BILL TOPIC: "Establish State Dredge & Fill Water Permit Program"

DEADLINES: File by: 6/1/2020

A BILL FOR AN ACT

101 CONCERNING A PERMIT REQUIREMENT FOR THE DISCHARGE OF
102 POLLUTANTS INTO STATE WATERS, AND, IN CONNECTION
103 THEREWITH, ESTABLISHING A STATE DREDGE AND FILL PERMIT
104 PROGRAM TO ADDRESS CHANGES IN FEDERAL LAW.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at http://leg.Colorado.gov.)

On June 22, 2020, a new federal rule will take effect that will decrease the jurisdictional scope of water that is considered to be waters of the United States and subject to federal permits for the discharge of

Capital letters or bold & italic numbers indicate new material to be added to existing statute. Dashes through the words indicate deletions from existing statute.
dredge or fill material. The bill establishes a state dredge and fill permit program in the department of public health and environment to protect state waters that would otherwise not be covered by the federal dredge and fill permit program. The water quality control commission will adopt rules to govern the new program, including fees. The state dredge and fill permit program is repealed on September 1, 2025, subject to sunset review.

The department may use money in the water quality improvement fund for grants for dredge and fill operations management and associated best practices training. The department shall submit a report by December 31 of each year regarding the fees for the state dredge and fill permit program for review by the senate agriculture and natural resources committee and the house of representatives rural affairs and agriculture committee, or their successor committees.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, add 25-8-503.6 as follows:

25-8-503.6. Waters of the state protection - dredge and fill permits - legislative declaration - fees - rules - repeal. (1) Legislative declaration. The general assembly hereby:

(a) Finds that:

(I) On June 22, 2020, a new federal rule takes effect that will decrease the jurisdictional scope of water that is considered to be waters of the United States (WOTUS) and subject to federal permits for the discharge of dredge or fill material. Once the WOTUS rule, also known as the "Navigable Waters Protection Rule", takes effect, the federal permitting of the discharge of dredge or fill material from construction projects into state waters will no longer cover certain state waters protected from unpermitted discharges by state law, including section 25-8-501;
(II) COLORADO does not currently have a state dredge and fill permit program and has relied on the federal government for this service, but with the revised **Navigable Waters Protection** rule, there is increased need for a state program;

(III) Some dredge or fill projects, such as for flood control; stream restoration; water development; underground utilities, road, transit, rail, and housing construction or maintenance; and other commercial purposes, that do not receive a federal permit before June 22, 2020, will be prohibited under section 25-8-501 unless Colorado develops its own dredge and fill permit program;

(b) Determines that:

(I) Supporting Colorado's construction sector is critical to economic recovery and a strong Colorado economy;

(II) Developing a state dredge and fill permit program will benefit the businesses that wish to engage in dredge or fill projects within Colorado because, without a permit program, those projects will be prohibited to the detriment of Colorado's economy; and

(c) Declares that:

(I) This section is intended to close any permitting gap created by the Navigable Waters Protection rule to maintain the status quo in effect before June 22, 2020, for the regulation of discharges of dredge or fill material;

(II) In furtherance of this intent, this section is intended to apply only to waters that were considered waters of the United States before June 22, 2020, but that are no longer
CONSIDERED WATERS OF THE UNITED STATES UNDER THE NAVIGABLE WATERS PROTECTION RULE;

(III) MAINTAINING THE STATUS QUO WILL NOT RESULT IN DREDGE AND FILL PERMITS BEING REQUIRED FOR ALL STATE WATERS BUT WILL PROVIDE SUFFICIENT ENVIRONMENTAL PROTECTION;

(IV) ENFORCEMENT OF DREDGE AND FILL PERMITS SHOULD INCORPORATE EXISTING COMPLIANCE ASSISTANCE MODELS UTILIZED BY THE DIVISION;

(V) THIS SECTION IS NECESSARY TO ADOPT A STATE DREDGE AND FILL PERMIT PROGRAM THAT MAINTAINS THE STATUS QUO IN EFFECT BEFORE JUNE 22, 2020, FOR THE PROTECTION OF STATE WATERS; AND

(VI) THE PERMITTING PROGRAM SHOULD INCORPORATE ELEMENTS OF THE FEDERAL 404 NATIONWIDE AND GENERAL PERMIT PROCESS, CREATED BY THE FEDERAL ACT AND CODIFIED AT 33 U.S.C. SEC. 1344, THAT AUTHORIZE PERMIT APPLICANTS TO BE COVERED BY A NATIONWIDE OR GENERAL PERMIT UPON NOTIFYING THE DIVISION OF THE PROPOSED DREDGE OR FILL ACTIVITY AND THEREBY BEING ABLE TO PROCEED WITH THE ACTIVITY WITHIN A SHORT PERIOD OF TIME.

