

# LEGISLATIVE OPTIONS FOR ADDRESSING THE SACKETT V. EPA DECISION AND WATERS OF THE UNITED STATES IN COLORADO

## OVERVIEW

The *Sackett v. EPA* United States Supreme Court decision removed federal protection of wetlands and other waters. Under that decision, the type of waterbodies subject to federal jurisdiction and permitting is significantly narrowed. The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) thereafter revised their regulatory definitions of “waters of the United States” to align with the *Sackett* ruling. Currently, the Corps issues permits in Colorado for dredge and fill activities. With fewer federal permits being issued by the Corps following *Sackett*, rivers, streams, lakes, and wetlands in Colorado are at risk of irreversible harm. In addition, the decision leaves the regulated community with much uncertainty about the legal risk associated with their development projects (i.e., housing developments, flood prevention, etc.).

## PROBLEM STATEMENT

The 1972 amendments to the Clean Water Act established federal jurisdiction over “navigable waters,” which are defined as the “waters of the United States” (Clean Water Act Section 502(7)). Waters of the United States, also known as “WOTUS,” are bodies of water such as rivers, lakes, streams, and wetlands that the federal government protects. The Clean Water Act authorizes EPA and the Corps to more precisely define waters of the United States in regulation, which the agencies have done but which have been subject to federal court challenges for decades. Since 2006 until recently, the Corps has determined the jurisdictional status of wetlands under the “significant nexus” test from the concurring opinion in *Rapanos v. United States*.

In Colorado (and 47 other states), the Corps uses its authority under Section 404 of the Clean Water Act to issue “404 permits,” which regulate discharges from dredge and fill activities into waters that meet the definition of waters of the United States. Dredge and fill activities involve digging up and placing dirt and other fill material into wetlands or surface waters as part of construction projects. These operations are necessary in many infrastructure projects including roads, bridges, housing developments, flood mitigation, and utility pipelines.

Colorado's Water Quality Control Act complements the Clean Water Act, defining “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.” Nevertheless, the federal definition of waters of the United States and the Corps’ 404 dredge and fill permitting program have safeguarded the vast majority of Colorado's state waters from pollution caused by dredge and fill activities.

On May 25, 2023, the U.S. Supreme Court issued a ruling in the *Sackett v. EPA* case that changes the definition of waters of the United States. The Court ruled that the EPA's previous interpretation of what constitutes waters subject to federal regulation was too broad. The Court held that in order to be jurisdictional, wetlands must be indistinguishable from a water of the United States. Previously, wetlands could be separated from a water of the United States (i.e., by a road or levee) if there was still a “significant nexus” between the waterbodies. The Court's decision also redefines waters of the United States to be “a relatively permanent body of water connected to traditional interstate navigable waters.” EPA and the Corps thereafter revised their regulatory definitions of “waters of the United

