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COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Water Quality Control Commission

REGULATION NO. 87 - DREDGE AND FILL CONTROL REGULATION

5 CCR 1002-87

87.1 GENERAL PROVISIONS

(1) Authority

The Water Quality Control Commission is authorized to promulgate this Control Regulation pursuant to sections 25-8-205, 25-8-205(1)(h), and 25-8-205.1, C.R.S.

(2) Purpose

Pursuant to section 25-8-205(1)(h), C.R.S., the purpose of this control regulation is to establish requirements, prohibitions, and standards for the discharge of dredged or fill material into state waters.

(3) Federal Regulations Incorporated by Reference

(a) Date of Incorporation. Requirements promulgated by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers have been adopted and incorporated by reference into this regulation. The federal references cited herein include only those versions in effect as of December 8, 2025, and not later amendments to the incorporated material.

(b) Location of Materials Incorporated by Reference. The federal regulations incorporated by reference are available at no cost in the online edition of the Code of Federal Regulations (CFR) hosted by the United States Government Printing Office, online at www.govinfo.gov.

(4) Severability

The provisions of this regulation are severable, and if any provisions or the application of the provisions to any circumstances is held invalid, the application of such provision to other circumstances, and the remainder of this regulation shall not be affected thereby.

(5) Water Rights

The interpretation and implementation of this regulation and the individual and general authorizations issued under this regulation shall be subject to the water rights provisions of section 25-8-104, C.R.S.

87.2 DEFINITIONS

See the Colorado Water Quality Control Act and other Water Quality Control Commission regulations for additional definitions.

- (1) "Activity as a Whole" means the discharge of dredged or fill material into state waters that triggers the need for an individual authorization in the first instance, as well as the project's short and long-term operation. "Activity as a whole" encompasses direct and indirect impacts to state waters upstream and downstream of the triggering discharge.
- (2) "Commission" means the Colorado Water Quality Control Commission created by section 25-8-201 of the Colorado Water Quality Control Act.
- (3) "Compensatory Mitigation" means the restoration, reestablishment, rehabilitation, establishment, creation, enhancement, or preservation of State Waters for the purpose of offsetting unavoidable adverse impacts that remain after all appropriate and practicable avoidance and minimization has been achieved.
- (4) "Discharge of Dredged or Fill Material" means any addition of dredged or fill material into, including redeposit of dredged or fill material other than incidental fallback within, state waters. The term includes:
 - (a) The addition of dredged or fill material to a specified discharge site located in State Waters;
 - (b) Runoff or overflow from a contained land or water disposal area; and
 - (c) Any addition, including redeposit other than incidental fallback, of dredged or fill material into State Waters that is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation.

"Discharge of Dredged or Fill Material" does not include:

- (a) Discharges of pollutants into state waters resulting from the onshore processing of dredged material that is extracted for any commercial use other than fill, which discharges are subject to Section 402 of the federal Clean Water Act, even though the extractions and deposit of such material may require a Section 404 permit or an authorization issued pursuant to this section;

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- (b) Activities that involve only the cutting or removing of vegetation above the ground, such as mowing, rotary cutting, and chainsawing, so long as the activity neither substantially disturbs the vegetation's root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material; or
 - (c) Incidental fallback.
- (5) "Discharge of Fill Material" means the addition of fill material into state waters. The term includes:
- (a) Placement of fill material that is necessary for the construction of any structure or infrastructure in state waters;
 - (b) The building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction;
 - (c) Site development fills for recreational, industrial, commercial, residential, or other uses;
 - (d) Causeways or road fills;
 - (e) Dams and dikes;
 - (f) Artificial islands;
 - (g) Property protection or reclamation devices such as riprap;
 - (h) Levees;
 - (i) Placement of fill material for infrastructure such as sewage treatment facilities, intake and outfall pipes associated with power plants, and subaqueous utility lines;
 - (j) Placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; and
 - (k) Placement of overburden, slurry, tailings, or similar mining-related materials.

"Discharge of Fill Material" does not include:

- (a) Plowing, cultivating, seeding, or harvesting for the production of food, fiber, or forest products; or

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- (b) Placement of pilings in state waters, unless the placement has or would have the effect of a discharge of fill material. Placement of pilings for linear projects, such as bridges, elevated walkways, and power line structures, generally does not have the effect of a discharge of fill material. Furthermore, placement of pilings in state waters for a pier, a wharf, or an individual house on stilts generally does not have the effect of a discharge of fill material. Examples of activities that would have the effect of a discharge of fill material include projects where the pilings are so closely spaced that sedimentation rates would be increased, projects in which the pilings themselves effectively would replace the bottom of a body of state waters, projects involving the placement of pilings that would reduce the reach or impair the flow or circulation of state waters, and projects involving the placement of pilings that would result in the adverse alteration or elimination of aquatic functions.
- (6) "Division" means the Water Quality Control Division of the Colorado Department of Public Health and Environment.
- (7) "Drainage Ditch" means a ditch that is designed for at least the partial purpose of increasing drainage of a particular land area or infrastructure for purposes including agriculture; transportation, including roadside and railroad transportation; mosquito abatement; and stormwater management.
- (8) "Dredge and Fill Activity/Project" means an activity/project that includes the discharge of dredged or fill material into state waters.
- (9) "Dredged Material" means material that is excavated or dredged from state waters.
- (10) "Ecological Lift" means an improvement in the biological health, as well as the chemical, geomorphic, or hydrologic health, of an area that has been damaged, degraded, or destroyed.
- (11) "Fens or Peatlands" means wetlands with organic soil that are classified as a histosol in the guidance document titled "field indicators of hydric soils in the United States" published by the federal Natural Resources Conservation Service.
- (12) "Fill Material" means material placed in state waters where the material has the effect of:
- (a) Replacing any portion of state waters with upland; or
 - (b) Changing the bottom elevation of any portion of any state waters.
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"Fill material" includes rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in state waters. "Fill material" does not include solid waste.

