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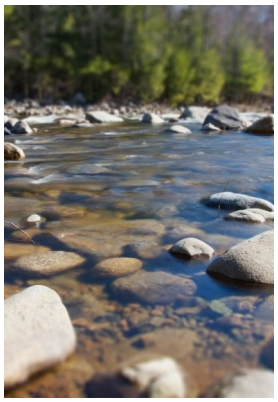

Ecology Proposes New Permitting Program for State Waters

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By Duncan Greene and Rachael Lipinski

On June 10, the Washington Department of Ecology ("Ecology") issued a CR-101 Preproposal Statement of Inquiry to create a new permitting program for projects that could alter or impact waters of the state. This new "State Waters Alteration Permit" program would create Washington State's first formal program for permitting impacts to wetlands, streams, and other aquatic resources that are not federally jurisdictional "Waters of the United States" ("WOTUS") but are regulated as "waters of the state" under the state Water Pollution Control Act ("WPCA"). Currently, no formal permitting program exists, and Ecology uses "administrative orders" to authorize impacts to waters that are not jurisdictional WOTUS but are regulated as "waters of the state," including certain wetlands and streams.

In the CR-101 Statement, Ecology proposes adopting a rule that would create a new, formal permitting program, to be codified in the Washington Administrative Code as WAC 173-217. This rulemaking process presents a unique opportunity for the regulated community in Washington State to provide input that will help define permit exemptions, general permits, and other key features of the new state-level permitting program. The rule could also help improve interagency coordination among Ecology, the Army Corps of Engineers, and other state and federal agencies on permitting issues at the intersection of WOTUS and "waters of the state."

Waters of the State

This rulemaking effort arises from Ecology's authority under the WPCA, which gives Ecology authority to regulate all "waters of the state." The WPCA defines "waters of the state" as including "lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and watercourses within the jurisdiction of the state of Washington." The reference to "underground waters" confirms that "waters of the state" includes both surface waters and groundwater.

Ecology broadly interprets "waters of the state," and courts have generally upheld this approach. For example, while the statute does not mention "wetlands," Ecology's regulations include "wetlands" as "surface waters." Courts have upheld this assertion of jurisdiction as to wetlands that are hydrologically connected to other large water bodies. *See Pacific Topsoils, Inc, v. Ecology*, 238 P.3d 1201 (2010) (affirming Ecology jurisdiction over wetlands on an island with "large areas of historically documented wetlands").

As explained below, Ecology asserts jurisdiction over so-called "isolated" wetlands that lack any connection to other water bodies, which are no longer federally jurisdictional after *Sackett v. Environmental Protection Agency*. Washington appellate courts have not addressed whether or to what extent Ecology has jurisdiction over such isolated wetlands. One trial court interpreted the WPCA as granting Ecology jurisdiction over intermittent, isolated wetlands because they were "bigger than puddles." *See BIAW v. Lacey*, Thurston County Superior Court,

Cause No. 91-2-02895-5 (1991) (upholding Ecology's jurisdiction over intermittent, isolated wetlands because they were "bigger than puddles"). The Pollution Control Hearings Board ("PCHB") has held that Ecology has jurisdiction over at least some isolated wetlands but has not analyzed the extent of Ecology's jurisdiction. See *Kariah Enterprises, LLC v. Ecology*, PCHB No. 05-021, Corrected Order Granting Partial Summary Judgment (Jan. 6, 2005) (stating that a Clean Water Act ("CWA") Section 401 certification "may include provisions to address impacts to all state waters, including isolated wetlands"); *Sno-King Watershed Council v. Ecology*, PCHB No. 15-086, Order Denying Motion to Reverse Ecology Administrative Order No. 11627 (March 21, 2016) (holding that certain "isolated wetlands . . . fell under Ecology's jurisdiction as waters of the state pursuant to the state Water Pollution Control Act"). In one case, the PCHB held that Ecology lacked jurisdiction over a "large puddle" because the water in question was a "small, shallow depression, unconnected to any other water body, with no outlet to any other water body, and wholly transitory in nature." *BNSF Railway Co. v. Ecology*, Order on Motion for Summary Judgment on Legal Issue No. 3, PCHB No. 11-181 (June 13, 2012). The PCHB distinguished the *BIAW v. Lacey*, which held that "waters of the state" includes wetlands that are larger than puddles. However, the PCHB did not discuss whether *isolated wetlands that are puddle-sized or smaller* would still meet the jurisdictional test articulated in these PCHB decisions.

