

## Introduction

Colorado's natural water supply infrastructure, healthy and high-functioning streams and wetlands, won big in Colorado's 2023 and 2024 legislative sessions. The passage of **SB23-270 – Projects to Restore Natural Stream Systems** and **HB24-1379 – Regulate Dredge and Fill Activities in State Waters**, has raised questions about how these two bills work together and their implications for stream restoration work. While these two bills function independently and were born out of separate issues, both bills add new terms and concepts into the Colorado Revised Statutes (CRS) that carry major implications for restoration work aimed at improving river health and bolstering fire and drought resilience throughout Colorado. This memo compares these two bills, and identifies areas of overlap. Bolded terms are defined in the "Key Terms" table at the end of this memo.

## How are the 2 bills connected?

Restoration project managers need to understand the implications of both laws – how to determine when a state permit is needed under the new **Dredge and Fill** Program created by HB1379, and how to apply SB270 criteria before and after project installation. The two bills are administered by two different agencies – one agency (DWR) has no permitting authority over restoration projects (but has authority to stop illegal diversions, storage, or obstructions) and the other agency (CDPHE) now has authority over "dredge and fill" in **state waters**. However, many restoration projects may qualify for a permit exemption.

The stream and wetlands habitats that can be restored under SB-270 without being subject to water rights administration, are the same habitats that HB-1379 aims to protect through the new permitting program. The passing of SB270 helps provide clarity for public land managers and private landowners moving forward with restoration work and has significantly reduced concerns over water rights conflicts. Together, these two laws ensure that Colorado has clear pathways for restoring wetland and stream habitats and that voluntary projects that provide **ecological lift** will have a streamlined permitting process.

A major concern in the restoration community during the development and debate over HB1379 was that strict regulations of fill material could add unnecessary permitting barriers to restoration projects. The exemptions under HB-1379 for "voluntary stream restoration efforts in ephemeral streams" ensure that the **Minor Stream Restoration Activities** in ephemeral streams are not subject to additional permitting requirements. Projects in ephemeral streams that only "incidentally and temporarily increase surface area or infiltration" will qualify as a Minor Stream Restoration Activity under SB270, and thus not be subject to water administration.

## HB24-1379 (2024)

Regulate Dredge and Fill Activities in State Waters

## SB23-270 (2023)

Projects to Restore Natural Stream Systems

### Why Was this Legislation Needed?

The Supreme Court's decision in Sackett v EPA (2023) limited the Clean Water Act's (CWA) jurisdiction to only wetlands with a surface water connection to perennial waters. This left an estimated 60% of the state's wetlands and many of its seasonal streams without federal protection (which are estimated to account for up to 80% of **state waters according to this 2021 EPA Colorado stream map using USGS data**). The bill's legislative declaration highlights three key factors necessitating this legislation:

- 1) That "water is Colorado's most critical natural resource" and its protection is key to the state's public and environmental health.
- 2) That following the Supreme Court's Sackett decision, the CWA's (§)404 program no longer adequately protects state waters.
- 3) Creating a state program, applicable to all state waters, ensures future regulatory certainty for when a permit may be needed prior to commencing projects that will impact state waters.

This legislation was born out of the need to clarify whether or not a **stream restoration project** requires water rights administration. Prior to the legislation, concerns over whether a restoration project might require a water right or if it may cause injury to downstream water rights holders have slowed efforts to restore streams and take full advantage of available funding.

The bill's legislative declaration identifies a multitude of ecosystem services provided by healthy stream systems and highlights the importance of stream restoration to implementing Colorado's Water Plan. The bill provides a path forward by providing new criteria for restoration projects that if followed, allow projects to proceed without being subject to water rights administration.

### Nuts & Bolts

HB-1379 mandates that the Colorado Department for Public Health and Environment (CDPHE) create a new permit program for regulating **dredge and fill** activities in **state waters** that is modeled after the federal 404 permit program administered by the U.S. Army Corp Engineers (USACE). The bill has five key provisions:

- 1) CDPHE's Water Quality Control Commission (WQCC) must promulgate the rules for this program by December 31, 2025.
- 2) CDPHE's Division of Administration (Division) will be responsible for administering the program.
- 3) Certain activities are exempt from having to obtain a permit and certain water bodies are excluded from being a State Water (so no permit required).
- 4) The permitting program focuses on avoidance first and foremost, then minimization, and then compensatory mitigation of unavoidable adverse impacts to waters of the state.
- 5) The bill authorizes appropriations from the Clean Water Cash Fund to run the program.