- (13) "Isolated Ordinary High Watermark Reaches" means reaches of state waters with an ordinary high watermark that are bordered upstream and downstream by uplands.
- (14) "Isolated Ponds and Impoundments" means ponds and impoundments that are not within the one-hundred-year floodplain or within one thousand five hundred (1,500) feet of an ordinary high watermark of other state waters. In the absence of one-hundred-year floodplain mapping by the federal emergency management agency, the one thousand five hundred feet distance criterion applies.
- (15) "Isolated State Waters" are isolated wetlands, isolated ponds and impoundments, and isolated ordinary high water mark reaches.
- (16) "Isolated Wetlands" means wetlands wholly surrounded by uplands. "Isolated wetlands" does not include wetlands where any portion of the wetland is within the one-hundred-year floodplain or within one thousand five hundred (1,500) feet of the ordinary high watermark of other state waters. In the absence of one-hundred-year floodplain mapping by the federal emergency management agency, the one thousand five hundred feet distance criterion applies.
- (17) "Kettle Ponds" means lakes, ponds, or wetlands located within a formerly glaciated landscape and formed by ice blocks left by a retreating glacier.
- (18) "Nationwide Permit" means a general permit issued by the United States Army Corps of Engineers under the authority of Section 404 of the federal Clean Water Act with national applicability and covering a specified category of activities.
- (19) "Notice of Coverage" means a notification issued by the division to the owner/operator of the project in instances where pre-construction notification is required under the terms of a division-issued general authorization.
- (20) "Ordinary High Watermark" means that line on the shore established by the fluctuations of water and indicated by physical characteristics, such as:
 - (a) A clear, natural line impressed on the bank;
 - (b) Shelving;
 - (c) Changes in the character of soil;

- (d) Destruction of terrestrial vegetation;
 - (e) The presence of litter and debris; or
 - (f) Other appropriate means that consider the characteristics of the surrounding area.
- (21) "Regional general permit" means a general permit issued by the United States Army Corps of Engineers under the authority of Section 404 of the federal Clean Water Act with regional applicability and covering a specified category of activities.
- (22) "Section 404 Permit" means a permit issued by the United States Army Corps of Engineers pursuant to Section 404 of the Clean Water Act. The term includes an individual permit, activities authorized under a nationwide or regional general permit, and a letter of permission issued in accordance with regulations of the United States Army Corps of Engineers.
- (23) "State Waters" means any and all surface and subsurface waters that are contained in or flow in or through this state, including wetlands, 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.
- (24) "Temporary Authorization" means an authorization issued by the division to discharge dredged or fill material into state waters for those projects that would meet eligibility requirements associated with relevant U.S. Army Corps of Engineers Nationwide and Regional General Permits. Temporary authorizations will only be issued from January 1, 2025, through the date when statewide general authorizations become effective. The term of a temporary authorization shall be two years from the date of issuance.
- (25) "Upland" means any land area that, under normal circumstances, is not a wetland, and does not lie below the ordinary high watermark.
- (26) "Waters of the United States" or "WOTUS" means the term as defined in 40 C.F.R. 122.2 and 33 C.F.R. 232.2.
- (27) "Wetlands" means areas that are inundated or saturated by surface or groundwater at a frequency and for a duration sufficient to support, under normal circumstances, a prevalence of vegetation typically adapted for life in saturated soil conditions.

87.3 SCOPE AND APPLICABILITY

(1) Indian Tribes

Nothing in this control regulation applies to the activities of federally recognized Indian tribes, Indians, their political subdivisions, or tribally controlled affiliates, which activities are undertaken or to be undertaken on lands within the boundaries of an Indian reservation located within the state. Additionally, nothing in this regulation applies to the activities of third-party non-Indian owners and operators, which activities are undertaken or to be undertaken with respect to reservation waters on Indian trust lands, tribally-owned fee lands, or Indian-owned fee lands within the boundaries of an Indian reservation located within the state. With regard to privately owned fee land, as defined in section 25-7-1302(4), within the boundaries of an Indian reservation located within the state, this regulation applies only to the discharge of dredged or fill material by persons who are not Indians.