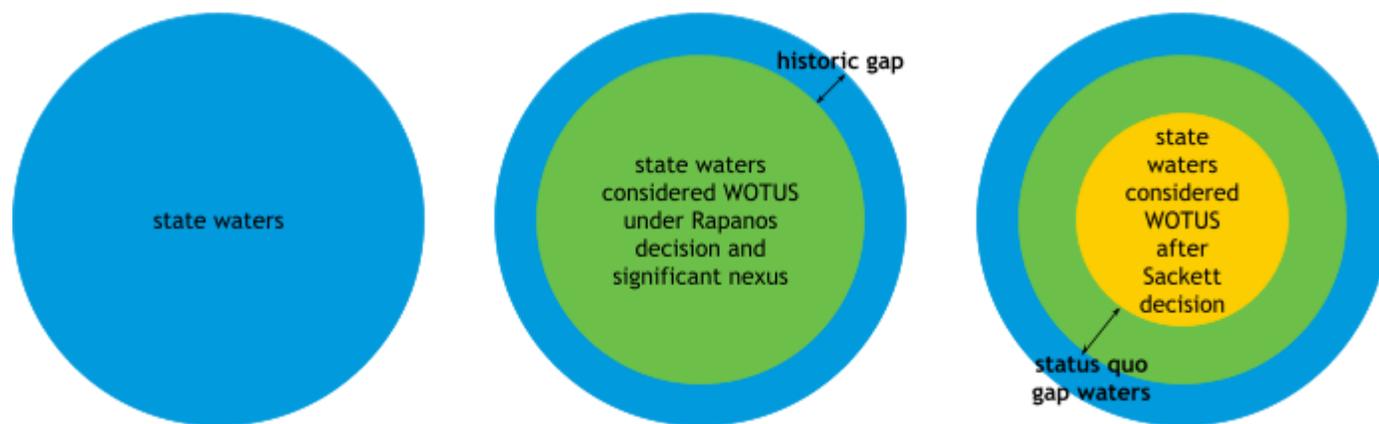
States” to align with the *Sackett* ruling. These changes place an estimated 60 percent of Colorado wetlands at risk of losing environmental protection, based on an analysis of wetlands using the [National Fish and Wildlife Service’s National Wetland Inventory](#). In addition, many state streams may not be considered relatively permanent and are similarly at risk. In Colorado, 26 percent of streams only flow in response to rainfall, and 59 percent flow seasonally, based on analysis using the [United States Geological Survey’s National Hydrography Dataset](#). The State is waiting for additional guidance from the EPA and Corps to determine exactly how many of Colorado waters may lose protection.

Dredge and fill projects that no longer require a federal permit are still subject to state-level pollution enforcement under the Colorado Water Quality Control Act. Under that law, the Colorado Department of Public Health and Environment’s Water Quality Control Division can take enforcement action against any person discharging pollutants in Colorado waters without a permit. However, the law does not authorize the Water Quality Control Division to issue permits to allow discharges from dredge and fill activities.

## OPTIONS TO ADDRESS THE PROBLEM

During the first half of 2023, and in recognition that the *Sackett* decision could result in fewer protections for state waters, Governor Polis tasked a group of experts to discuss options for addressing the pending decision. The group discussed examples from other states that have already protected their state waters or are in the process of protecting their state waters that are not protected by federal dredge and fill permits. The group summarized the problem in Colorado using Figure 1:

Figure 1 Colorado’s state waters definition vs. federal definitions of waters of the United States



In Colorado, “state waters means any and all surface and subsurface waters which are contained in or flow in or through this state, but does not include waters in sewage systems, waters in treatment works of disposal systems, waters in potable water distribution systems, and all water withdrawn for use until use and treatment have been completed.” C.R.S. 25-8-103(19). The definition of state waters has always been more expansive than the definition of waters of the United States. Before the *Sackett* decision, a subset of state waters were not waters of the United States (difference between the blue and green circle in the diagram above). However, this prior definition of waters of the United States sufficiently safeguarded Colorado’s state waters from pollution caused by dredge and fill activities. Post-*Sackett*, the percentage of state waters protected by federal dredge and fill permitting will be significantly less (the difference between the green and yellow circle in the diagram).

The group discussed four options to address the impacts of the *Sackett* decision:

1. **Use of enforcement discretion.** The group discussed using enforcement discretion as a short-term solution to allow development projects to continue without a state-issued permit. The Water Quality Control Division [developed a policy](#) that describes how the division will exercise enforcement discretion for discharges of dredged or fill material into state waters that are not subject to federal Section 404 permitting following the *Sackett* decision.
2. **Gap waters program.** One long-term option the group discussed is a permit program covering only the "status quo" gap shown in the above diagram. This permit program would concentrate on waters where there may be a gap between the status quo of waters that have been permitted and protected for decades (and specifically, as clarified by the Supreme Court's *Rapanos* decision and the *Rapanos* guidance issued by EPA in 2008) and the new federal definition of WOTUS as a result of the *Sackett* decision.
3. **Colorado program.** Another long-term option discussed is a permit program covering all state waters minus anything with a federal permit or that addresses dredge and fill activities in all state waters not under federal jurisdiction. This is the "historic gap" plus the "status quo gap" in the above diagram.
4. **Full assumption.** The final long-term option discussed was that Colorado could seek full assumption of the federal 404 program. This is a formal process and could not be accomplished in the short term.

