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MEMORANDUM

TO: Chatfield Watershed Authority (“CWA”) Board of Directors (“Board”)
FROM: Michael Daugherty, Somach Simmons & Dunn (“SSD”)
SUBJECT: Legal Report – October 17, 2022, Board Meeting
DATE: October 11, 2022

1. Revised Nutrient Criteria for Colorado Lakes Update

CWA filed a party status request in the Water Quality Control Commission’s (the “Commission”) lakes nutrients rulemaking on August 17, 2022. As such, CWA is a formal party to the rulemaking. Following numerous motions, orders, and a status conference, which are described in further detail below, the Commission postponed the rulemaking hearing to April 10, 2023.

On August 29, 2022, Arapahoe County Water and Wastewater Authority filed a Joint Motion for Extension of Time on behalf of a number of parties, seeking an immediate stay of responsive prehearing statements and an extension of time of the rulemaking deadlines and the hearing. CWA supported the relief requested in the motion.

On August 30, 2022, the Commission issued an order that stayed the deadlines for filing responsive prehearing statements and rebuttal statements until further action by the Hearing Chair. The Commission’s order also set a deadline for any other motions for delay of the hearing for August 31, 2022, and for responses to all motions by September 2, 2022.

On August 31, 2022, Northern Colorado Water Conservancy District filed a Joint Motion to Continue Rulemaking Hearing on behalf of a number of parties that requested the Commission to continue the nutrients rulemaking hearing for a period of at least one year. CWA did not oppose the relief requested in the motion.

The Division filed a response to the two motions that requested a delay of the rulemaking hearing to April 10, 2023, and included a proposed revised timeline for related procedural deadlines.

Several other parties also filed responses to the two motions. Colorado Parks and Wildlife (“CPW”) indicated in its response that it opposed delaying the hearing on the basis of the request for a cost-benefit analysis or consultation with the State Engineer and CWCB or

by an unreasonable amount of time, but that CPW does not oppose a reasonable extension of the hearing date (by one to no more than five months from the currently scheduled date) for other reasons. The Colorado Monitoring Framework indicated in its response that it supports delaying the hearing by approximately one year to allow for meaningful stakeholder review, engagement, and QA/QC, among other reasons. The U.S. Environmental Protection Agency (“EPA”) indicated in its response that it would defer to the Commission regarding the motions but included reasons to justify a delay if granted and also commended the Division’s outreach efforts. The City of Fort Collins indicated in its response that it supported delaying the hearing by one year.

On September 7, 2022, the Commission issued an order continuing and rescheduling the rulemaking hearing from November 14, 2022, to April 10, 2023, and set a status conference for September 14, 2022, to discuss additional revisions to the rulemaking timeline.

On September 19, 2022, the Commission issued an order that establishes all of the revised deadlines for the rulemaking proceeding. The order also set a new deadline of October 5, 2022, for the Water Quality Control Division (the “Division”) to submit a supplemental prehearing statement. This order, along with the above referenced motions and orders, are attached to this legal report in chronological order.

The Division submitted its supplemental prehearing statement on October 5, 2022. SSD has reviewed the supplemental prehearing statement and notes that the Division has revised its proposed total nitrogen standard for cold water reservoirs with recreation use from 330 ug/L to 380 ug/L, which would apply to Chatfield Reservoir. The TAC has not yet had the opportunity to discuss the Division’s supplemental prehearing statement, but anticipates making a decision regarding CWA’s position at the November TAC meeting.

2. Regulation 73 Rulemaking Update

According to Joni Nuttle at the Division, this rulemaking has been indefinitely postponed. She indicated that she would keep CWA apprised of any new information as she receives it.

COLORADO WATER QUALITY CONTROL COMMISSION

JOINT MOTION FOR (1) IMMEDIATE STAY OF RESPONSIVE PREHEARING STATEMENTS AND (2) EXTENSION OF TIME OF RULEMAKING DEADLINES AND HEARING

REVISIONS TO THE BASIC STANDARDS AND METHODOLOGIES FOR SURFACE WATER (REGULATION NO. 31); REVISIONS TO CLASSIFICATIONS AND NUMERIC STANDARDS FOR ARKANSAS RIVER BASIN (REGULATION NO. 32), UPPER COLORADO RIVER BASIN AND NORTH PLATTE RIVER (PLANNING REGION 12) (REGULATION NO. 33), SAN JUAN RIVER AND DOLORES RIVER BASINS (REGULATION NO. 34), GUNNISON AND LOWER DOLORES RIVER BASINS (REGULATION NO. 35), RIO GRANDE BASIN (REGULATION NO. 36), LOWER COLORADO RIVER BASIN (REGULATION NO. 37), AND SOUTH PLATTE RIVER BASIN, LARAMIE RIVER BASIN, REPUBLICAN RIVER BASIN, SMOKY HILL RIVER BASIN (REGULATION NO. 38); REVISIONS TO NUTRIENTS MANAGEMENT CONTROL REGULATION (REGULATION NO. 85)

Arapahoe County Water and Wastewater Authority; Cache La Poudre Water Users Association; Central Colorado Water Conservancy District, Groundwater Management Subdistrict of the Central Colorado Water Conservancy District, and Well Augmentation Subdistrict of the Central Colorado Water Conservancy District; City of Aurora; City of Brighton; City of Colorado Springs, by and through its enterprise, Colorado Springs Utilities; City of Loveland; City of Northglenn; East Cherry Creek Valley Water and Sanitation District; Front Range Feedlots, LLC; Parker Water and Sanitation District; United Water and Sanitation District; and Water Supply and Storage Company (collectively, “Water Suppliers”), by and through their undersigned counsel, move the Hearing Officer to (1) immediately stay the September 7, 2022 deadline to file Responsive Prehearing Statements, and (2) extend the prehearing deadlines and Rulemaking Hearing. In support of this motion, the Water Suppliers state as follows:

1. Certificate of Conferral: Undersigned counsel has conferred about the relief requested in this motion with counsel for the Water Quality Control Division (“Division”) and for the other parties, and is authorized to state the following: Centennial Water and Sanitation District and Chatfield Watershed Authority support this motion; Town of Windsor and Town of Firestone consent to the filing of this motion; City of Boulder, City of Golden, City of Thornton, and The River District do not oppose this motion; City of Westminster, the Cherry Creek Basin Water Quality Authority, and Pueblo Board of Water Works take no position concerning this motion; Northern Colorado Water Conservancy District supports the requested delay for purposes of addressing issues relating to water rights and to conduct a cost-benefit analysis, but also intends to submit a separate motion seeking a longer continuance of the rulemaking to allow for sufficient time to address complex technical issues; Town of Erie, City of Fort Collins, Colorado Wastewater Utility Council, and Morrison Creek Water and Sanitation District support this motion, but also believe that

a longer delay (up to one year) is necessary to address technical concerns with the draft criteria and the TetraTech report; the Water Quality Control Division does not take a position on a reasonable delay of the rulemaking hearing but is continuing to review the request for an alternate schedule and will provide its recommendation in a response to the motion; and Colorado Parks & Wildlife opposes the motion and the relief requested herein, and anticipates filing a response to the Commission later this week.

2. The Water Quality Control Commission (“Commission”) filed the notice of the rulemaking regarding revisions to Regulation Nos. 31-38 and 85 (“Rulemaking”), in a Notice of Public Rulemaking Hearing on July 12, 2022. The 10-Year Water Quality Roadmap produced by the Division, and reviewed and recognized by the Commission, called for the draft standards to be finalized and circulated for review in 2021.
3. The Division performed stakeholder outreach beginning in 2018, including starting to convene the 10-Year Water Quality Roadmap Workgroup. Although the draft nutrients criteria were referenced in a May 2018 meeting, this only was to indicate that draft criteria would be available in 2021. Between 2018 and 2020 the Division provided only process-related updates on lake nutrients, such as notifying stakeholders that the Technical Advisory Committee planned to meet, and at all times the Division indicated that the criteria would be available for public review and consideration in 2021. *See, e.g.*, 10-Year Water Quality Roadmap, pp. 1-2, available at: <https://drive.google.com/file/d/1VmcBnvaSowB5jre3v9M9ajlHPW8K8ok/view>; Lakes Nutrients Fact Sheet, p. 2, available at: https://drive.google.com/file/d/1AEbjn76QzuSW63Ua2IZBGTph_foUkjQv/view; and Lakes Nutrients TAC Meeting #1 Notes (Dec. 16, 2019), p. 2, available at <https://docs.google.com/document/d/11ZQw4A4EpUJgiBx3EmYO-rk04K0Z3QHBRCTXOm9aBv8/edit>. Collectively, the preceding references are attached as **Exhibit A**.¹ A few updates in 2020 and early 2021 provided some information about the process and the information Tetra Tech (the Division’s consultant) was reviewing. The timeline for draft criteria issuance was successively extended by several months, although the Division indicated they would have a several-month external comment period on the draft criteria before being forwarded to the Commission for public rulemaking.² Draft criteria were not ultimately made available to the public until May 2022, with the draft

¹ **Exhibit A** is available via this Dropbox link:

<https://www.dropbox.com/sh/k954ybdqn649spx/AAAkf2UtgNdi7ECom3BC0poUa?dl=0>.

² The timing of criteria and the ability to provide meaningful comments were of concern to numerous stakeholders, and discussed at multiple meetings. *See, e.g.*, November 2021 Roadmap Meeting (Nov. 18, 2021), <https://drive.google.com/drive/folders/1ZLNvIQ8OPabqPvLjuLX1eraA68-X4y0n> (recording not available online); December 2021 Pre-Technical Advisory Committee (TAC) Meeting, at 27:26 (Dec. 6, 2021), https://drive.google.com/file/d/1BHLHLbnUZqf6x-_pcJozchPwv-PNpO7N/view (“Dec. 2021 Pre-TAC”); February 2022 Pre-TAC Meeting, at 11:49 (Feb. 1, 2022), https://drive.google.com/file/d/1W7o3i4_bwcBHFqRKn-CJcrfYXDPRg9A/view (“Feb. 2022 Pre-TAC”); February 2022 Roadmap Meeting, at 1:12:53 (Feb. 16, 2022), https://drive.google.com/file/d/1MRCuSLZzrqA8T4G3Z3js83p_zpA8TE9/view; May 2022 Lakes Nutrient Town Hall, at 1:07:10 (May 2, 2022), <https://drive.google.com/file/d/1soO5PPsfAk6A3w5r7kh6f4EpnXvDxfni/view> (“May 2022 Town Hall”).

standards being presented for the first time to a townhall on May 2 and to the 10-Year Water Quality Roadmap Workgroup on May 19.³ Despite all of the Division's previous promises, there was not an opportunity for an external comment period.

4. The Division developed proposed standards without adequate participation of water suppliers and with insufficient consideration of the Rulemaking's impact to their water rights, including plans of augmentation, appropriative rights of exchange, administrative exchanges, substitute supply plans, and suppliers' ability to make replacements. Only upon issuance of the proposed rule in July of this year did the Water Suppliers discover that it poses significant risk to their water operations.
5. The Division filed its Prehearing Statement on August 3, 2022. The Prehearing Statement consists of ninety-nine pages and nineteen exhibits, including multiple data-heavy Excel files. The Division's Prehearing Statement does not address potential impacts to water rights operations.
6. Parties' Responsive Prehearing Statements are currently due September 7, 2022.
7. Based on their initial assessment, the Water Suppliers are concerned that the proposed rule threatens reservoir operations, particularly in regard to the operation of plans for augmentation and appropriative rights of exchange, administrative exchanges, substitute supply plans, and the future impacts of Total Maximum Daily Loads that will likely be developed for many non-attaining lakes and reservoirs. *See Exhibit B* (relevant party status requests).⁴ These impacts threaten the utilization and capacity of existing and

³ Stakeholders directly raised concerns about the delay in criteria and the ability to prepare for a November 2022 hearing at numerous meetings. *See, e.g.*, Dec. 2021 Pre-TAC, at 13:53–17:04, 19:07–22:45; Feb. 2022 Pre-TAC, at 20:53; May 2022 Town Hall, at 1:09:32–1:10:15, 1:14:05–1:15:24, 1:17:03–1:17:48.