(2) Prohibition on the Discharge of Dredged or Fill Material

Except when conducting an exempted activity described in subsection 87.3(C) or when discharging into an excluded type of water described in subsection 87.3(E), no person shall discharge dredged or fill material into state waters without first obtaining coverage for the discharge under an individual authorization, a general authorization, or, until the division issues its own general authorizations.

(3) Exempted Activities

The following activities are exempt from the requirements of this regulation and do not require a discharge authorization:

- (a) Activities in receipt of an active Section 404 permit that was issued prior to May 25, 2023;
- (b) Activities in receipt of an approved jurisdictional determination issued by the United States Army Corps of Engineers prior to May 25, 2023, finding that the state waters into which the proposed discharge of dredged or fill material will occur are not waters of the United States, unless there has been a significant hydrological change since the determination was issued;
- (c) Activities in receipt of an active Section 404 permit that was issued on or after May 25, 2023, except to the extent that the project area of the Section 404 permit involves a discharge of dredged or fill material into state waters that have been determined by the United States Army Corps of Engineers to not be waters of the United States under the Section 404 permit and are not otherwise excluded under this section. In such cases, where there are both waters of the United

States and non-WOTUS state waters in a project area, the division and the United States Army Corps of Engineers will exercise dual jurisdiction. The activity will be subject to coverage under a Section 404 permit for impacts to waters of the United States and coverage under a state-issued dredge and fill authorization for impacts to non-WOTUS state waters, unless otherwise exempted or excluded;

- (d) Activities associated with a project for which the project proponent applied for an individual Section 404 permit prior to May 25, 2023, even if the United States Army Corps of Engineers determined that the activity could be covered under a Nationwide Permit or Regional General Permit;
- (e) Normal farming, silviculture, and ranching activities, such as plowing, seeding; cultivating; minor drainage; application of on-farm chemicals; harvesting for the production of food, fiber, and forest products; or upland soil and water conservation practices. As used in this subsection, "upland soil and water conservation practices" means any discharge of dredged or fill material into state waters incidental to soil and water conservation practices for the purpose of improving, maintaining, or restoring uplands, including rangeland management practices, erosion control practices, and vegetation management practices;
- (f) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures, such as dikes, dams, levees, lagoons, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance also includes minor deviations in a structure's configuration or filled area to accommodate changes in materials, construction techniques, regulatory requirements, or construction codes or safety standards;
- (g) Construction or maintenance of farm ponds, stock ponds, farm lagoons, springs, recharge facilities located in uplands, and irrigation ditches or acequias, or maintenance of a drainage ditch, roadside ditch, or a ditch or canal conveying wastewater or water. Construction of new work or to extend, expand, or relocate an irrigation ditch or acequia for municipal or industrial purposes is not an exempt activity. As used in this subsection:
 - (i) "Construction" includes new work and work that results in an extension or expansion of an existing structure, and the construction of irrigation ditches or acequias includes activities such as placement of new control structures, ditch relocation, ditch conversion into pipe, and lining, which means placing impervious material such as concrete, clay, or geotextile within the flow perimeter of an open canal, lateral, or ditch with the intent of reducing seepage losses and improving conveyance efficiency. All new

lining of ditches, in instances where the ditch has not previously been lined, is considered construction.

- (ii) "Irrigation ditch or acequia" includes a human-made feature or a maintained natural feature if use of the maintained natural feature existed on January 1, 2024, and an upland swale that moves or conveys water to an ultimate irrigation use or place of use, or moves or conveys irrigation water, also known as "runoff," away from irrigated lands. "Irrigation ditch or acequia" may include a distribution system or its parts, including human-made canals, laterals, ditches, siphons, pumps, headgates, wing walls, weirs, diversion structures, pipes, pump systems, return structures, and such other facilities appurtenant to and functionally related to irrigation ditches. If a ditch carries water that is used for irrigation, irrigation return flows or return flow obligations, aquifer recharge, aquifer or stream augmentation or replacement, or precipitation or snowmelt that moves from an irrigated field either to or away from an area subject to being irrigated, that ditch is considered an irrigation ditch and not a drainage ditch.
- (iii) "Maintenance" means maintenance pertaining to a human-made structure, such as a farm pond, stock pond, or maintained spring, or a maintained natural feature conveying water for irrigation or wildlife purposes if use of the maintained natural feature existed as of January 1, 2024; maintenance pertaining to a drainage ditch, a roadside ditch, or a ditch or canal conveying wastewater or water for irrigation or for municipal purposes, domestic purposes, industrial purposes, commercial purposes, augmentation, recharge, wildlife, recreation, compact compliance, or any other purpose; and maintenance pertaining to repairs to an existing structure or feature to keep it in its existing state or proper condition or to preserve it from failure or decline. Such maintenance includes excavation of accumulated sediments back to original contours; reshaping of side-slopes; bank stabilization to prevent erosion where reasonably necessary using best management practices and, for maintenance of drainage ditches, materials that are compatible with existing bank materials; armoring, lining, and piping for the purpose of repairing a previously armored, lined, or piped section of a ditch so long as all work occurs within the footprint of the previous work; and replacement of existing control structures where the original function is not changed and original approximate capacity is not increased;
- (h) Construction of temporary sedimentation basins on a construction site, which construction does not include placement of fill material into state waters;