The group's general consensus was that there were two viable options for a long-term solution: a gap waters program or a Colorado program. The group developed the pros and cons of these options, as shown in Table 1 below:

Table 1 Pros and cons of a gap waters program and a Colorado program

Gap Waters Program		Colorado Program	
Pros	Cons	Pros	Cons
<ul style="list-style-type: none"> <li>• No overlap in coverage between federal and state regulations.</li> <li>• Could provide continuity for the regulated community who understand current requirements.</li> <li>• Would be consistent with EPA's 2008 guidance, so less change for project proponents.</li> </ul>	<ul style="list-style-type: none"> <li>• Coordination between the Corps and the State may take extra time.</li> <li>• Less long-term certainty</li> <li>• Staff and budget resources.</li> <li>• The complication of determining jurisdiction. Differences between state and federal waters, and could cause needing more time to assess.</li> <li>• Subject to external forces requiring triggers for changes.</li> </ul>	<ul style="list-style-type: none"> <li>• No overlap in coverage between federal and state regulations if structured to avoid dual permits.</li> <li>• Wetlands of unusual/unique importance to Colorado may be covered under a Colorado program</li> <li>• Examples from other states that could be modeled from.</li> <li>• For waters that fall in the gap, could be faster to get a permit in Colorado program than gap waters program.</li> </ul>	<ul style="list-style-type: none"> <li>• If overlapping jurisdiction, coordination between the Corps and the State may take extra time.</li> <li>• Staff and budget resources.</li> <li>• More expansive than status quo.</li> <li>• Regulatory community would be subject to more requirements and expenses.</li> <li>• More uncertainty for landowners where Fed and State jurisdictions start and end.</li> <li>• Questions/uncertainties about what are the boundaries of what is included in the defin. of a state water.</li> </ul>

The remainder of this document will outline legislative options for both a gap waters program and a Colorado program.

## LEGISLATIVE OPTIONS

Following are recommended statutory changes to address the *Sackett* decision in Colorado. Where there are differences between the gap waters program and a Colorado program, the information is presented tabularly to show the difference. **Please note that a likely solution for Colorado could contain elements from both information presented under Gap Waters Program and Colorado Program below. They have been presented separately below for organizational purposes only and to help facilitate discussion . In addition, options that have been included based on stakeholder feedback are noted with an asterisk (\*)**.

1. **PERMIT AND MITIGATION AUTHORITY.** Modify Colorado statute so that it is clear that the Department of Public Health and Environment’s Water Quality Control Division can issue dredge and fill permits and require mitigation in certain circumstances.
2. **SCOPE OF PROGRAM.** Statutory direction should direct the scope of the program. The differences between the scope of a program are highlighted in the table below.

Table 1 Statutory direction

Gap Waters Program	Colorado Program
Direction to maintain "status quo" of environmental protection aligned with the 2006 <i>Rapanos</i> decision and corresponding EPA guidance in place since 2008.	Direction to protect all state waters that are not waters of the United States, however that federal term is defined going forward.

3. **CONSULTATION WITH OTHER STATE AGENCIES.** Statutory direction should require that the Water Quality Control Division consult with the Department of Natural Resources (DNR) on permits for water supply projects on the topics of potential impacts to aquatic resources and associated mitigation (Colorado Parks and Wildlife) and potential impacts to water rights (State Engineer’s Office). The statute should also direct consultation with DNR (State Engineer’s Office) on the applicability of exclusions of certain types of waters (either on a permit-specific basis or in identifying additional exclusions in rulemaking) (see Item 4, Tables 2 and 3 below) and with the Department of Agriculture on the applicability of exemptions for agricultural activities (see Item 5, Tables 4 and 5 below). The statute should direct consultation with DNR concerning the "purpose and need" and the “alternatives analysis” for individual permit applications for water projects under the Corps’ 404(b)(1) guidelines (see Item 7 below). The statute should require the Water Quality Control Commission (WQCC) to further detail the consultation processes in regulation.
4. **EXCLUSIONS AND INCLUSIONS OF TYPES OF WATERS.** The statute should specify exclusions for types of waters that would not require permits for discharges of dredge and fill material, as well as certain express inclusions. The statute should specify a consultation role for DNR concerning excluded types of waters (see Item 3 above). Table 2 and 3, below, provide suggestions for what should be in statute versus what should be addressed through regulation. The statute should direct the regulatory body to consider specifying the exclusions in Table 3 below. ***In addition, options that have been included based on stakeholder feedback are noted with an asterisk (\*)***.