⁴ **Exhibit B** is available via this Dropbox link:
<https://www.dropbox.com/sh/k954ybdqn649spx/AAAkf2UtgNdi7ECom3BC0poUa?dl=0>.

In addition to the relevant party status requests provided in Exhibit B, Parker Water and Sanitation District and City of Aurora provide as follows:

Parker Water and Sanitation District owns and operates Rueter-Hess Reservoir, a 72,000-acre-foot municipal water storage reservoir. Rueter-Hess Reservoir is classified as a Direct Use Water Supply reservoir and would be subject to the Division's proposed criteria for chlorophyll-a, total nitrogen, and total phosphorus. Among other supplies, Parker Water and Sanitation District has the right to divert flows from Cherry Creek into Rueter-Hess Reservoir for storage and subsequent use. However, over twenty years of water quality data from the basin show that the surface and alluvial ground water in Cherry Creek does not meet the proposed standards for total phosphorus. And despite the water quality of Cherry Creek being the focus of intense study and significant expenditures over the past three decades, no process has been discovered to reduce the background concentrations of total phosphorus. Based on existing data and Parker Water and Sanitation District's water supply operations, the Division's proposed criteria would lead to a Clean Water Act Section 303(d) impairment listing, requiring that a future Total Maximum Daily Load (TMDL) be developed and control measures imposed to reduce nutrient concentrations in the reservoir. TMDL requirements implemented through future actions—such as discharge permits, nonpoint source controls, and future 401 certifications—risk impairing Parker Water and Sanitation District's water rights.

proposed reservoirs throughout Colorado and thus threaten future water availability for populations already challenged by drought and population growth. To wit, the Colorado State Water Plan, issued by the Colorado Water Conservation Board, already predicts a water supply shortage and calls for additional reservoir construction and more efficient utilization of water supplies. It is critical that the Commission allow the parties additional time to consider and resolve any conflicts between the proposed rule and Water Suppliers' water rights, and to ensure that the proposed rule fully accounts for the dire need for long-term water supply planning, particularly in and near the Front Range.

8. Two of the parties to this rulemaking requested a cost-benefit analysis of this proposed Rulemaking. The Department of Regulatory Agencies responded to that request stating that the cost-benefit analysis would be completed on November 4, 2022, the day after the consolidated proposal is due to the Commission, and ten days before the currently scheduled hearing before the Commission on November 14, 2022. A cost-benefit analysis of a similar nutrient control program conducted in 2011 for the Division found that statewide costs would be between \$2.5 and \$25 Billion dollars, with benefits piling in comparison. *See Report, Cost/Benefit Study of the Impacts of Potential Nutrient Controls for Colorado Point Source Discharges* (Dec. 2021), attached as **Exhibit C**.⁵ The cost-benefit analysis to be completed by the Department of Regulatory Agencies will help ensure that the Commission satisfies its obligations to evaluate economic reasonableness. *See, e.g.,* C.R.S. §§ 25-8-102(5), -202(2), -205(2)(c). Without a full cost-benefit analysis comparing the water quality benefits to the economic, environmental, energy, public health, and other costs associated with the proposed rule, the parties to this proceeding cannot sufficiently evaluate and comment on the economic reasonableness and scope of the proposed rule, and the Commission cannot fully evaluate the proposed rule, consider the parties' comments, or make informed decisions concerning the proposed rule. The Commission thus should not proceed with the Rulemaking as scheduled, as it would deprive the parties, the Division, and the Commission of meaningful consideration of cost-benefit and economic reasonableness analyses. The Colorado Administrative Procedure Act authorizes the Commission to postpone the hearing on a rule or amendment to complete the cost-benefit analysis. C.R.S. § 24-4-103(2.5)(a).
9. Based on water rights concerns presented in at least seventeen Party Status Requests, the Commission Administrator formally requested consultation of the Colorado State

The City of Aurora owns and operates Rampart Reservoir, Quincy Reservoir, and Aurora Reservoir, all of which are classified as Direct Use Water Supply reservoirs and would be subject to the Division's proposed criteria for chlorophyll-a, total nitrogen, and total phosphorus. Despite Aurora's efforts to manage nutrients in its reservoirs, as summarized in its Party Status Request, Aurora's existing data indicate that Aurora Reservoir would not meet the proposed chlorophyll-a or total phosphorus standards, and Quincy Reservoir would not meet the chlorophyll-a or total nitrogen standards. Any future Clean Water Act Section 303(d) impairment listing based on predicated nonattainment would result in a future Total Maximum Daily Load (TMDL) to reduce nutrient concentrations, which risk impairing Aurora's water rights based on the terms, conditions, and restrictions included in future discharge permits, non-point source controls, and future 401 certifications, and potential restrictions on water releases from Rampart Reservoir to Quincy and/or Aurora Reservoirs.

⁵ **Exhibit C** is available via this Dropbox link:

<https://www.dropbox.com/sh/k954ybdqn649spx/AAAkf2UtgNdi7ECom3BC0poUa?dl=0>.

Engineer's Office and Colorado Water Conservation Board on August 23, 2022 to consider whether the proposed rule would cause or result in material injury to water rights. A timeline and deadline for such consultation is not set, and it is unlikely the Water Suppliers will receive the results of that consultation before the Responsive Prehearing Statement deadline. There is also no assurance that the parties will have sufficient time to consider and comment on the results of such consultation before submitting their Rebuttal Statements and oral testimony at the hearing. The Commission has flexibility for deciding the consultation timeline (C.R.S. § 25-8-104(2)(d) does not specify any deadlines) and passively receiving the State Engineer's consultation report at the midnight hour will be unproductive and meaningless without input from the affected parties.