- (i) Construction or maintenance of farm roads, forest roads, or temporary roads for moving wildfire and post-fire mitigation equipment and related materials or 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 state waters is not reduced, and that any adverse impacts on the state waters will be otherwise minimized;
- (i) Activities for the purpose of providing emergency response to, preventative mitigation of, or recovery from damage caused by a fire, a flood, or other natural disaster so long as the activity is conducted in a manner that minimizes the loss of state waters to the extent practicable and in accordance with best management practices that do not interfere with efforts to address the underlying emergency;
- (j) Maintenance of water reuse facilities, wastewater reclamation facilities, water management facilities, water treatment facilities, or wastewater treatment facilities. Such maintenance includes reconstruction due to recent damage or maintenance of currently serviceable structures, such as pumps, control systems, weirs, gates, clarifiers, solids handling, filters, sedimentation basins, treatment ponds and lagoons, and related features, which maintenance activities keep the facility in its existing state or proper condition to preserve it from failure or decline;
- (k) Maintenance activities in off-channel reservoirs that do not directly affect a connected natural stream. Such maintenance includes emergency reconstruction due to recent damage; maintenance of currently serviceable structures such as spillways, outlet structures, gates, pumps, and control systems; and reshaping of side slopes, bank stabilization, or dredging, which maintenance activities keep an off-channel reservoir in its existing state or proper condition and to preserve it from failure or decline;
- (l) Wildlife habitat management activities, including seeding, cultivating, minor drainage, vegetation management, irrigating, water management, and maintenance of ditches, dikes, embankments, impoundments, water control features, and other water conveyance features that are human-made or maintained or that occur naturally to support wildlife habitat. "Wildlife habitat management" means activities that occur on land managed primarily for wetland or riparian habitats to support wetland and riparian species and does not include activities that are incidental to land used for residential, industrial, or commercial purposes; and

- (m) Voluntary stream restoration efforts in ephemeral streams that do not require compensatory mitigation and are designed solely to provide ecological lift where the activity is taking place. As used in this subsection, "ephemeral stream" means a stream channel or a reach of a stream channel that carries flow during, and for a short duration as the direct result of, precipitation events and that has a channel bottom that is always above the groundwater table.

(4) Recapture Provision

Any discharge of dredged or fill material into state waters incidental to any activity that brings 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 where the reach of such waters may be reduced, is not included in the exempted activities described in subsection 87.3(C) above.

(5) Excluded Types of Waters

Notwithstanding the definition of "state waters" in section 25-8-103(19), C.R.S. and in section 87.3, an authorization is not required for the discharge of dredged or fill material into the following types of waters, and such a discharge is not otherwise prohibited or regulated under this section:

- (a) All portions of ditches and canals that are excavated on upland and that convey water or wastewater;
- (b) Stormwater control features that are constructed to convey, treat, or store stormwater and that are created in upland;
- (c) Artificially irrigated areas that would revert to uplands if irrigation ceased;
- (d) Artificial lakes, lagoons, or ponds that are created entirely by excavating or diking upland to collect and retain water and that are used exclusively for stock watering, irrigation, settling basins, or rice growing;
- (e) Wetlands that are adjacent to a ditch or canal and supported by water in the adjacent ditch or canal;
- (f) Recharge facilities, including ponds, included in uplands for the purpose of facilitating recharge of aquifers or streams;
- (g) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking upland to retain water for primarily aesthetic reasons;

- (h) Water-filled depressions created in uplands incidental to mining or construction activity and pits excavated in uplands for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting water feature is state waters;
- (i) Swales and erosional features, such as gullies, small washes, and rills, that do not contain wetlands or an ordinary high watermark;
- (j) Groundwater. As used in this regulation, "groundwater" means subsurface waters in a zone of saturation that are or can be brought to the surface of the ground or to surface waters through wells, springs, seeps, or other discharge areas. "Groundwater" does not include wetlands.
- (k) Prior converted cropland. "Prior converted cropland" means any area that, prior to December 23, 1985, was drained or otherwise manipulated for agricultural purposes, which includes 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, if the cropland otherwise qualifies under this subsection, is prior converted cropland. The commission and the division shall recognize designations of prior converted cropland made by the United States Secretary of Agriculture. An area is no longer considered prior converted cropland if 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. The division shall determine whether prior converted cropland has been abandoned, subject to appeal to the commission under the procedures in section 21.4 of Regulation No. 21 (5 CCR 1002-21).

87.4 GUIDELINES FOR PROTECTION

(1) Section 404(b)(1) Guidelines

To the extent relevant to Colorado's program, the provisions of 40 CFR Part 230 as adopted by the U.S. Environmental Protection Agency (also adopted at 33 CFR Part 332 by the U.S. Army Corps of Engineers), Subparts (A-I), also known as the "404(b)(1) Guidelines," are hereby incorporated by reference into this Regulation 87, except where:

- (a) The 404(b)(1) Guidelines refer to "navigable waters" or "waters of the United States," those terms are replaced with "state waters" as defined herein; and
- (b) The 404 (b)(1) Guidelines refer to the duties and responsibilities of the "district engineer" (U.S. Army Corps of Engineers), "administrator" or "regional

administrator” (U.S. Environmental Protection Agency), those terms shall be replaced with “the division.”