The appellate courts have not ruled on these issues, and significant questions remain about the extent of Ecology's jurisdiction over small, isolated, transitory wetlands and other isolated waters. This is a key issue that should be clarified as part of Ecology's rulemaking process.

Relationship Between "Waters of the State" and Federal WOTUS

Ecology's legal jurisdiction over "waters of the state" under the WPCA is independent from federal agencies' jurisdiction over WOTUS under the federal CWA. As a practical matter, however, Ecology's approach to regulating "waters of the state" is impacted by the scope of federal jurisdiction over WOTUS.

When a federal agency has jurisdiction over a water body as WOTUS under the CWA, Ecology does not require a separate state-level approval for impacts to the same water body as "waters of the state" under the WPCA. Instead, Ecology participates in federal CWA permitting processes through the state water quality certification process provided under CWA Section 401. Because of *Sackett*, many water bodies that were previously treated as WOTUS are no longer subject to federal CWA permitting requirements. As a result, Ecology has seen an increase in requests for state-level approvals authorizing impacts to waters of the state.

In response to U.S. Supreme Court decisions removing certain types of waters from federal jurisdiction, Ecology has responded by asserting that Ecology still regulates those waters under the WPCA. For example, in *Sackett*, the Supreme Court clarified that WOTUS only includes "relatively permanent, standing or continuously flowing bodies of water" and adjacent wetlands with a "continuous surface connection" to navigable waters. In response to *Sackett*, Ecology has identified the following types of waters as "no longer defined as WOTUS":

- Floodplain wetlands
- Wetlands behind dikes
- Depressional wetlands not directly connected to a stream
- Ephemeral streams
- Interdunal wetland systems along the outer coast without a direct connect ion to a WOTUS

Ecology estimates that *Sackett* removed over 50% of Washington's wetlands and 14% of state streams from federal oversight, and that this will increase Ecology's project reviews from a handful to 50-100 annually.

Current Ecology Approval Process

Currently, Ecology has no formal permit process for granting authorizations to alter or impact "waters of the state." For example, the federal CWA authorizes wetland impacts through the Section 404 "dredge and fill" program, but no such permitting program exists in the state WPCA or in Ecology's regulations. Instead, Ecology issues wetlands-related decisions in the form of an "administrative order" in which Ecology staff apply the statutory language of the WPCA directly to a particular project, on a case-by-case basis. Unlike the federal Section 404 permit program, which was enacted by Congress after robust public debate and includes clearly defined agency procedures and exemptions for minor impacts, the "administrative order" process has never been subject to public review, includes no procedural safeguards, and includes no exemptions.

Ecology's CR-101 Statement reflects the agency's recognition that the current "administrative order" process should be changed, and Ecology had previously acknowledged that the current process is inefficient. In a 2024 budget request, Ecology stated that continued use of the "administrative order" process would cause "significant delays for project proponents and increased risk to the state's wetlands and streams no longer protected under the new WOTUS definition" in *Sackett*. Ecology also predicted "an increase in inadvertent violations, where proponents discover they do not need a federal permit, and proceed to implement their project assuming that no other authorization is needed." Even before *Sackett*, Ecology recognized that the current process could put an unfair burden on innocent landowners. In a 2019 comment letter addressing the relationship between federal and state regulations, Ecology's Director stated that, without federal coverage over isolated waters and no state permitting program to authorize impacts, innocent landowners would fall into a permitting "gap," increasing costs for landowners and Ecology: "Increased costs can result from the potential for increases in violations, which will increase costs in enforcement for the state and for landowners who inadvertently violate state law where no program to authorize impacts currently [exists]."