10. Thirty-five days is an insufficient amount of time for the Water Suppliers and their consulting engineers to review and respond to the Division's lengthy and technical Prehearing Statement and to propose changes to protect their water rights. Due to the lack of stakeholder discussion to date regarding the effect of the Rulemaking on water rights, the Water Suppliers have only begun to evaluate the Rulemaking's impact on their water rights portfolios and must be afforded sufficient time to meet with the Division and the State Engineer's Office to propose regulatory changes to protect water rights and water supplies in Colorado.
11. The Commission is authorized to postpone the public rulemaking hearing on these grounds (*see* C.R.S. § 24-4-103(2.5)(a); Reg. 21), as long as the Commission either adopts a rule or terminates the rulemaking proceeding within 180 days after the last public hearing on the proposed rule (*see* C.R.S. § 24-4-103(4)(d)). The Commission has not yet held any public hearing on the proposed rules in this matter.
12. Based on the foregoing, and pursuant to 5 C.C.R. § 1002-21.3(F), the Water Suppliers request that the prehearing deadlines and Rulemaking Hearing be extended by at least ninety days following the release of the consultation report by the State Engineer's Office, and be reset by the Commission at its discretion.
13. Additionally, the Water Suppliers request the September 7, 2022 deadline for the Responsive Prehearing Statement be immediately stayed until the Commission issues an order on the extended deadlines.
14. The Water Suppliers request *en banc* consideration of this motion by all members of the Commission.
15. No parties will be prejudiced by the Water Suppliers' requested extension. In particular, the Division will not be prejudiced by the requested extension because the Division commenced the Rulemaking one year later than it originally planned, any rulemaking proposal will benefit from further consideration of cost-benefit and economic reasonableness analysis as well as consideration of water rights impacts, and adjustments to the standards may be warranted by such analysis.

WHEREFORE, the Water Suppliers respectfully request that the Hearing Officer grant this motion, (1) extending the prehearing deadlines and Rulemaking Hearing by at least 90 days following the release of the consultation report by the State Engineer's Office, and (2) staying the September 7, 2022 deadline for the Responsive Prehearing Statement until such time as the Commission issues an order on the extension of deadlines. A proposed order is submitted with this motion for the Hearing Officer's consideration.

Respectfully submitted this 29th day of August, 2022.

/s/ Sheela S. Stack

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 29th day of August, 2022, a true and correct copy of the foregoing **JOINT MOTION FOR (1) IMMEDIATE STAY OF RESPONSIVE PREHEARING STATEMENTS AND (2) EXTENSION OF TIME OF RULEMAKING DEADLINES AND HEARING** was served via email to those listed on the party list, attached hereto.



Teresa Johnson, Paralegal



COLORADO

Water Quality
Control Commission

Department of Public Health & Environment

PARTY STATUS LIST

August 26, 2022

FOR CONSIDERATION OF ADOPTION OF:

revisions to the Nutrients Management Control Regulation, Regulation #85 (5 CCR 1002-85) and revisions pertaining to lakes nutrient criteria in The Basic Standards and Methodologies for Surface Water, Regulation #31 (5 CCR 1002-31) along with revisions to the Classifications and Numeric Standards for:

- o Arkansas River Basin, Regulation #32 (5 CCR 1002-32);
- o Upper Colorado River Basin and North Platte River (Planning Region 12), Regulation #33 (5 CCR 1002-33);
- o San Juan River and Dolores River Basins, Regulation #34 (5 CCR 1002-34);
- o Gunnison and Lower Dolores River Basins, Regulation #35 (5 CCR 1002-35);
- o Rio Grande Basin, Regulation #36 (5 CCR 1002-36);
- o Lower Colorado River Basin, Regulation #37 (5 CCR 1002-37); and
- o South Platte River Basin, Laramie River Basin, Republican River Basin, Smoky Hill River Basin, Regulation #38 (5 CCR 1002-38).

November 14, 2022
HEARING CHAIR: APRILLONG

	NAME	REPRESENTED BY/ADDRESS	TELEPHONE/E-MAIL
1	Arkansas Fountain Coalition for Urban River Evaluation	Andra Ahrens City of Pueblo Wastewater Department 1300 S. Queens Avenue Pueblo, CO 81001	719-553-2896 aahrens@pueblo.us aneuhart@brwncaled.com
2	Arapahoe County Water and Wastewater Authority	Sheela Stack William Wombacher Stacy Brownhill NAZARENUS STACK & WOMBACHER LLC 5299 DTC Blvd., Suite 610 Greenwood Village, CO 80111	720-647-5661 sstack@nswlaw.com wwombacher@nswlaw.com sbrownhill@nswlaw.com
3	Barr Milton Watershed Association	Samantha Miller Coordinator Barr Milton Watershed Association 41 Osceola St. Denver, CO 80219	314-960-1552 miller.sami@outlook.com esandos@englewoodco.gov slundt@metrowaterrecovery.com michelle.seubert@state.co.us jtinetti@cwsdhrmd.org sreeves@brwncaled.com caleb.owen@thorntonco.gov curt.bauers@gmail.com kelly@dinatalewater.com

4	Board of Water Works of Pueblo, Colorado	Lee H. Johnson Mason H. Brown Sarah B. Wiedemann Carlson, Hammond & Paddock, L.L.C. 1900 Grant Street, Suite 1200 Denver, CO 80203	303-861-9000 jnorton@pueblowater.org ljohnson@chp-law.com mbrown@chp-law.com swiedemann@chp-law.com
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6	Cherry Creek Basin Water Quality Authority	Zach C. Miller and Andrea M. Bronson Davis Graham & Stubbs LLP 1550 Seventeenth Street, Suite 500 Denver, Colorado 80202 Jane Clary Wright Water Engineers, Inc. 2490 W 26th Ave #100-A Denver, CO 80211 Jessica DiToro LRE Water 1221 Auraria Parkway Denver, CO 80204	303-892-9400 zach.miller@dgsllaw.com andrea.bronson@dgsllaw.com 303-480-1700 clary@wrightwater.com 802-793-8545 Jessica.ditoro@lrewater.com
7	Centennial Water & Sanitation District	Gabe Racz Centennial Water & Sanitation District c/o Vranesh and Raisch, LLP 5303 Spine Road, Suite 202 Boulder, CO 80301	303-443-6151 gr@vrlaw.com jtinetti@cwsdhrmd.org pbong@cwsdhrmd.org jcb@vrlaw.com rlb@vrlaw.com
8	Central Colorado Water Conservancy District	Bradley C. Grasmick David P. Jones Lawrence Custer Grasmick Jones & Donovan, LLP 5245 Ronald Reagan Blvd., Suite 1 Johnstown, CO 80534	970-622-8181 brad@lcwaterlaw.com david@lcwaterlaw.com