87.5 DIVISION CONSULTATION WITH STATE AND FEDERAL AGENCIES AND LOCAL AND TRIBAL ENTITIES

As appropriate, the division shall consult with agencies and entities with special expertise in environmental, natural resource, or agriculture-related issues as follows:

(1) Division of Water Resources/Colorado Water Conservation Board

The division shall consult with the Division of Water Resources and the Colorado Water Conservation Board concerning any water rights issues raised by a prospective permittee prior to issuing any individual authorization. Further protocol for communication shall be established through a Memorandum of Understanding among the division and these agencies.

(2) Colorado Parks and Wildlife

The division shall consult with Colorado Parks and Wildlife (CPW) concerning dredge and fill impacts to fish, wildlife and/or their habitats. Further protocol for division coordination with CPW shall be established through a Memorandum of Understanding between the division and CPW.

(3) Colorado Department of Agriculture

The division shall consult with the Colorado Department of Agriculture concerning issues raised by a project proponent or the division about the applicability of the agriculture-related exemptions and exclusions outlined in subsections 87.3(C) and (E) of this regulation. Further protocol for communication shall be established through a Memorandum of Understanding between the division and the Department of Agriculture.

(4) Federal Agencies

The division shall consult with the appropriate district office of the United States Army Corps of Engineers and United States Environmental Protection Agency Region 8 on jurisdictional issues concerning “waters of the United States.” The division may enter into one or more Memoranda of Understanding with these agencies to outline protocol for coordination on jurisdictional issues.

(5) Local and Tribal Entities

The division shall consult with the relevant local government entity concerning jurisdictional issues raised by a project proponent, the division, or the local government entity concerning any dredge and fill authorization. The division shall consult with the Southern Ute Indian Tribe concerning any proposed dredge and fill activity occurring on fee lands within Reservation boundaries that are subject to this regulation (see subsection 87.3(A)). Further protocol for communication may be established through a Memorandum of Understanding between the division and the Southern Ute Indian Tribe.

87.6 INDIVIDUAL AUTHORIZATIONS

(1) Application Requirements for Individual Authorizations

A complete application for individual authorization shall include:

- (a) A completed individual dredge and fill authorization application form, signed by the authorized representative;
- (b) Project location information, including a map and a description of the impacted state waters;
- (c) A project description, including site plans;
- (d) A description of water quality-related conditions in any applicable local, state, and federal permits, licenses or agreements;
- (e) A list of selected Control Measures chosen for the project in accordance with widely accepted industry standards and guidance. Control Measures must protect the chemical, biological, and physical integrity of the receiving water(s). The control measure(s) must be selected, designed, installed and adequately sized in accordance with good engineering, hydrologic and pollution control practices for the intended application. Good engineering, hydrologic and pollution control practices: are methods, procedures, and practices that: (a) are based on basic scientific fact(s); (b) reflect best industry practices and standards; (c) are appropriate for the conditions and pollutant sources; and (d) provide appropriate solutions to meet the associated permit requirements, including practice-based effluent limits.

- (f) An alternatives analysis. The applicant bears the burden of providing the division with the alternatives analysis used to determine which practicable alternative has the least reasonably expected adverse impacts on state waters. The alternatives analysis must provide the division with all the underlying information necessary to support its considerations under subsection (B) of this section;
- (g) A purpose and need statement;
- (h) A projected impacts analysis;
- (i) A statement describing how impacts to state waters are to be avoided and minimized.
- (j) A compensatory mitigation plan for any unavoidable adverse impacts to state waters;
- (k) A summary of the applicant's consultation with Colorado Parks and Wildlife concerning potential impacts to aquatic resources and/or wildlife; and
- (l) Appropriate fees for processing the application in accordance with Regulation No. 102 (5 CCR 1002-102).

For projects impacting both waters of the United States and non-WOTUS state waters, submittal of any alternatives analysis, purpose and need statement, or projected impacts analysis developed by the applicant through the Section 404 permitting process shall satisfy the corresponding application requirements in this subsection.

(2) Consideration of Practicable Alternatives

The discharge of dredged or fill material is prohibited where there is a practicable alternative to the proposed discharge that would have less adverse impact on state waters, so long as the alternative does not have other significant adverse environmental consequences. "Practicable alternative" means an alternative that is or was available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purpose. In implementing this prohibition, the division shall consider the following criteria:

- (a)
- (b)

(3) Notification of Complete Application

The division shall send written confirmation to the project applicant of the date the application for individual authorization was received and the date the application was deemed complete.

