

MEMORANDUM

TO: Chatfield Watershed Authority (“CWA”) Board of Directors (“Board”)
FROM: Michael Daugherty, Somach Simmons & Dunn (“SSD”)
SUBJECT: Legal Report – July 17, 2023, Board Meeting
DATE: July 11, 2023

I. Development of a Site-Specific Nitrogen Standard for Chatfield Reservoir

At its April 17, 2023, meeting, the Board voted to begin exploring the development of a site-specific total nitrogen (“TN”) standard to avoid application of the table value TN standard for cold water reservoirs to Chatfield Reservoir currently proposed by the Water Quality Control Division (the “Division”) beginning in 2028.

A. Relevant Regulatory Provisions

The final regulations that the Commission provided to parties on April 18, 2023, include information related to the development of site-specific nutrient standards. The pertinent provisions of the draft regulations are included below:

(4) Site-specific Standards, Assessment Locations, and Assessment Criteria

(a) Upper South Platte Segment 6b, Chatfield Reservoir: Chlorophyll *a* Assessment Thresholds

chlorophyll *a* = 11.2 µg/L, summer average, 1 in 5 year allowable exceedance frequency
phosphorus(Tot) = 0.035 mg/L, summer average, 1 in 5 year allowable exceedance frequency.

5 CCR 1002-38.6(4), above, contains the existing site-specific chlorophyll *a* and phosphorus standards for Chatfield Reservoir, which will remain the same following the promulgation of the revised regulations, and this is where a site-specific nitrogen standard would fit in the regulations should the Commission adopt such a standard.

3. Site-specific Standards for Nutrients

In this rulemaking hearing, multiple parties (e.g., Parker Water and Sanitation District, City of Fort Collins, City of Westminster, Cherry Creek Basin Water Quality Authority, Chatfield Watershed Authority) objected to the adoption of table value standards for chlorophyll *a*, total nitrogen, and/or total phosphorus on certain waterbodies, and expressed the need for the commission's consideration of site-specific standards in future rulemaking hearings. The commission continues to support a phased implementation approach to adoption of nutrient criteria and declined to consider any site-specific standards during this rulemaking. However, evidence on the record attests that consideration of site-specific standards on some segments may be warranted in future commission reviews of water quality standards and classifications when and where data and information to support such a proposal are available.

Proposals for site-specific standards or changes to use classifications will need to be scientifically-defensible and protective of uses and meet all requirements of Regulation No. 31 (31.7(1)(b)(ii) and (iii)). In addition, the supporting information for any potential future site-specific standards proposals will need to describe why a departure from specific elements of the table value standards are appropriate; this includes the commission's dual control (total nitrogen and total phosphorus) approach to nutrient control, and its adoption of independently applicable criteria for chlorophyll *a*, total nitrogen, and total phosphorus (31.50).

CODE OF COLORADO REGULATIONS
Water Quality Control Commission

5 CCR 1002-38

division PHS Exhibit R). The commission appreciates the efforts of PWSD to obtain, and make available for this hearing, information that improves the understanding of existing conditions within and treatment of raw water from Rueter-Hess Reservoir.

a. Control Regulations

The commission may also consider site-specific nutrients standards for the following lake and reservoir segments that have existing nutrient control regulations in future rulemaking hearings if information to support appropriate and protective revisions is developed:

Upper South Platte River: 6b (COSBUS06b; Chatfield Reservoir)

Cherry Creek: 2 (COSPC02; Cherry Creek Reservoir)

The commission did not adopt total nitrogen or total phosphorus table value standards for either waterbody in this rulemaking hearing.

5 CCR 1002-38.106(B)(3), above, describes the process for proposing a site-specific nutrient standard. As indicated above, CWA indicated a desire for a site-specific TN standard throughout the 2022 – 2023 rulemaking proceeding. Given that the Commission has indicated strong support for dual control of both nitrogen and phosphorus and expressed an intent to adopt the table value nutrient standards beginning in 2028, SSD has recommended

that CWA develop its own site-specific TN standard and propose it to the Commission, as opposed to allowing the Division to develop Chatfield Reservoir’s site-specific TN standard or pushing the Commission to forgo a TN standard for Chatfield Reservoir. The fact that CWA ultimately supported the Division’s proposal should bode well for future site-specific proposals. The second paragraph in 5 CCR 1002-38.106(B)(3), above, indicates that proposed site-specific standards will need to be scientifically defensible and protective of uses, and CWA will need to describe why a departure from the table value standard is appropriate.