9	Chatfield Watershed Authority	Michael Daugherty Somach Simmons & Dunn, P.C. 1155 Canyon Blvd, Suite 110 Boulder, CO 80302	916-469-3891 mdaugherty@somachlaw.com wesmartin@pcwra.org radrian@douglas.co.us dvandellen@crgov.com alison.witheridge@denverwater.org alan.leak@respec.com diane@coloradowater.org sklahn@somachlaw.com dthompson@somachlaw.com
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11	City of Boulder	Kate Dunlap City of Boulder 5605 N. 63rd St. Boulder, CO 80301	303-413-7402 DunlapK@bouldercolorado.gov lawlorm@bouldercolorado.gov windm@bouldercolorado.gov behnampourl@bouldercolorado.gov wilsonm@bouldercolorado.gov
12	City of Brighton	Daniel K. Brown, Esq. Sara J.L. Irby, Esq. Whitney Phillips Coulter, Esq. Fischer, Brown, Bartlett, Larsen, & Irby P.C. 1319 E. Prospect Road Fort Collins, CO 80525	970-407-9000 sarairby@fischerbrownlaw.com whitneycoulter@fischerbrownlaw.com brentbartlett@fischerbrownlaw.com acreswell@brightonco.gov mrice@brightonco.gov solsen@brightonco.gov
13	City of Colorado Springs	Mari Deminski City Attorney's Office 30 South Nevada Avenue Colorado Springs, CO , 80903 Matthew Montgomery Hill and Robbins, P.C. 1660 Lincoln Street Suite 2720 Denver, CO 80624 Patti Zietlow Environmental Specialist EVS Technical Services 121 S. Tejon St. Colorado Springs, CO 80903	719-385-5690 Mari.deminski@coloradosprings.gov 303-296-8100 matthewmontgomery@hillandrobbsins.com 719-668-4171 pzietlow@csu.org

14	City of Fort Collins	Gabe Racz City of Fort Collins c/o Vranesh and Raisch, LLP 5303 Spine Road, Suite 202 Boulder, CO 80301	303-443-6151 kmarko@fcgov.com jschlam@fcgov.com epotyondy@fcgov.com gr@vrlaw.com jcb@vrlaw.com rlb@vrlaw.com
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16	City of Greeley Water and Sewer	Michaela Jackson Water Quality and Regulatory Compliance Manager 1001 11th Ave 2nd Floor Greeley, CO 80631	970-350-9836 michaela.jackson@greeleygov.com
17	City of Loveland	Derek Turner, Assistant City Attorney Tim Bohling, Water Quality Manager, Todd Hanlin, Water Resources Manager 500 East Third Street, Suite 330 Loveland, CO 80537	970-962-2549 Derek.turner@cityofloveland.org Tim.Bohling@Cityofloveland.org Todd.Hanlin@Cityofloveland.org
18	City of Northglenn	Shelley Stanley, Water Quality Coordinator 12301 Claude Court Northglenn, CO 80233	303-450-8800 jwinterton@northglenn.org tmoon@northglenn.org
19	City of Thornton	Caleb Owen, Water Quality Administrator 9500 Civic Center Dr. Thornton, CO 80229	303-255-7772 caleb.owen@thorntonCO.gov martin.kimmes@ThorntonCO.gov
20	City of Westminster	Lee H. Johnson Mason H. Brown Sarah B. Wiedemann Carlson, Hammond & Paddock, L.L.C. 1900 Grant Street, Suite 1200 Denver, CO 80203	303-861-9000 kcline@cityofwestminster.us ljohnson@chp-law.com mbrown@chp-law.com swiedemann@chp-law.com

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NOTE TO PARTIES: Please send electronic copies of all documents (prehearing statements, rebuttals, etc.) directly to the Commission Office
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WATER QUALITY CONTROL COMMISSION
COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

PROCEDURAL ORDER REGARDING ARAPAHOE COUNTY WATER AND WASTEWATER AUTHORITY, CACHE LA POUFRE WATER USERS ASSOCIATION, CENTRAL COLORADO WATER CONSERVANCY DISTRICT, GROUNDWATER MANAGEMENT SUBDISTRICT OF THE CENTRAL COLORADO WATER CONSERVANCY DISTRICT, WELL AUGMENTATION SUBDISTRICT OF THE CENTRAL COLORADO WATER CONSERVANCY DISTRICT, CITY OF AURORA, CITY OF BRIGHTON, CITY OF COLORADO SPRINGS, BY AND THROUGH ITS ENTERPRISE, COLORADO SPRINGS UTILITIES, CITY OF LOVELAND, CITY OF NORTHGLENN, EAST CHERRY CREEK VALLEY WATER AND SANITATION DISTRICT, FRONT RANGE FEEDLOTS, LLC, PARKER WATER AND SANITATION DISTRICT, UNITED WATER AND SANITATION DISTRICT, AND WATER SUPPLY AND STORAGE COMPANY'S JOINT MOTION FOR EXTENSION OF TIME

IN THE MATTER CONCERNING THE ADOPTION OF REVISIONS TO THE NUTRIENTS MANAGEMENT CONTROL REGULATION, REGULATION #85 (5 CCR 1002-85) AND REVISIONS PERTAINING TO LAKES NUTRIENTS CRITERIA IN THE BASIC STANDARDS AND METHODOLOGIES FOR SURFACE WATER, REGULATION #31 (5 CCR 1002-31) ALONG WITH REVISIONS TO THE CLASSIFICATIONS AND NUMERIC STANDARDS FOR:

- ARKANSAS RIVER BASIN, REGULATION #32 (5 CCR 1002-32);
 - UPPER COLORADO RIVER BASIN AND NORTH PLATTE RIVER (PLANNING REGION 12), REGULATION #33 (5 CCR 1002-33);
 - SAN JUAN RIVER AND DOLORES RIVER BASINS, REGULATION #34 (5 CCR 1002-34);
 - GUNNISON AND LOWER DOLORES RIVER BASINS, REGULATION #35 (5CCR 1002-35);
 - RIO GRANDE BASIN, REGULATION #36 (5 CCR 1002-36);
 - LOWER COLORADO RIVER BASIN, REGULATION #37 (5 CCR 1002-37); AND
 - SOUTH PLATTE RIVER BASIN, LARAMIE RIVER BASIN, REPUBLICAN RIVER BASIN, SMOKY HILL RIVER BASIN, REGULATION #38 (5 CCR 1002-38).
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On August 29, 2022, Arapahoe County Water and Wastewater Authority, Cache La Poudre Water Users Association, Central Colorado Water Conservancy District, Groundwater Management Subdistrict of the Central Colorado Water Conservancy District, and Well Augmentation Subdistrict of the Central Colorado Water Conservancy District, City of Aurora, City of Brighton, City of Colorado Springs, by and through its enterprise, Colorado Springs Utilities, City of Loveland, City of Northglenn, East Cherry Creek Valley Water and Sanitation District, Front Range Feedlots, LLC, Parker Water and Sanitation District, United Water and Sanitation District, and Water Supply and Storage Company submitted a joint Motion for (1) immediate stay of responsive prehearing statements and (2) extension of time of rulemaking deadlines and hearing ("Motion").

The deadlines for filing responsive prehearing statements AND rebuttal statements are hereby **STAYED** until determined by order of the Hearing Chair.

Any other motions for delay of the hearing are due by 5:00 p.m. on Wednesday, August 31, 2022. Responses to the pending Motion and any other motions for delay are due by **12:00 p.m. on Friday, September 2, 2022**. Responses to all motions may be consolidated between parties and shall be emailed to all parties and the commission office at cdphe.wqcc@state.co.us. The filing of responses is optional.

DONE and ORDERED this 30th day of August, 2022.

Water Quality Control Commission


April Long, Hearing Chair

**COLORADO WATER QUALITY CONTROL COMMISSION
STATE OF COLORADO**

JOINT MOTION TO CONTINUE RULEMAKING HEARING

IN THE MATTER OF THE ADOPTION OF REVISIONS TO THE NUTRIENTS MANAGEMENT CONTROL REGULATION (REGULATION NO. 85); THE BASIC STANDARDS AND METHODOLOGIES FOR SURFACE WATER (REGULATION NO. 31); AND CLASSIFICATIONS AND NUMERIC STANDARDS FOR ARKANSAS RIVER BASIN (REGULATION NO. 32), UPPER COLORADO RIVER BASIN AND NORTH PLATTE RIVER (PLANNING REGION 12) (REGULATION NO. 33), SAN JUAN RIVER AND DOLORES RIVER BASINS (REGULATION NO. 34), GUNNISON AND LOWER DOLORES RIVER BASINS (REGULATION NO. 35), RIO GRANDE BASIN (REGULATION NO. 36), LOWER COLORADO RIVER BASIN (REGULATION NO. 37), AND SOUTH PLATTE RIVER BASIN, LARAMIE RIVER BASIN, REPUBLICAN RIVER BASIN, SMOKY HILL RIVER BASIN (REGULATION NO. 38)

Northern Colorado Water Conservancy District (“Northern Water”); Colorado Wastewater Utility Council (“CWWUC”); Lower Arkansas Valley Water Conservancy District; Arapahoe County Water and Wastewater Authority; East Cherry Creek Valley Water & Sanitation District; United Water and Sanitation District; Centennial Water and Sanitation District; Town of Erie; City of Loveland; Central Colorado Water Conservancy District; Front Range Feedlots, LLC; City of Brighton; City of Northglenn; Cache la Poudre Water Users Association; and Water Supply and Storage Company (together, the “Joint Parties”), by and through their respective counsel, submit this Joint Motion to Continue Rulemaking Hearing as follows:

CERTIFICATION OF CONFERRAL UNDER C.R.C.P. 121 § 1-15(8)

Counsel for Northern Water conferred with counsel for the Water Quality Control Division (“Division”) and all other parties to this rulemaking regarding this motion. In addition to the parties listed above who are jointly submitting this motion, the following parties also

support this motion and the requested continuance of the rulemaking hearing: City of Aurora, City of Boulder; City of Thornton; Morrison Creek Water & Sanitation District; Parker Water and Sanitation District; Plum Creek Water Reclamation Authority; and Summit Water Quality Committee. The following parties do not oppose this motion: Board of Water Works of Pueblo; Chatfield Water Authority; City of Golden; Northwest Colorado Council of Governments (NWCOG); City of Westminster; and Colorado River Water Conservation District. Cherry Creek Basin Water Quality Authority takes no position on the motion at this time, but reserves the right to respond by September 2. The Division opposes the motion for a one-year extension but is continuing to review the request for an alternate schedule and will provide its recommendation in a response to the motion. Colorado Parks and Wildlife (“CPW”) opposes the relief requested and intends to file a response by September 2 to address CPW’s position in more detail.

I. Introduction and Background

The Joint Parties respectfully ask the Commission to continue the nutrients rulemaking hearing currently scheduled for November 14, 2022, for a period of at least one year in order to provide time for reasonable and meaningful stakeholder engagement concerning the development of the proposed table value standards (“TVSs”) for total nitrogen and total phosphorus for, and broader application of chlorophyll-a standards to, lakes and reservoirs statewide, including time for review, detailed evaluation, feedback, and consideration of concerns regarding the data, assumptions, and methodology used to derive those standards. This requested continuance applies to the Division’s proposed changes to Regulations 31 and 32-38, and not the Division’s proposal with respect to Regulation 85. In conjunction with continuing the hearing, the Joint Parties also ask that the Commission extend the dates in Regulation 31 that

allow for implementation of interim nutrient standards from December 31, 2022, to December 31, 2023 in order to allow for completion of the rulemaking.