(4) Division Consideration of State Water Quality Requirements

The division shall review and consider the application submitted, the water quality impacts of the construction and operation of the project, associated National Environmental Policy Act (NEPA) documents, if any, and the following water quality requirements, as appropriate:

- (a) Antidegradation review pursuant to the procedures in the Procedural Rules, Regulation No. 21. (5 CCR 1002-21), section 21.16, and the Basic Standards and Methodologies for Surface Water, Regulation No. 31 (5 CCR 1002-31), section 31.8, except that “significance determinations” for reviewable waters under section 31.8(3)(c) shall be made with respect to the net effect of the new or increased water quality impacts of the proposed Project, taking into account any environmental benefits within the Project area, including any water quality improvements, or mitigation measures proposed to be implemented within the Project area. Where possible, water quality improvements, or mitigation measures shall be located in the same watershed where the reviewable segment(s) are located;
- (b) The Basic Standards and Methodologies for Surface Water, Regulation No. 31 (5 CCR 1002-31), and the Basic Standards for Ground Water, Regulation No. 41 (5 CCR 1002-41);
- (c) Classifications and water quality standards assigned to the waters affected by the Project at the date of certification;
- (d) Any applicable effluent limitations or control regulations;
- (e) Control Measures required by this Regulation;
- (f) The discharge provisions of the Colorado Discharge Permit System, Regulation No. 61 (5 CCR 1002-61), as appropriate;
- (g) Water quality-related conditions in any applicable local, state, and federal permits, licenses or agreements;
- (h) Comments and other information raised during the public comment period outlined in subsection (I) below; and

- (i) Any project-specific conditions mutually agreed to by the applicant and the division, including any condition beyond the authority of the division to require.

(5) Conditions to Protect Water Quality

When necessary, the division shall include conditions in individual authorizations that are designed to:

- (a) Remove or reduce the impact to state waters of a discharge of dredged or fill material;
- (b) Protect downstream uses;
- (c) Address the direct, indirect, and cumulative impacts of the activity on the chemical, physical, and biological integrity of state waters; and
- (d) Ensure that any authorized “activity as a whole,” as defined in this regulation, will comply with all applicable state water quality requirements, either as proposed or as conditioned in the authorization. This includes appropriate monitoring, record-keeping, and reporting requirements.

(6) Official State Position on Fish and Wildlife Mitigation

For reservoir construction projects subject to the requirements of section 37-60-122.2, the division shall take into consideration the official state position regarding mitigation for fish and wildlife resources established pursuant to section 37-60-122.2, and may adopt all or part of such position into individual authorizations as conditions.

(7) Compensatory Mitigation Requirements

The division shall include compensatory mitigation requirements in all individual authorizations consistent with Section 87.10 of this regulation.

(8) Duration

Individual authorizations and notices of coverage shall be valid for five years if construction on the project has not started. Applicants may submit to the division, in writing, a request for renewal before the five-year expiration date, and such request will be granted on a case-by-case basis for good cause. The term of such renewal may be less than five years. Authorized project representatives shall apply for renewal of the

individual authorization every five years should the activity as a whole continue beyond the term of the initial authorization. Requests for renewal shall be submitted at least 180 days before expiration of the authorization.

(9) Public Notice

The division shall prepare a draft of each individual authorization for public notice and opportunity for interested persons to comment.

- (a) The division shall notify the public of the draft individual authorization and shall include a request for comments to be submitted to the division within thirty days of the public notice.
- (b) The division shall review and consider all public comments received but is not obligated to respond to all public comments.
- (c) The final individual authorization shall include any changes determined appropriate by the division based on comments provided during the public comment period. Public notice of a final individual authorization shall be accomplished by the same means as the draft.

(10) Time Period for Division Issuance

- (a) The division shall issue a final individual authorization within two years after receiving a complete application, as determined by the division. For projects that, as determined by the division, involve minimal to moderate costs and have minimal water quality impacts or limited potential water quality impacts, the division shall issue the final individual authorization within ____.
- (b) The time periods in subsection (1) may be extended by a written agreement between the division and the applicant. These periods may also be extended by the division if there are significant changes to the project that is the subject of the application or if the division learns of significant new information concerning the environmental impacts of the project, in which case the division shall provide notice to the applicant of the extension in writing along with an explanation of the basis for the extension.

(11) Appeals of Individual Authorizations

- (a) An individual authorization, including all conditions incorporated into such authorization, is subject to administrative reconsideration by the commission under section 25-8-403 and then judicial review under section 25-8-404.

- (b) Only issues of law or fact identified by the applicant or other person during the public comment period or not reasonably ascertainable from the draft individual authorization may be identified at the adjudicatory hearing. The request for hearing must include a demonstration that each issue being identified in the request for hearing was identified during the public comment period. For each issue identified that was not identified previously, the request for hearing must include an explanation as to why such issues were not reasonably ascertainable during the public comment period.

87.7 GENERAL AUTHORIZATIONS

(1) Recognition of Federal Permits

As authorized in section 25-8-205.1(5)(b)(II), C.R.S., until the division issues its own general authorizations under the provisions of this section 87.7, the division shall recognize the United States Army Corps of Engineers nationwide and regional general permits that are relevant and applicable in Colorado for projects impacting non-WOTUS state waters. Where pre-construction notification is required under any nationwide or regional permit, the division shall issue and administer a temporary authorization to the project proponent that includes Colorado-specific conditions.