Table 2 Exclusions and inclusions (types of waters) to specify in statute

Gap Waters Program	Colorado Program
<p>Exclusions to specify in statute:</p> <ul style="list-style-type: none"> <li>• Non-tidal drainage and irrigation ditches excavated on dry land.</li> <li>• Artificially irrigated areas which would revert to uplands if irrigation ceased.</li> <li>• Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.</li> <li>• Water-filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of WOTUS pursuant to the pre-2015 federal regulations and the 2008 Guidance.</li> </ul>	<p>Exclusions (do not need a permit) to specify in statute:</p> <ul style="list-style-type: none"> <li>• All ditches and canals, including drainage ditches, roadside ditches, irrigation ditches, and canals, that are excavated on dry land and not along any natural stream systems (37-92-602(9)(b)(III), C.R.S).*</li> <li>• Artificially irrigated areas which would revert to uplands if irrigation ceased</li> <li>• Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.</li> <li>• Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.</li> <li>• Water-filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water or wetlands is within the natural stream system (37-92-602(9)(b)(III), C.R.S).</li> <li>• Groundwater.*</li> <li>• Prior converted cropland or any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. An area is no longer considered prior converted cropland when the area is abandoned and has reverted to wetlands. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. Agricultural purposes include land use that makes the production of an agricultural product possible, including grazing and haying. Cropland that is left idle or fallow for conservation or agricultural purposes for any period of time remains in agricultural use, and, therefore, maintains the prior converted cropland.*</li> </ul>

**Table 3 Exclusions and inclusions (types of waters) to be considered by the WQCC through rulemaking**

Gap Waters Program	Colorado Program
Not applicable.	<p>Exclusions (do not need a permit) to specify in statute:</p> <ul style="list-style-type: none"> <li>● Isolated wetlands.*</li> <li>● Ephemeral drainages and upland swales.*</li> </ul> <p>Inclusions (need a permit) to specify in statute:</p> <ul style="list-style-type: none"> <li>● Peatlands.*</li> <li>● Natural springs.*</li> </ul>

5. **EXEMPTED AND NON-EXEMPTED ACTIVITIES.** The statute should include exemptions for certain types of activities that would not require permits for discharges of dredge and fill material. The statute should specify a consultation role for the Department of Agriculture concerning applicability of the exemptions related to agricultural practices (see Item 3 above). Table 4 and 5 that follow detail suggestions for what should be included in statute versus what should be addressed through regulation. The statute should direct the regulatory body to consider including the exemptions in Table 5 below. *In addition, options that have been included based on stakeholder feedback are noted with an asterisk (\*)*.

**Table 4 Exempted and non-exempted activities to include in statute**

Gap Waters Program	Colorado Program
<p>Exempted activities:</p> <ul style="list-style-type: none"> <li>● Activities in receipt of a valid federal permit based on preliminary jurisdiction determinations that address all aquatic resources on site, regardless of federal jurisdiction, are excluded.</li> <li>● Normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices. “Upland soil and water conservation practices” means any discharge of dredged or fill material to state waters incidental to soil and water conservation practices for the purpose of improving, maintaining, or restoring uplands including, but not limited to, rangeland management practices, erosion control practices, and vegetation management practices.</li> <li>● Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge</li> </ul>	<p>Exempted activities:</p> <ul style="list-style-type: none"> <li>● Activities in receipt of a valid federal permit based on preliminary jurisdiction determinations that address all aquatic resources on site, regardless of federal jurisdiction, are excluded.*</li> <li>● Activities in receipt of a valid approved jurisdictional determination stating an aquatic resource is nonjurisdictional dated prior to May 25, 2023.*</li> <li>● Normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices. “Upland soil and water conservation practices” means any discharge of dredged or fill material to state waters incidental to soil and water conservation practices for the purpose of improving, maintaining, or restoring uplands including, but not limited to, rangeland management practices, erosion control practices, and vegetation management practices.</li> </ul>