Before the Commission can conduct a hearing on the proposed nutrient standards, more time is needed to craft nutrients standards that are scientifically supported and appropriate for Colorado's lakes and reservoirs. The nutrients standards proposed by the Division are of critical significance to reservoir operators, water suppliers, and other water users, as well as to the continued protection of designated uses throughout Colorado. The standards proposed by the Division, if adopted by the Commission, will be used as the basis for discharge permit limits, Section 303(d) listing assessments, development of TMDLs, water project certification conditions under Section 401, and other regulatory actions, such as CPW fish and wildlife mitigation plans and National Environmental Policy Act (NEPA) reviews of new water storage and transmission facilities needed to meet Colorado's future water supply needs. In addition, the standards adopted in this rulemaking will provide the groundwork for the Division's future development of nutrient standards for rivers and streams in 2027. Therefore, it is critical that any adopted nutrients standards are defensible and appropriate for the protection of designated uses, without being unnecessarily overly protective.

As set forth in the rulemaking notice dated July 12, 2022 and the Division's prehearing statement submitted on August 3, 2022, the Division is proposing to revise the current interim total nitrogen and total phosphorus standards, which impact all lakes and reservoirs in the state, and to broaden the applicability of chlorophyll-a standards to far more lakes and reservoirs statewide.¹ The noticed proposal consists of a file that is 729 pages long, and the Division's

¹ While the standards would only be adopted on select lakes and reservoirs in this 2022 hearing, the proposal for Regulation 31 states that the numeric values proposed "shall be considered and applied as appropriate by the Commission in establishing site-specific standards in accordance with section 31.7." (Proposed Section 31.17(1)). Proposed Section 31.17(b) states that the proposed Table Values will be considered for standards adoption after

prehearing statement is nearly 100 pages and supplemented by 19 data-rich exhibits totaling 148 megabytes.

The Joint Parties recognize that it is an unusual step—although not entirely unprecedented—to request a one-year delay of a rulemaking proceeding. The Joint Parties also recognize and appreciate the time spent by the Division in developing the proposed standards. A delay in the rulemaking hearing is warranted, however, for several reasons. First, the Division has not provided stakeholders with a reasonable amount of time to meaningfully review and provide input and feedback on the data, assumptions, and methodology used to derive the proposed standards. This is partially the result of the Division repeatedly missing the milestones previously set forth by the Division as part of the 10-Year Water Quality Roadmap (“Roadmap”) established to provide stakeholders time for adequate review and comment. Note that in order to adequately evaluate the Division’s proposed standards, and basis for those standards, a complete package of technical information—including data, assumptions, and methodology—needs to be available and considered in an integrated fashion.

Second, initial review of the proposed standards—which are significantly more stringent than the existing interim nutrient values contained in Regulation 31—demonstrates technical errors and inconsistencies in the Division’s treatment, processing, and use of data (which are the foundation of the Division’s chosen empirical approach to the proposed standards), as well as critical and fundamental technical issues with the Division’s chosen methodology. A significant delay is needed to adequately address and reach resolution on these issues.

Finally, more time is needed to allow for consultation with the State Engineer on the impact that the proposed standards may have on water rights, as well as preparation of a cost-

2027, and the Division’s Policy CW-8 describes that in 2027 the Division will propose to adopt the same standards on all remaining lakes and reservoirs in the state (Policy CW-8, pg. 17).

benefit analysis of the regulatory changes (as requested in another motion), particularly because the proposed standards may be revised following additional stakeholder engagement and refinement.

The current proposed standards, although well intentioned, are the product of a hurried process that has lacked the rigorous review and stakeholder engagement envisioned under the Roadmap and the Commission's historical approach to the development of water quality standards. There is no compelling reason to proceed with this rulemaking within the existing timeframe given (1) the lack of opportunity for meaningful review and comment from stakeholders; and (2) the substantive technical concerns with the data, assumptions, and methodology underlying the Division's proposed standards identified by the Joint Parties upon their limited initial review to date.

II. Argument

The Joint Parties request that the Commission continue the rulemaking for a period of at least one year, including a one-year delay of the hearing itself and all associated pre-hearing deadlines. The Commission holds the authority to continue the rulemaking at any time upon a motion by any interested party for good cause shown. *See* Reg. 21.3(K) (allowing for continued hearings and appropriate orders to control the course of the proceedings); 21.3(C)(7) (Commission may continue a hearing to another date "at any time prior to the close of the record").

A. Abbreviated Stakeholder Process Not Reasonable or Meaningful

The Commission should continue the rulemaking with respect to the Division's proposed changes to Regulations 31 and 32-38 because inadequate time was provided for reasonable or meaningful stakeholder feedback and the Division's consideration of concerns associated with

the development of total nitrogen and total phosphorus standards for lakes and reservoirs and with broader applicability of the chlorophyll-a standards. Although the Division’s efforts to respond to EPA’s 2016 action letter regarding nutrients started in December 2019, critical aspects of the Division’s proposed methodology and use of data (as well as the proposed standards themselves) were just recently communicated to stakeholders, beginning in May 2022. More time is needed to allow for the iterative, participatory process originally set forth by the Division and recognized by the Commission—and which the Joint Parties support—to ensure that stakeholders have an opportunity to evaluate and comment on both the data and methodology underlying any proposed nutrient standards. *See* Division Implementation Policy CW 8, “Colorado Nutrient Management Plan and 10-Year Water Quality Roadmap,” effective Sept. 30, 2018 and updated Oct. 30, 2020, attached as **Exhibit A**, at 11 (“The success of this roadmap relies on a robust stakeholder process.”).

In its Prehearing Statement, the Division describes a “significant amount of agency and stakeholder outreach” conducted as part of the development of the Division’s proposal. *See* Division PHS at 24-27. The Joint Parties do not dispute that the Division conducted many meetings over the course of the past two to three years, but simply scheduling a large number of meetings is not the same as meaningful stakeholder engagement when those meetings generally lacked any substantive information about the Division’s technical assumptions, methodology, or draft standards themselves. What is not apparent based on the Division’s compilation of meeting dates and other described opportunities for stakeholder involvement is the fact that the draft nutrient standards were only made available to a broad group of stakeholders for review for the first time on May 2, 2022 at a Division “town hall” meeting, were only made available in writing on the Division’s website on May 6, 2022—six to nine months after the corresponding Roadmap

milestone of “mid-2021” or “fall 2021” (CW 8, pp. 15, 19)—and were not presented or discussed at a Roadmap meeting until May 19, 2022, less than two months before the rulemaking notice.