(2) Permit fees. (a) AFTER THE DIVISION CONDUCTS A STAKEHOLDER PROCESS REGARDING FEES TO BE COLLECTED FOR THE STATE DREDGE AND FILL PERMIT PROGRAM, THE COMMISSION SHALL ADOPT, BY RULE, THE FOLLOWING FEES ON OR BEFORE DECEMBER 1, 2020, IN AN AMOUNT SUFFICIENT TO COVER ONLY THE DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT’S DIRECT AND INDIRECT COSTS TO IMPLEMENT THE STATE DREDGE AND FILL PERMIT PROGRAM:

(I) A FEE FOR AN APPLICATION FOR A DREDGE AND FILL PERMIT THAT MUST COVER THE COST OF THE DIVISION’S ANALYSIS OF POTENTIAL
PERMIT CONDITIONS AND PROCESSING OF THE PERMIT;

   (II) A FEE FOR DEVELOPING JURISDICTIONAL DETERMINATIONS OF
whether a proposed dredge or fill project requires a state
permit;

   (III) A FEE FOR STATE WATERS AND WETLAND MITIGATION
project services sought by applicants; and

   (IV) Such other fees that the commission determines to be
appropriate and necessary to administer the state dredge and
fill permit program.

   (b) (I) The division shall collect the fees authorized by
this subsection (2) and transfer the fees to the state treasurer,
who shall credit them to the construction sector fund created
in section 25-8-502 (1.5)(a)(II).

   (II) The commission, by rule or as otherwise provided by
law, may reduce the amount of one or more of the fees if
necessary pursuant to section 24-75-402 (3) to reduce the
uncommitted reserves of the construction sector fund created
in section 25-8-502 (1.5)(a)(II). After the uncommitted reserves of
the fund are sufficiently reduced, the commission, by rule or as
otherwise provided by law, may increase the amount of one or
more of the fees as provided in section 24-75-402 (4).

   (III) Subject to appropriation by the general assembly, the
division may use the construction sector fund created in section
25-8-502 (1.5)(a)(II) to cover the division's direct and indirect
costs to implement this section. <{This is the prior subsection (4).}>

   (3) Permit program. (a) If and during the time that the
federal navigable waters protection rule is in effect in
COLORADO SO THAT THE FEDERAL PERMITTING OF DREDGE AND FILL FROM
CONSTRUCTION PROJECTS NO LONGER COVERS CERTAIN STATE WATERS
PROTECTED FROM UNPERMITTED DREDGE OR FILL ACTIVITIES BY STATE
LAW, THE COMMISSION SHALL PROMULGATE RULES AS NECESSARY TO
IMPLEMENT THIS SECTION AND AUTHORIZE THE DIVISION, DURING THE
TIME THAT THE FEDERAL NAVIGABLE WATERS PROTECTION RULE IS IN
EFFECT IN COLORADO, TO ISSUE PERMITS RELATING TO THE DISCHARGE OF
POLLUTANTS CONSISTING OF DREDGE OR FILL MATERIAL INTO STATE
WATERS THAT, BEFORE JUNE 22, 2020, WERE CONSIDERED WATERS OF THE
UNITED STATES _____ UNDER SECTION 404 OF THE FEDERAL ACT, AS
COMMISSION SHALL CONSIDER:

(I) THE PROTECTION OF WATERS THAT, BEFORE JUNE 22, 2020,
WERE CONSIDERED WATERS OF THE UNITED STATES _____ UNDER SECTION
404 OF THE FEDERAL ACT, AS AMENDED, 33 U.S.C. SEC. 1344;

(II) WHEN PERMITS WILL BE REQUIRED PURSUANT TO THIS SECTION
AND PERMIT EXEMPTIONS AND APPLICATION AND FILING REQUIREMENTS;

(III) REQUIREMENTS NECESSARY TO PROVIDE REASONABLE
ASSURANCE THAT A PERMITTED PROJECT WILL COMPLY WITH ALL
APPLICABLE STATE WATER QUALITY REQUIREMENTS, EITHER AS PROPOSED
OR AS CONDITIONED IN THE PERMIT;