In *Sackett*, the U.S. Supreme Court emphasized that ambiguous wetlands regulations are uniquely harmful from both a practical and legal perspective:

> Even if a property appears dry, application of the guidance in a complicated manual ultimately decides whether it contains wetlands. This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property . . . And because the [law] can sweep broadly enough to criminalize mundane activities like moving dirt, this unchecked definition . . . means that a staggering array of landowners are at risk of criminal prosecution or onerous civil penalties. . .

Because there is no formal permit process and no exemption in Washington State, even minor impacts can be deemed a WPCA violation—including impacts that Ecology and federal agencies previously treated as exempt from Section 404 permit requirements before *Sackett*. For example, in the pending case of *Wade and Teresa King v. Department of Ecology*, PCHB No. 23-007c, two ranchers from eastern Washington are challenging Ecology's allegation that their digging of stock ponds—an activity they claim has always been exempt from federal permitting under Section 404(f)(1)—violated the WPCA. The Kings contend, among other things, that the areas in question do not meet the regulatory definition for "wetlands," and that these "waters" are too small, isolated, and transitory to be regulated as "waters of the state."

Scope of Proposed New Permit Program

"Waters of the state": As explained above, Ecology proposes a new permit program that would apply to "waters of the state" regulated under the WPCA, an ambiguous term whose meaning is currently being litigated. The geographic scope of "waters of the state" is a key issue that stakeholders should seek to clarify during Ecology's rulemaking process.

"Alter or impact": Clarifying which types of activities trigger a permit requirement is another key issue for stakeholders. The permit program would apply to "projects that could alter or impact" wetlands, streams, and other state waters. The CR-101 Statement does not define "alter or impact," but previous Ecology statements confirm that the program would be focused on "dredge and fill" impacts to wetlands, streams, and other surface waters that were previously considered to be WOTUS but were deemed by *Sackett* to be "nonfederally jurisdictional." Ecology has also suggested that the program would likely be similar to the federal Section 404 "dredge and fill" permit process. Because the WPCA applies to both surface water and groundwater, Ecology might attempt to address discharges to groundwater as part of the new permit program.

Predictability, general permits, public review, and mitigation: In its CR-101 Statement, Ecology states that the new permitting system will "improve customer service" by (i) providing more consistent and predictable permitting requirements and agency decisions; (ii) creating general permits that would allow more efficient, streamlined review of projects with minor impacts; (iii) establishing opportunities for public review; and (iv) "[s]etting mitigation requirements for projects." These are also key issues for stakeholder comment.

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Exemptions: Perhaps the single most important issue for public comment by many stakeholders will be permit exemptions. Ecology should include reasonable exemptions from the permit requirement for a range of normal activities with minor impacts. Ecology should also consider specifying Best Management Practices for particular activities that, if followed, can make an applicant eligible for a permit exemption by reducing an otherwise nontrivial impact down to an acceptable level. To reduce inefficiency in projects involving potential state and federal jurisdiction, Ecology should adopt exemptions that are consistent with federal exemptions under the Section 404 "dredge and fill" permit program.

Rulemaking Process

Ecology is currently in the rule development phase and has issued the following timeline for its rulemaking process. As noted in Ecology's timeline, these dates are subject to change. The latest updates and information on this rulemaking process can be found on the Department of Ecology's WAC 173-217 rulemaking webpage.

Timeline

Date (subject to change)	Activity
June 10, 2025	Announced rulemaking (filed the CR-101 form)
June 2025 - summer 2026	Develop and prepare the rule language and other information
Spring 2026	Propose rule (file the CR-102 form). Start public comment period with rule text and supporting documents
Summer 2026	Hold 2 public hearings
Late summer 2026	End public comment period
Summer - fall 2026	Review public comments and prepare adoption packet
Fall 2026	Adopt rule (file the CR-103 form)
Dec. 2026	Rule effective (usually 31 days after filing)

For More Information

Van Ness Feldman closely monitors and counsels clients on environmental regulatory and permitting developments. If you would like more information about Ecology's proposed permitting program or current process, please contact Duncan Greene, Jenna Mandell-Rice, Adam Gravley, Rachael Lipinski, or any member of our Land Use, Water, or Natural Resources practices in Seattle, WA at (206) 623-9372.