**Table 4 Exempted and non-exempted activities to include in statute**

Gap Waters Program	Colorado Program
<p>abutments or approaches, and transportation structures.</p> <ul style="list-style-type: none"> <li>• Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches.</li> <li>• Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters.</li> <li>• Construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the state waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized.</li> </ul> <p>Not exempted:</p> <ul style="list-style-type: none"> <li>• Any discharge of dredged or fill material into state waters incidental to any activity having as its purpose bringing an area of the 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 such waters be reduced are not included within these exemptions, consistent with Section 404(f)(2). See 33 U.S.C. § 1344(f)(2) (the “Recapture Provision”).</li> </ul>	<ul style="list-style-type: none"> <li>• Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches.</li> <li>• Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters.</li> <li>• Construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the state waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized.</li> </ul>

**Table 5 Exempted activities to be considered by the WQCC through rulemaking**

Gap Waters Program	Colorado Program
<p>Not applicable.</p>	<p>Exempted activities: Providing clarity around the current exemption: Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures. Areas the WQCC should consider through rulemaking:</p> <ul style="list-style-type: none"> <li>• Maintenance activities that include minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety</li> </ul>

Table 5 Exempted activities to be considered by the WQCC through rulemaking

Gap Waters Program	Colorado Program
	<p>standards that are necessary to make the repair, rehabilitation, or replacement are authorized. Any stream channel modification is limited to the minimum necessary for the repair, rehabilitation, or replacement of the structure or fill; such modifications, including the removal of material from the stream channel, must be immediately adjacent to the project. This includes removal of accumulated sediment and debris within, and in the immediate vicinity of any structure or fill. This also includes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events.*</p> <ul style="list-style-type: none"> <li>● Installation of scientific measurement devices.*</li> <li>● Survey activities.*</li> <li>● Repair of uplands damaged by discrete events.*</li> <li>● Emergency and natural response activities, if the activities are to restore aquatic features to their previous state and/or provide beneficial effects to the aquatic features. This would require some approval and oversight by the state permitting agency.*</li> <li>● Maintenance of any previously constructed stormwater or flood control facilities, including retention and detention basin.</li> <li>● Maintenance in off-channel reservoirs that are not connected to a downstream natural stream system.*</li> </ul> <p>Not exempted: make the "recapture provision" more clear in regulation.*</p>

6. **DETERMINATION IF PERMIT REQUIRED:** If the scope of the program is a gap waters program, then there will need to be a determination of whether a state permit is required or not. The statute should provide direction on these determinations. To maintain the status quo the statute should say that what the Division is trying to maintain is protection provided under the *Rapanos* significant nexus test and EPA's 2008 guidance. The statute could provide direction that the WQCC should try and provide more refined direction than what has been provided nationally on this issue, taking into account Colorado's hydrology. If the scope of a program is a Colorado program, then the statute should state that any discharge of dredge and fill material should require a permit except for waters that are excluded or activities that are exempted.
7. **PERMITS:** The statute should allow for individual and general permits and define a permit duration. The statute should authorize the WQCC to establish permitting regulations. The WQCC's regulations should include a requirement for the Water Quality Control Division to consult with DNR regarding "purpose and need" and the "alternatives analysis" for individual permit applications for water

projects under the Corps’ 404(b)(1) guidelines. Tables 6 and 7, below, provide suggestions for what to include in statute versus what should be addressed through regulation. *In addition, options that have been included based on stakeholder feedback are noted with an asterisk (\*)*.