(IV) THE CONDITIONS NECESSARY TO REGULATE BOTH THE
CONSTRUCTION AND OPERATION OF THE PERMITTED ACTIVITY;

(V) THE DIRECT AND INDIRECT EFFECTS OF THE PERMITTED
ACTIVITY;

(VI) AUTHORIZING PERMIT CONDITIONS DESIGNED TO DO ANY OF
THE FOLLOWING:
(A) REMOVE OR REDUCE AN IMPAIRMENT TO STATE WATERS OR WETLANDS THAT WOULD OTHERWISE RESULT FROM THE PROJECT;

(B) IMPROVE THE WATER QUALITY THAT WOULD OTHERWISE RESULT FROM THE PROJECT;

(C) REMOVE OR REDUCE THE EFFECT OF A DISCHARGE OF DREDGE OR FILL MATERIAL; AND

(D) MITIGATE ANY UNAVOIDABLE LOSSES OF STATE WATERS RESULTING FROM THE PROJECT OR ASSIST IN MEETING STATE WATER QUALITY REQUIREMENTS, INCLUDING PROTECTION OF DOWNSTREAM USES;

(VII) THE TERMS AND CONDITIONS REQUIRED FOR PERMITS, NOTICE, AND PUBLIC PARTICIPATION REQUIREMENTS, AND THE DURATION OF THE PERMITS;

(VIII) THE DIVISION'S REVIEW OF THE PERMITS, INCLUDING CONSIDERATION OF CURRENT FEDERAL GENERAL PERMITTING PROCESSES THAT ALLOW PERMIT APPLICANTS TO FILE A PERMIT NOTIFICATION AND THEREBY BECOME AUTHORIZED TO PROCEED WITH CONSTRUCTION FOR ROUTINE DREDGE OR FILL PROJECTS AFTER A SPECIFIED PERIOD OF TIME;

(IX) MONITORING, RECORDING, AND REPORTING REQUIREMENTS;

(X) THE APPROPRIATE DEFINITIONS OF THE TERMS "DREDGE" AND "FILL"; AND


(b) UNTIL THE RULES PROMULGATED BY THE COMMISSION BECOME EFFECTIVE, THE DIVISION MAY ISSUE PERMITS PURSUANT TO SECTION 25-8-501 IN ACCORDANCE WITH FEDERAL LAW AND GUIDANCE IN EFFECT
AS OF APRIL 20, 2020. UNTIL THE COMMISSION ESTABLISHES FEES IN ACCORDANCE WITH SUBSECTION (2)(a) OF THIS SECTION, THE DIVISION SHALL CHARGE A FEE TO COVER THE DIVISION'S DIRECT AND INDIRECT COSTS TO ISSUE PERMITS PURSUANT TO THIS SECTION. THE DIVISION SHALL PUBLISH THE FEES ON ITS WEBSITE. THE FEES AUTHORIZED UNDER THIS SUBSECTION (3)(b) EXPIRE WHEN THE COMMISSION'S RULE ESTABLISHING FEES BECOMES EFFECTIVE.

(c) A PERMIT FROM THE DIVISION IS NOT REQUIRED UNDER THIS SECTION FOR PROJECTS WITH DISCHARGES OF DREDGE OR FILL MATERIAL THAT PROCEED UNDER SECTION 404 OF THE FEDERAL ACT, AS AMENDED, 33 U.S.C. SEC. 1344, BASED ON AN APPROVED JURISDICTIONAL DETERMINATION THAT IS NOT EXPIRED AND WAS ISSUED BEFORE JULY 1, 2020, PURSUANT TO FEDERAL LAW AND GUIDANCE IN EFFECT BEFORE JUNE 22, 2020.

(d) WHEN ISSUING A PERMIT FOR A DISCHARGE OF DREDGE OR FILL MATERIAL, WHERE THE APPLICANT HAS AN UNEXPIRED FEDERAL AGENCY JURISDICTIONAL DETERMINATION MADE PURSUANT TO FEDERAL LAW AND GUIDANCE IN EFFECT BEFORE JUNE 22, 2020, THE DIVISION SHALL USE THE FEDERAL JURISDICTIONAL DETERMINATION TO ESTABLISH THE SCOPE OF THE APPLICANT'S PERMIT.