5 CCR 1002-38.106(B)(3)(a), above, expressly permits the Commission to consider site-specific standards for Chatfield Reservoir, given its existing control regulation. Accordingly, both the Division and the Commission expect CWA to propose a site-specific TN standard, and they will be more open to adopting site-specific standards in the next rulemaking proceeding, unlike in the recent proceeding.

As discussed at prior TAC meetings, the Division did include in its rebuttal statement a site-specific TN standard for Chatfield Reservoir of 530 ug/L, calculated using the Division’s recommended method for developing site-specific nutrient standards. However, the Division explicitly recommended against adoption of that standard, qualifying it with concerns regarding the data and changes to the reservoir’s operation. While this standard may serve as a good starting point, CWA should first determine what data to use in its calculations and whether the reservoir’s current and expected operations can allow for collecting data that the Division and Commission will support in a site-specific calculation.

The TAC has established a subcommittee to oversee CWA’s development of a site-specific TN standard for Chatfield Reservoir, and the subcommittee held its first meeting last month to discuss initial steps.

B. Procedural Options

CWA has at least three potential options for requesting the Colorado Water Quality Control Commission (“WQCC”) to promulgate a site-specific TN standard for Chatfield Reservoir:

Option 1: Request a formal rulemaking hearing for Regulation 73, during which CWA can propose to add a TN standard to Regulation 73. The informational hearing for Regulation 73 has been postponed indefinitely, but the Division would likely be open to a formal rulemaking at CWA’s request to make general revisions to the regulation as well as to add nitrogen information.

Pros: If Regulation 73 includes a TN standard, it could provide more clarity regarding implementation. If ultimately needed (i.e. Chatfield Reservoir isn’t meeting an adopted site-specific standard), a TMAL could be developed for nitrogen, and

CWA could develop a nitrogen trading program similar to phosphorus (which would help with future consolidation of facilities, for example).

Cons: Would likely require more work from CWA, including a potential need to amend the bylaws and/or IGA to include nitrogen regulation authority. Of the three options included in this legal report, this option would likely result in the earliest application of a TN standard to Chatfield Reservoir, although the exact timing could be negotiated with the Division in advance of a hearing. CWA may not have sufficient relevant data soon enough to accommodate this option.

Option 2: Request a site-specific TN standard as part of the Regulation 38 hearing, expected to commence in 2025.

Pros: This is where the site-specific TN standard will be promulgated eventually; it may be most efficient to request during this narrower proceeding rather than the basin-wide proceeding. Could potentially avoid being heavily involved in next basin nutrients hearing. Would give CWA until 2025 to develop a site-specific standard proposal.

Cons: CWA will likely need to participate in the basin-wide proceeding regardless of what actions are taken prior. This option would result in a standard being applied as early as 2025, and CWA may not have sufficient relevant data to develop a proposal by then.

Option 3: Request a site-specific TN standard as part of the basin wide (Regulations 31; 32-38 and 85) hearing in 2027.

Pros: This would give CWA the most time to gather data and develop a site-specific proposal. Other parties will likely also be requesting site-specific standards during this proceeding—the Division and Commission are expecting this. Could build off progress made in the 2023 rulemaking proceeding. CWA will likely participate in the basin-wide proceeding as a party regardless, so it likely makes sense to wait until this hearing to make the site-specific proposal.

Cons: Likely to be the most contentious proceeding of the three, may get somewhat caught up in other parties' issues.

Regardless of which option the TAC decides to pursue, SSD recommends CWA take the following initial steps:

1. CWA should review its existing water quality data, particularly for 2023 when available, to determine whether that data can be used in a

- site-specific analysis, or if CWA needs to restrict such an analysis to post-reallocation project data.
2. CWA should determine whether the Division’s proposed “site-specific lite” method of calculating a site-specific TN standard for Chatfield Reservoir is appropriate.
 - a. The first step would be to assess whether the Division’s calculation of 530ug/L makes sense. If so, we can use that as our proposal; if not, we need to determine whether the Division’s equation would work with different data/analysis, or if we need to pursue another calculation method.

