of state waters that were not within the Corps' jurisdiction under the pre-2015 federal definition of WOUTS and 2008 guidance. This notice requirement is challenging as discussed above, and it goes well beyond the Policy's stated intention of spelling out enforcement discretion for gap waters. This aspect of the Policy imposes a notification requirement of any activity not exempted that the state determines may be state waters.
- For projects that could require mitigation to stay below the greater than 0.10 acres of wetlands impacts, or 0.03 acres of streambed impacts as stated under Policy on page 6, it is not clear that the "0.10 and 0.003" thresholds are post-mitigation. Some interpret the Policy as saying enforcement discretion is only available if the impacts are below those thresholds pre-mitigation. There needs to be a clear path forward for those projects that previously fell under a nationwide permit, but that exceed the impact area thresholds and/or require mitigation. Credit should be given for off-setting mitigation to reach any threshold set by a COE Nationwide Permit. The Policy does not clearly extend enforcement discretion to projects requiring mitigation to reach thresholds; it should. Please clarify.
- For projects that would have required an individual 404 Permit under pre-*Sackett* regulations, or where jurisdiction is uncertain, the Policy is unclear. This more constraining approach promises to cause confusion for projects formerly subject to individual permits. The Policy would stop certain projects given the requirement to contact WQCD to develop a path forward for projects that would have required an individual 404 Permit – the Division has stated it has no staff to do this.
- Nationwide Permit provisions should be clearly stated as in effect for purposes of the Policy so as to clearly embrace their content uniformly. If Nationwide Permits had thresholds or caps greater than the "0.10 and 0.003" values in the Policy, the Policy should clearly defer to the provisions of the Nationwide Permit.
- All relevant definitions in the federal Army Corps of Engineers (COE) regulations should be embraced uniformly for continuity. One example of an omitted definition in the Policy is the federal definition of "discharge of dredged material" (33 CFR 323.2(d)).
- Stormwater control features should be listed in the exclusions, as was done in the Obama Rule.
- Treatment of incidental fallback associated with removal of material appears different and more restrictive than under the COE 404 Permit Program by (Definition 9 on page 5).
- Driving construction equipment in a channel is not D&F, nor a point source discharge; why does the Policy try to regulate this activity? (see the first paragraph under Applicability on page 5).
- Many municipal entities that must perform routine work will be tasked with filing countless notification forms - adding to the financial burden of these entities.
- Mining companies construct linear project activities such as roads, pipelines, and powerlines. We appreciate and support that the Policy incorporates the federal approaches to Piling built into definition #3, the distinct treatment of linear projects within definition #9 for Project, and the concept of Loss (of

state waters) taken from the federal Nationwide Permit definitions. These aspects should be carried forward as they represent the status quo, and many stakeholders are familiar with how these provisions currently work in the federal permit context.

- A helpful clarification for the Policy would be to provide some examples of linear projects perhaps through addition of a “such as but not limited to” list mentioning roads, powerlines, pipelines, communication lines and other linear utilities.
- Finally, a minor editorial observation. In Section 5.2, the second sentence begins with the phrase: “Consistent with this discussion,”. It might be clearer to state: “Consistent with the provisions of this Policy,” or “Consistent with the historic actions and policy of the Division,”.

CMA appreciates the opportunity to comment, and we look forward to providing additional comments and clarifications.

Sincerely,

A handwritten signature in black ink that reads "Stan Dempsey, Jr." in a cursive script.

Stan Dempsey Jr
President
Colorado Mining Association