(2) Categories and Terms of General Authorizations

The division has the following duties with respect to general authorizations:

- (a) The division shall issue general authorizations for the discharge of dredged or fill material into state waters for categories of activities that are similar in nature and similar in impact on the quality of state waters, cause only minimal adverse impacts to state waters when performed separately, and have only minimal cumulative adverse impacts on state waters. The categories of general authorizations must correspond with the various nationwide and regional general permits issued by the United States Army Corps of Engineers.
- (b) The division may tailor the terms of certain nationwide or regional permits or create additional general authorizations to achieve greater efficiency and to address Colorado-specific needs, including but not limited to emergency response to wildfire and voluntary ecological restoration and enhancement projects.

(3) Public Notice and Comment

The division shall prepare a draft of each general authorization for public notice and opportunity for interested persons to comment.

- (a) The division shall notify the public of its draft general authorizations and shall include a request for comments to be submitted to the division within thirty days of such notice.
- (b) The division shall review and consider all public comments received but is not obligated to respond to all public comments.
- (c) The final general authorization shall include any changes determined appropriate by the division based on comments provided during the public comment period. Public notice of issuance of the final general authorization shall be accomplished by the same means as the draft.

(4) Appeals of General Authorizations

- (a) General authorizations issued by the division are subject to administrative reconsideration by the commission under section 25-8-403 and then judicial review under section 25-8-404.
- (b) Only issues of law or fact identified by persons during the public comment period or not reasonably ascertainable from the draft general authorization may be identified at the adjudicatory hearing. The request for hearing must demonstrate, by providing specific citation to the administrative record, including document name and page number, that each issue being identified in the request for hearing was identified during the public comment period. For each issue identified that was not identified previously, the request for hearing must include an explanation as to why such issues were not reasonably ascertainable during the public comment period.

**87.8 PRE-CONSTRUCTION NOTIFICATION – ISSUANCE OF TEMPORARY
AUTHORIZATIONS AND NOTICES OF COVERAGE UNDER GENERAL AUTHORIZATIONS**

(1) Temporary Authorizations

Until the division's general authorizations become effective:

- (a) When required under the relevant United States Army Corps of Engineers nationwide permit or regional general permit, prior to commencing a dredge and fill project, the project proponent shall submit a pre-construction notification (PCN) to the division as set forth in the relevant nationwide permit/regional general permit.
- (b) Upon receipt of a pre-construction notification (PCN) submitted under a nationwide or regional general permit, the division shall issue a temporary authorization to the project proponent within 45 days of receiving the PCN, which may include Colorado-specific conditions where the division determines such conditions are necessary to protect state waters. If the division does not act on the PCN within 45 days of receipt, the project may proceed without the temporary authorization.
- (c) Project proponents shall consult with Colorado Parks and Wildlife (CPW) concerning potential impacts to aquatic resources and/or wildlife prior to applying for any individual authorization or submitting pre-construction notification to the division under any nationwide permit or regional general permit that requires consultation with CPW.

(2) Notices of Coverage

After the division's general authorizations become effective:

- (a) When required under the relevant division-issued general authorization, prior to commencing a dredge and fill project, the project proponent shall submit a pre-construction notification (PCN) to the division as set forth in the relevant general authorization.
- (b) Upon receipt of a pre-construction notification submitted under any division-issued general authorization, the division shall issue a notice of coverage to the project proponent within 45 days of receiving the PCN. If the division does not act on the PCN within 45 days of receipt, the project may proceed without the notice of coverage.
- (c) Project proponents shall consult with Colorado Parks and Wildlife (CPW) concerning potential impacts to aquatic resources and/or wildlife prior to applying for any individual authorization or submitting pre-construction notification to the division under any division-issued general authorization that requires consultation with CPW.

- (d) Notices of coverage under general authorizations shall be valid for five years if construction on the project has not started. Applicants may submit to the division, in writing, a request for renewal of coverage before the five-year expiration date, and any such requests will be granted on a case-by-case basis for good cause. The term of such renewal may be less than five years.

(3) Notification of Improper Category of General Authorization

Where the division determines that the dredge and fill activity is subject to a different nationwide permit, regional general permit, or division-issued general authorization than the one for which construction notification was submitted, the division shall immediately notify the project proponent.

(4) Notification of Requirement to Obtain Individual Authorization

Where the division determines that a general authorization is not appropriate because the proposed project exceeds the acreage threshold(s) for the relevant nationwide permit, regional general permit, or general authorization, the division shall require the project proponent to apply for an individual authorization.

(5) Appeals of Temporary Authorizations and Notices of Coverage

Temporary authorizations under a nationwide permit or regional general permit and notices of coverage under a division-issued general authorization are considered “final determinations” by the division subject to judicial review under section 25-8-404.

87.9 REQUIREMENTS APPLICABLE TO ALL DREDGE AND FILL AUTHORIZATIONS

(1) Requirements for Dredge and Fill Projects

The following requirements apply to all projects covered under individual authorizations, temporary authorizations, or general authorizations issued by the division:

- (a) Authorized representatives from the division shall be permitted to enter upon the site where the dredge and fill activities (and operation of the project, where relevant) are taking place to inspect for compliance with the relevant temporary, general or individual authorization conditions, and any of the below requirements.
- (b) In the event of any changes in control or ownership of facilities where the construction activity or operation of the project is taking place, the

successor shall be notified in writing by their predecessor of the existence of the requirements of this subsection and/or authorization conditions, if applicable. A copy of such notification shall be provided to the division within sixty days after the change in control or ownership.