II. Process for Requesting Chatfield State Park Water Quality Fee Hearing

On June 6, 2023, Governor Jared Polis signed the Chatfield State Park Water Quality Fee bill (SB23-267), and it became law. The new law includes the following process for establishing a water quality fee at Chatfield State Park:

1. The Colorado Parks and Wildlife Commission (“CPWC”) has until July 1, 2024, to promulgate rules establishing a process by which CWA may request that the CPWC create by rule a water quality fee to be collected by the Division from visitors to Chatfield State Park.
 - a. The rules will also include criteria for approving a request for a water quality fee, as well as criteria for determining which visitors to Chatfield State Park should be required to pay the fee.
 - b. The CPWC shall not unreasonably deny a request by CWA to create a water quality fee.
 - c. The CPWC shall review the fee on January 1, 2030, to evaluate whether it should continue or is no longer necessary.
2. If and when a fee is established, CWA must spend up to 25 percent of funds collected on water quality projects within Chatfield State Park. CWA shall use remaining funds to support water quality projects, including construction, operation and maintenance of nonpoint source projects, water quality monitoring, and urban runoff and erosion management and control.

On June 28, 2023, Kris Wahlers, Park Manager of Chatfield State Park, reached out to Barbara Biggs, TAC member, regarding the water quality fee and indicated that the “core of

the CPW implementation team” will be Kris, Regulation Manager Hilary Hernandez, and CFO Mike Minatta, and that Hilary “will be the conduit to get items in front of [the CPWC] including timing, content, form, etc.” That same day, I reached out to Hilary Hernandez of CPWC to request that the water quality fee be added to an upcoming CPWC agenda and to inquire regarding whether CPWC would like TAC and/or Board members to attend any upcoming CPWC meetings to discuss the water quality fee.

On July 11, 2023, Hilary Hernandez called me to discuss the fee setting process, and indicated that CPW had created an internal workgroup to develop the process and guidelines for setting the water quality fee prior to bringing it to the CPWC, which will need to take action by May 2024 to meet CPW’s July 2024 deadline by which to set the fee.

III. U.S. Supreme Court Rules Against EPA in WOTUS Litigation; Colorado DWR Issues Memo Clarifying State Approach

In *Sackett v. EPA*¹, the U.S. Supreme Court limited the federal government’s jurisdiction pursuant to the Clean Water Act over “adjacent wetlands” to those having a continuous surface connection to bodies that are “waters of the United States” (“WOTUS”). This requires the party asserting jurisdiction over adjacent wetlands to establish (1) that the adjacent body of water constitutes a water of the United States (*i.e.*, a relatively permanent body of water connected to traditional interstate navigated waters), and (2) that the wetland has a continuous surface connection with that water with no clear demarcation between the “waters” and wetlands.² The decision disposes of the “significant nexus” test that was previously in use for determining the Clean Water Act’s jurisdictional reach, which could have included wetlands “adjacent” to or “neighboring” covered waters even when they were separated by dry land.

In anticipation of this decision, the Colorado WQCD issued a Draft Implementation Policy for Enforcement of Unpermitted Dredged and Fill Material into State Waters (available [here](#)). The Division will use the policy to guide any enforcement actions authorized by the Colorado Water Quality Control Act on the discharge of unpermitted dredged and fill materials into state waters after the *Sackett* decision resulted in less water quality protections for Colorado state waters.

In short, the policy commits to forego enforcement for projects in *Sackett* Gap Waters³ that comply with the federal 404 permitting requirements for such discharges prior to the *Sackett* decision. The purpose of the policy is to maintain the status quo vis-à-vis current protections for state waters and collect information on the number of projects impacting

¹ *Sackett v. EPA*, 598 U.S., slip op. (May 25, 2023).

² *Id.* at 22.

³ “*Sackett* Gap Waters” are state waters that were WOTUS pursuant to the pre-2015 federal regulations but that are no longer considered WOTUS post-*Sackett*.

Sackett Gap Waters as the Division considers developing a dredged and fill regulatory program. The Division does not intend to take enforcement action for unpermitted discharges of dredged or fill material into state waters if:

1. Notification is provided to the Division;
2. The discharges would have been eligible for a 404 nationwide or 404 general permit;
3. The discharges are undertaken in accordance with protective conditions; and
4. The Division can exercise oversight over the projects.