(e) NOTHING IN THIS SECTION LIMITS OR EXTINGUISHES A PERSON'S ABILITY TO APPLY FOR AND OBTAIN A PERMIT UNDER SECTION 404 OF THE FEDERAL ACT, AS AMENDED, 33 U.S.C. SEC. 1344, FOR THE DISCHARGE OF DREDGE OR FILL MATERIAL INTO WATERS OF THE UNITED STATES, INCLUSIVE OF STATE WATERS REGULATED UNDER THIS SECTION. A PERMIT ISSUED PURSUANT TO THE FEDERAL ACT FOR THE DISCHARGE OF DREDGE OR FILL MATERIAL INTO STATE WATERS REGULATED UNDER THIS SECTION.
SHALL BE DEEMED TO BE A TEMPORARY PERMIT ISSUED UNDER THIS SECTION THAT EXPIRES UPON EXPIRATION OF THE FEDERAL PERMIT.

(4) Repeal. This section is repealed, effective September 1, 2025. Before the repeal, the regulation of the discharge of dredge or fill material into state waters by the department of public health and environment in accordance with this section is scheduled for review in accordance with section 24-34-104.

SECTION 2. In Colorado Revised Statutes, 24-34-104, add (26)(a)(IX) as follows:

24-34-104. General assembly review of regulatory agencies and functions for repeal, continuation, or reestablishment - legislative declaration - repeal. (26) (a) The following agencies, functions, or both, are scheduled for repeal on September 1, 2025:

(IX) The regulation of the discharge of dredge or fill material into state waters by the department of public health and environment in accordance with section 25-8-503.6.

SECTION 3. In Colorado Revised Statutes, 25-8-104, amend (1) as follows:

25-8-104. Interpretation and construction of water quality provisions. (1) No provision of this article shall be interpreted so as to supersede, abrogate, or impair rights to divert water and apply water to beneficial uses in accordance with the provisions of sections 5 and 6 of article XVI of the constitution of the state of Colorado, compacts entered into by the state of Colorado, or the provisions of articles 80 to 93 of title 37, C.R.S., or Colorado court determinations with respect to the determination and administration of water rights. Nothing in this article
ARTICLE 8 shall be construed, enforced, or applied so as to cause or result in material injury to water rights. The general assembly recognizes that this article may lead to dischargers choosing consumptive types of treatment techniques in order to meet water quality requirements. Under such circumstances, the discharger must comply with all of the applicable provisions of articles 80 to 93 of title 37, C.R.S., and shall be obliged to remedy any material injury to water rights to the extent required under the provisions of articles 80 to 93 of title 37, C.R.S. The question of whether such material injury to water rights exists and the remedy therefor shall be determined by the water court. This section shall not be interpreted so as to prevent the issuance of a permit pursuant to sections 25-8-501 to 25-8-503 which is necessary to protect public health. Nothing in this article shall be construed to allow the commission or the division to require minimum stream flows or minimum water levels in any lakes or impoundments.

SECTION 4. In Colorado Revised Statutes, 25-8-502, amend (1.5)(a)(II), (1.7)(a)(I) introductory portion, and (1.7)(a)(I)(B) as follows:

25-8-502. Application - definitions - fees - funds created - public participation - report - repeal. (1.5) (a) (II) There is hereby created in the state treasury the construction sector fund, which consists of all annual fees collected for regulated activities associated with the construction sector pursuant to subsection (1.1) of this section; all fees for services performed by the division associated with the construction sector collected pursuant to subsection (1.3) of this section; and all interim fees associated with the construction sector collected pursuant to subsection (1.4) of this section; and fees collected pursuant to section 25-8-503.6 (2)(a). The division shall transmit the fees to the state
treasurer, who shall credit them to the construction sector fund.

(1.7) (a) The department of public health and environment shall report annually to:

(I) The senate agriculture and natural resources committee and the house of representatives RURAL AFFAIRS AND agriculture livestock, and natural resources committee, or their successor committees, on:

(B) The clean water program. The report must include the number of permits processed, the number of applications pending for new and amended permits, the length of time the permits remain in the system prior to issuance, the number of inspections conducted, the number of site application and design reviews completed, the number of enforcement actions taken, the costs associated with each sector specified in subsections (1.1), (1.2), and (1.3) of this section, the number of full-time equivalents assigned to and actively processing permits, the number of full-time equivalents assigned to and actively conducting inspections, the number of full-time equivalents assigned to and actively conducting site application and design reviews, the number of full-time equivalents assigned to and actively conducting enforcement actions, and the number of full-time equivalents assigned to and actively developing rules and standards. The department shall inform the committees regarding all new standards and rules to be proposed within the subsequent year. The department shall submit the report on or before March 31 of each year. Commencing in 2017, the department shall develop baseline information for reporting. Commencing in 2018, the department shall provide information on improvements that have been made in comparison to the baseline information and information on the barriers to making improvements. COMMENCING IN 2021, THE DEPARTMENT SHALL PROVIDE
ANALOGOUS INFORMATION TO THAT OTHERWISE REQUIRED BY THIS SUBSECTION (1.7)(a)(I)(B) FOR THE STATE DREDGE AND FILL PERMIT PROGRAM AUTHORIZED BY SECTION 25-8-503.6 AND SHALL PROVIDE A SEPARATE REPORT BY DECEMBER 31 OF EACH YEAR REGARDING THE FEES FOR THE STATE DREDGE AND FILL PERMIT PROGRAM AUTHORIZED BY SECTION 25-8-503.6, WHICH REPORT MUST SUMMARIZE FOR COMMITTEE REVIEW THE DIRECT AND INDIRECT COSTS FOR THE STATE DREDGE AND FILL PERMIT PROGRAM AND FEES ASSESSED TO COVER THESE COSTS.

SECTION 5. In Colorado Revised Statutes, 25-8-503, amend (4) as follows:

25-8-503. Permits - when required and when prohibited - variances. (4) (a) No A permit shall NOT be issued which allows a discharge that by itself or in combination with other pollution will result in pollution of the receiving waters in excess of the pollution permitted by an applicable water quality standard unless:

(I) The permit contains effluent limitations and a schedule of compliance specifying treatment requirements; OR

(II) FOR A DREDGE AND FILL PERMIT ISSUED PURSUANT TO SECTION 25-8-503.6, THE PERMIT CONTAINS ADEQUATE CONDITIONS OR MITIGATION TO PROVIDE REASONABLE ASSURANCE THAT THE PROJECT WILL COMPLY WITH ALL APPLICABLE STATE WATER QUALITY REQUIREMENTS.

(b) Effluent limitations designed to meet water quality standards shall MUST be based on application of appropriate physical, chemical, and biological factors reasonably necessary to achieve the levels of protection required by the standards.

(c) (I) EXCEPT AS PROVIDED IN SUBSECTION (4)(c)(II) OF THIS SECTION, THE DISCHARGE OF DREDGE OR FILL MATERIAL FROM THE
FOLLOWING ACTIVITIES IS NOT PROHIBITED BY OR OTHERWISE SUBJECT TO REGULATION UNDER THIS SECTION:

(A) Normal farming, silviculture, and ranching activities such as plowing; seeding; cultivating; minor drainage; harvesting for the production of food, fiber, or forest products; and upland soil and water conservation practices;

(B) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures;

(C) Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) Construction of temporary sedimentation basins on a construction site that does not include the placement of fill material into state waters; and

(E) Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where the roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of state waters are not impaired, that the reach of state waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized.

(II) Any discharge of dredge or fill material into state waters incidental to any activity having as its purpose bringing an area of state waters into a use to which it was not previously
SUBJECT, WHERE THE FLOW OR CIRCULATION OF STATE WATERS MAY BE IMPAIRED OR THE REACH OF STATE WATERS MAY BE REDUCED, MUST HAVE A PERMIT ISSUED PURSUANT TO SECTION 25-8-503.6.

(d) A PERMIT FROM THE DIVISION IS NOT REQUIRED UNDER THIS SECTION FOR PROJECTS WITH DISCHARGES OF DREDGE OR FILL MATERIAL THAT PROCEED UNDER SECTION 404 OF THE FEDERAL ACT, AS AMENDED, 33 U.S.C. SEC. 1344, BASED ON AN APPROVED JURISDICTIONAL DETERMINATION THAT IS NOT EXPIRED AND WAS ISSUED BEFORE JULY 1, 2020, PURSUANT TO FEDERAL LAW AND GUIDANCE IN EFFECT BEFORE JUNE 22, 2020.

SECTION 6. In Colorado Revised Statutes, 25-8-608, amend (1.7)(a) introductory portion and (1.7)(a)(IV) as follows:

25-8-608. Civil penalties - rules - fund created - temporary moratorium on penalties for minor violations - definitions - repeal. (1.7) (a) The department shall expend money in the water quality improvement fund for the following purposes:

(IV) Providing grants for storm water management, training DREDGE OR FILL OPERATIONS MANAGEMENT, and ASSOCIATED best practices training to prevent or reduce the pollution of state waters.

SECTION 7. Effective date - applicability. This act takes effect July 1, 2020, and applies to conduct occurring on or after said date.

SECTION 8. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, or safety.