Especially important is that the bill adds wetlands to the legal definition of **state waters**. This bill also sets the expectation that the CWA's (§)404 rules, prior to Sackett, are the baseline for the new program. However, the WQCC can enact more protective rules if needed to adequately protect state waters.

SB-270 adds **Minor Stream Restoration Activities** to the list of activities exempt from water rights administration under C.R.S 37-92 602. The bill sets forth six different situations where **stream restoration projects** can take place without obtaining a water right, if all statutory criteria are met. Importantly, the bill defines **natural stream system** as encompassing a stream and its "*geomorphic floodplain and associated riparian area.*"

The bill also introduces working within the **ordinary highwater mark** (OHWM) as criteria for working in **natural streams** under SB-270. The OHWM has been used by the U.S. Army Corps of Engineers (USACE) for decades to determine jurisdictional waters for (§)404 permitting. The OHWM has also been defined in the Colorado Revised Statutes 37-87-102(1)(e) for years. In 2024, HB24-1379 added delineation factors from the USACE OHWM delineation manual to the C.R.S. (see key terms table).

All perennial streams and many intermittent have an OHWM, but ephemeral streams do not. Under certain categories of **Minor Stream Restoration Activities**, a project cannot "cause the water level to exceed the OHWM."

The bill specifies that qualifying projects "do not cause material injury to any vested water right" and are not considered "an unnecessary dam or obstruction," and thus not subject to water rights administration.

## Implications for Stream Restoration

With the passing of HB-1379, state law now explicitly acknowledges the importance of wetland and stream restoration work and the vital role wetlands and seasonal streams play in maintaining water quality. Six provisions of the bill are most relevant to stream restoration work:

- 1) WQCC must adopt a rule that exempts “voluntary stream restoration efforts in ephemeral streams . . . [that] are designed solely to provide **ecological lift**” from permitting requirements.
- 2) Restoration projects that require a USACE 404 permit (all perennial streams and intermittent streams with “relatively permanent waters”) will not require a separate state permit. The typical USACE permit obtained for a **stream restoration project** is the Nationwide General Permit 27 (NW27).
- 3) The bill requires WQCC to develop **general authorization permits** that “correspond with the various nationwide and regional permits issued by USACE.” Thus, by Dec. 2025, WQCC must adopt, among many other USACE general permits, the NW27 for stream restoration.
- 4) The bill allows WQCC, in adopting general authorization permits, to tailor existing nationwide and regional general 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.”
- 5) The bill defines “**Isolated Wetlands**” similar to a pre-Sackett approach that kept as jurisdictional wetlands located within the 100-year floodplain and/or within 1500 feet of a state water. The bill requires the WQCC to “issue a statewide general authorization for discharges in isolated state waters.” “**State waters**” includes “isolated wetlands” and “isolated ponds and impoundments.”
- 6) **Ordinary highwater mark** has been defined in Colorado water statutes for decades under CRS 37-87-102(1)(e). This bill further defines the OHWM using physical characteristics by adding six delineating factors straight from the USACE OHWM Delineation Manual.

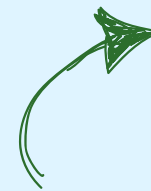
The rulemaking process will commence in September 2024 to further clarify how the permit program may impact stream and wetlands restoration activities. Rules must be complete by the end of 2025.

sB270 set forth the criteria for each of the six **Minor Stream Restoration Activities**. These criteria must be met for a restoration project to be exempt from water rights administration. A few key provisions include:

- 1) Any type of structure placed into a perennial stream as part of the restoration work (e.g. PALS, BDAs, large woody debris, J-hooks, cross vanes etc.) must not cause the water level to “exceed the OHWM” under “less than extreme flow conditions,” (all flows from base flows up to high spring flows).
- 2) Restoration activities in ephemeral or intermittent streams qualify as exempt from administration as long as they only ‘incidentally and temporarily’ increase the stream’s surface area or infiltration.
- 3) In cases of emergency wildfire or flood response, restoration interventions can be applied broadly to the entire **natural stream system**, and are not limited to the OHWM.