**Table 6 Permit information to include in statute**

Gap Waters Program	Colorado Program
<ul style="list-style-type: none"> <li>• A permit term should be no longer than five years.</li> <li>• The state may issue general permits for any category of activities involving discharges of dredged or fill material if the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment.</li> <li>• Activities that are not covered by general permits may be authorized by individual permits.</li> </ul>	<ul style="list-style-type: none"> <li>• A permit term should be no longer than five years.</li> <li>• The state may issue general permits for any category of activities involving discharges of dredged or fill material if the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment.</li> <li>• Activities that are not covered by general permits may be authorized by individual permits.</li> </ul>

**Table 7 Permit information to be considered by the WQCC through rulemaking**

Gap Waters Program	Colorado Program
<ul style="list-style-type: none"> <li>• Permit regulations equivalent to the Corps’ Clean Water Act 404(b)(1) guidelines, including consultation with DNR concerning the required "purpose and need" and "alternatives analysis" for individual permit applications for water projects.</li> <li>• All general permits have a threshold of no more than 0.5 acre of permanent impacts to wetlands and/or ordinary high water mark.</li> <li>• Some projects can proceed without pre-construction notification.*</li> <li>• General permits should be equivalent to current nationwide and regional general permits.*</li> <li>• Individual permits would require a 401 water quality certification type analysis.</li> </ul>	<p>General Permits</p> <ul style="list-style-type: none"> <li>• Permit types: <ul style="list-style-type: none"> <li>○ Utility lines (water, oil/natural gas, electric)</li> <li>○ Restoration/Enhancement</li> <li>○ Transportation</li> <li>○ Development (commercial, residential, industrial)</li> <li>○ Recreational</li> <li>○ Renewable Energy</li> <li>○ Temporary construction</li> </ul> </li> <li>• All general permits have a threshold of no more than 0.5 acre of impacts, except for restoration/enhancement projects, which have no limits provided it demonstrates ecological lift.</li> <li>• Similar processes where certain projects can proceed without pre-construction notification.*</li> <li>• For linear projects, each crossing is a single and complete project.</li> </ul> <p>Individual permits (focus on potentially streamlining individual permit process*):</p>

Table 7 Permit information to be considered by the WQCC through rulemaking

Gap Waters Program	Colorado Program
	<ul style="list-style-type: none"> <li>● Required if project does not fit within exemptions or a general permit.</li> <li>● Requires the following information:                             <ul style="list-style-type: none"> <li>○ Project location information</li> <li>○ Project description, including site plans</li> <li>○ Alternatives analysis</li> <li>○ Purpose and need</li> <li>○ Description of avoidance and minimization measures</li> <li>○ Compensatory mitigation plan (see requirements below)</li> </ul> </li> <li>● Is project protective of water quality standards - include in alternatives analysis</li> </ul> <p>For projects impacting both waters of the United States and non-waters of the United States it may be possible for the state to permit the entire project and have it recognized by the Corps. Utah and West Virginia currently have programs that do this.</p>

8. **MITIGATION:** Provide direction in statute that the WQCC should establish rules for stream and wetland mitigation. Statute should require wetland mitigation for all permanent impacts over 0.1 acre. Statute should also state that mitigation could be completed by purchase of mitigation bank credits, in-lieu fee program, or permittee-responsible mitigation. Details on the mitigation process to be completed by rulemaking. Rulemaking to consider functional assessment methods and ratios for determining mitigation requirements for both wetland and stream mitigation. Rulemaking to determine stream mitigation thresholds. The statute should direct consultation with DNR (Colorado Parks and Wildlife) on mitigation for aquatic resources (see Item 3 above).
9. **CULTURAL RESOURCES EVALUATION:** Need to determine if statute should direct the WQCC to establish rules to include cultural resources evaluation in permitting processes.
10. **THREATENED AND ENDANGERED SPECIES ASSESSMENT:** Need to determine if statute should direct the WQCC to establish rules to include assessment of federally-recognized threatened or endangered species in permitting processes.