- (c) Any diversion from or bypass of facilities necessary to maintain compliance with the requirements and/or conditions in authorizations is prohibited, except (i) where unavoidable to prevent loss of life or severe property damage, or (ii) where excessive storm drainage or runoff would damage any facilities necessary for compliance with limitations and prohibitions herein. The division shall be notified immediately in writing of each such diversion or bypass.
- (d) Immediately upon discovery of any spill or other discharge to waters of the state not authorized by the applicable authorization, the project owner/operator shall notify the following:
 - (i) The division;
 - (ii) Applicable local health departments;
 - (iii) Owners or operators of municipal and domestic water treatment intakes which are located within twenty miles downstream from the site of the project; and
 - (iv) Owners or operators of other intakes or diversions which are located within five miles downstream from the site of the Project.

The project owner/operator shall maintain a list of the persons and entities notified, including the date and form of notification.

- (e) Construction operations within state waters shall be restricted to only those project areas specified in the dredge and fill authorization.
- (f) Work should be carried out diligently and completed as soon as practicable. To the maximum extent practicable, discharges of dredged or fill material shall be restricted to those periods when impacts to designated uses to designated uses are minimal.
- (g) If applicable, the project shall incorporate provisions for operation, maintenance, and replacement of Control Measures to assure compliance with the requirements identified in this section, and any other conditions placed in the dredge and fill authorization. All such provisions shall be identified and compiled in an operation and maintenance plan which the project owner/operator will retain

and make available for inspection within a reasonable timeframe upon request by any authorized representative of the division.

- (h) The use of chemicals during project construction and operation shall be in accordance with the manufacturer's specifications. There shall be no excess application and introduction of chemicals into state waters.
- (i) All solids, sludges, dredged or stockpiled materials and all fuels, lubricants, other toxic materials shall be controlled in a manner so as to prevent such materials from entering state waters.
- (j) Discharges of dredged or fill material to state waters in excess of that necessary to complete the project are prohibited.
- (k) Discharges to state waters not identified in the authorization are prohibited.
- (l) No discharge of dredged or fill material to state waters shall be allowed which causes non-attainment of a narrative water quality standard identified in the Basic Standards and Methodologies for Surface Waters, Regulation No. 31 (5 CCR 1002-31), including, but not limited to discharges of substances in amounts, concentrations or combinations which:
 - (i) Can settle to form bottom deposits detrimental to classified uses of state waters;
 - (ii) Form floating debris, scum, or other surface materials sufficient to harm existing classified uses;
 - (iii) Produce color, odor, or other conditions in such a degree as to create a nuisance or harm existing beneficial uses or impart any undesirable taste to significant edible aquatic species, or to the water;
 - (iv) Are harmful to the beneficial uses or toxic to humans, animals, plants, or aquatic life;
 - (v) Produce a predominance of undesirable aquatic life; or
 - (vi) Cause a film on the surface or produce a deposit on shorelines.

87.10 COMPENSATORY MITIGATION

RESERVED FOR details concerning compensatory mitigation requirements, including methods for assuring impacts to wetlands and streams are fully compensated through functional assessments and ratios that can be applied through individual mitigation projects or by applying acre-based ratios using the watershed approach as described by the United States Army Corps of Engineers.

87.11 MODIFICATION AND TERMINATION OF DREDGE AND FILL AUTHORIZATIONS

The division shall utilize the following procedures for modification and termination of individual and authorizations:

- (1) Project Proponent-Initiated Modification
- (2) Division-Initiated Modification

Upon the division's determination that the construction and/or operation of a project is adversely impacting state waters despite compliance with a dredge and fill authorization, the division and the owner/operator of the project may mutually agree to modify the authorization to achieve protection of state waters.

- (a) Temporary exceedances of water quality standards shall be deemed in compliance with the authorization so long as such exceedance will not be of a degree to cause conditions acutely toxic to aquatic life or to exceed standards assigned to protect a domestic drinking water supply where that is a classified use.
- (3) Termination

87.XX STATEMENT OF BASIS, SPECIFIC STATUTORY AUTHORITY AND PURPOSE; DECEMBER, 8, 2025 RULEMAKING; FINAL ACTION DECEMBER 8, 2024; EFFECTIVE DATE XXXX

The provisions of C.R.S. 25-8-205, and 25-8-205.1, and 25-8-205(1)(h) provide the specific statutory authority for adoption of this control regulation. The commission also adopted, in compliance with 24-4-103(4) C.R.S., the following statement of basis and purpose.

BASIS AND PURPOSE

I. Background

The Commission promulgated rules to implement a state dredge and fill discharge authorization program. The rule focuses on avoidance and minimization of adverse impacts and on compensation for unavoidable adverse impacts of dredge and fill activity and must incorporate the guidelines developed pursuant to Section 404(b)(1) of the Federal Act.

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