No permit for restoration work is required from DWR. Prior to SB-270, state law did not require restoration projects to be reviewed by DWR and this bill does not change that (see DWR’s website: [Pond Management & Restoration Projects | Division of Water Resources \(colorado.gov\)](https://www.dwr.state.co.us/Programs/PondManagementRestoration/)). However, DWR encourages project managers to reach out to their local DWR staff at the early design stage to identify any possible issues or unintended consequences. Communication with DWR is encouraged as a good practice to lower the risk of water rights issues.

For a comprehensive overview of the qualifying criteria for Minor Stream Restoration Activities see the [Training Manual: Translating SB23-270 Projects to Restore Natural Stream Systems](#)



Download the full  
SB23-70 Training  
Manual here



## Key Terms Reference Table

Term	SB-270	HB-1379	Added to CRS in recent legislation?	Location in CRS	Definition
<b>State Waters</b>		<b>X</b>	<b>Yes – HB1379</b> <i>Amended to include wetlands</i>	<b>25-8-103</b>	“Any & all surface and subsurface waters that are contained in or flow in or through this state, <i>including wetlands</i> ”- C.R.S. (this definition goes on to exclude sewage treatment and potable distribution systems).
<b>Dredge &amp; Fill</b>		<b>X</b>	<b>Yes – HB1379</b>	<b>25-8-205</b>	Dredged material is any material taken from state waters. Fill material is any material placed in state waters that 1) converts those waters to upland or 2) changes the bottom elevation. Dredge and fill material does not include incidental fallback. Full definitions for ‘discharge of dredge or fill material’, “dredge and fill activity”, “dredged material”, and “fill material” can be found in C.R.S. 25-8-205.1.
<b>Ordinary High Water mark</b>	<b>X</b>	<b>X</b>	<b>Yes - HB1379</b> <i>Definition in HB-1379 clarifies OHWM indicators.</i>	<b>37-87-102</b> <b>37-92-602</b>	<p>“The visible channel of a natural water course within which <b>water</b> flows with sufficient frequency so as to preclude the erection or maintenance of man-made improvements without special provision for protection against flows of <b>water</b> in such channel or the channel defined by the mean annual flood, whichever is greater.” (C.R.S. 37-87-102)</p> <p>“The line on the shore established by the fluctuations of water and indicated by physical characteristics such as 1) a clear, natural line impressed on the bank 2) shelving 3) changes in the character of soil 4) destruction of terrestrial vegetation 5) presence of liter and debris or 6) other appropriate means that consider the characteristics of the surrounding area.” (CRS 25-8-205)</p>
<b>Isolated State Waters</b>		<b>X</b>	<b>Yes - HB1379</b>	<b>25-8-205</b>	Isolated waters are those wetlands, ponds & impoundments, and other “ordinary highwater mark reaches” that are surrounded wholly by uplands and are not within the 100-year floodplain, or within 1,500 ft of the ordinary highwater mark of other state waters.

<b>Ecological Lift</b>		<b>X</b>	<b>Yes - HB1379</b>	<b>25-8-205</b>	"Improvement in the biological health, as well as the chemical, geomorphic, or hydrologic health, of an area that has been damaged, degraded or destroyed"
<b>General Authorizations</b>		<b>X</b>	<b>N/A</b>	<b>N/A</b>	General authorizations apply to activities with minimal impact, and are applied on a statewide basis. Activities that qualify for general authorizations can be permitted without individual review, expediting the permitting process.
<b>Natural Stream</b>	<b>X</b>	<b>X</b>	<b>No</b>	<b>37-87-102</b>	"A place on the surface of the earth where water naturally flows regularly or intermittently with a perceptible current between observable banks, although the location of such banks may vary under different conditions"
<b>Natural Stream Systems</b>	<b>X</b>		<b>Yes — SB270</b>	<b>37-92-602</b>	"The extent of a natural stream in the state and the geomorphic floodplain and associated riparian area."
<b>Minor Stream Restoration Activities</b>	<b>X</b>		<b>Yes — SB270</b>	<b>37-92-602</b>	Stream restoration activities that meet qualifying criteria, as defined in SB23-270, and are exempt from water rights administration, and are not considered to cause injury to downstream water rights.
<b>Stream Restoration Project</b>	<b>X</b>	<b>X</b>	<b>Yes — SB270</b>	<b>37-92-602</b>	"A project that is designed and constructed: 1) within a natural stream system; and 2) for the purposes of wildland fire mitigation; flood mitigation; bank stabilization; water quality protection or restoration; habitat, species, or ecosystem restoration; source water protection; infrastructure protection; or sediment and erosion management."