The documentation made available to interested parties as part of the Roadmap process before May 2022 was generally non-substantive and provided little meaningful information essential to evaluating the Division’s technical assumptions or methodology.

As the Division notes, parties who had provided data were invited in September 2021 to conduct a quality assurance review of the data being used by the Division as part of its development of nutrient standards. *See* Division PHS at 25, 40. That opportunity to review data, however, was not meaningful because interested parties (including Northern Water) were given only a two-week period to provide comments, without any context regarding how the data was being interpreted, processed, or used in the Division’s methodology. *See* E-Mail from Amanda Jensen to stakeholders, Sept. 4, 2021, attached as **Exhibit B** (asking for comments by September 17, 2021, in order to meet a “draft criteria deadline of December 2021”).

Moreover, a complete package of information necessary to properly evaluate the Division’s proposed standards and methodology (including all documentation, data, and usable scripts) was not available until July 25, 2022, and only after Northern Water’s request to the Division. The Joint Parties have been more than willing to fully engage with the Division throughout the process, but were unable to evaluate the Division’s overall approach until those details were provided. Although the Division asserts that they are only changing a portion of the 2012 methodology, the changes made critically impact the final proposed table value standards. Further, the Division’s own explanation of its approach to developing the proposed standards was not fully disclosed until the Division submitted its prehearing statement on August 3, 2022, barely a month before the September 7 deadline for responsive prehearing statements.

Contrary to the Division’s suggestions in its prehearing statement, this is not the process that the Commission or Division previously envisioned with respect to the development of nutrients standards. Since work began on the Roadmap in 2018, the Roadmap schedule consistently targeted 2022 as the year for a rulemaking hearing on nitrogen and phosphorus standards for certain lakes and reservoirs. The Roadmap also called for the circulation of draft standards to stakeholders in mid-2021 or fall 2021, at least a year before the rulemaking hearing and six to nine months before draft standards were actually provided by the Division for stakeholder review. *See Exhibit A* (Implementation Policy CW 8) at 15 (“Draft criteria will be available in **fall 2021**”) (emphasis added); *Id.* at 19 (“**By mid-2021**, the division plans to have developed draft revisions to the lake and reservoir phosphorus and nitrogen criteria for consideration as part of a statewide rulemaking hearing in 2022.”) (emphasis added); Memorandum from Division to Commission, Apr. 30, 2021 (including two-page table summary showing “[d]evelop and provide draft of lakes TN and TP criteria” in 2021), attached as **Exhibit C**.

Discussion of lakes nutrients criteria within the Roadmap process from 2018 through 2020 was generally schedule and process-related. This continued to be the case well into 2021, when the Division began to modify its schedule but still called for the circulation of draft nitrogen and phosphorus standards internally by at least September 2021 (presumably within the Division and perhaps the Technical Advisory Committee, although it is unclear what is meant by “internal” in the Division’s materials) and externally by December 2021, with opportunity for stakeholder comments in early 2022. *See Lakes Nutrient Criteria: Colorado Progress and EPA’s Draft Criteria*, Water Quality Control Division, May 13, 2021 (presented at the Roadmap meeting on that date), attached in relevant part as **Exhibit D**. The revised timeline set forth by

the Division in May 2021, however, simply did not occur as scheduled. The following table compares the Division’s planned schedule as set forth on May 13, 2021, to what actually happened:

	WQCD Revised Timeline (as of May 2021)	Actual Timeline
Draft criteria, internal	Sept 2021	April 2022
Address comments (internal)	Oct-Nov 2021	Unknown
Draft criteria, external	Dec 2021	May 2022
Address comments (external)	Feb-March 2022	Did not happen
Hearing Notice	June 2022	July 12, 2022
Hearing	Nov. 14, 2022	Nov. 14, 2022

The Joint Parties recognize that delays in the Division’s schedule were perhaps well justified, given the staffing and workload challenges wrought by a global pandemic and the emergence of unexpected time-sensitive issues that the Division was forced to address during this period, including PFAS regulation and a rulemaking on antidegradation in certain South Platte River segments that is now set to take place this September. Such challenges, however, do not justify compromising the robust stakeholder process previously envisioned by both the Commission and Division essential and necessary to develop well-supported nutrients standards for lakes and reservoirs. Although the Joint Parties recognize that delaying this rulemaking for one year may create new scheduling concerns and workload challenges for the Division, Commission, and stakeholders, those logistical issues do not excuse rushing the development of accurate standards, especially considering the significant potential implications of implementing these standards.

B. The Division's Schedule Has Precluded Consideration of Critical Concerns Identified After Sufficient Information was Provided for Evaluation

In addition to the inability to provide stakeholders with a complete set of information for proper evaluation of proposed nutrients standards in a timely manner, the Joint Parties' initial review of the combined information has resulted in the identification of numerous and critical issues. Although most of these issues were brought to the attention of Division staff as soon as two of the Joint Parties, Northern Water and CWWUC, identified them, the Division's schedule has precluded detailed discussions and serious consideration of changes on the part of the Division (other than to fix egregious data errors). Thus, the Commission should continue this rulemaking to allow time to complete this process.

In their initial evaluation of the Division's proposal and Prehearing Statement, Northern Water and CWWUC have separately identified multiple errors and flaws in the nutrients data from lakes and reservoirs and the overall technical approach employed by Tetra Tech and the Division to develop the proposed standards. The technical issues identified by Northern Water and CWWUC include, but are not limited to, incorrect interpretation of raw data, incorrect processing of raw data, inconsistencies in the use of data, faulty assumptions regarding the treatment of the data, script errors, and incorrect implementation and interpretation of the stressor-response relationship. *See* Affidavits of Dr. Jean Marie Boyer and Dr. James H. McCutchan, Jr., attached hereto as **Exhibits E and F**, respectively.

Both Northern Water and CWWUC have communicated with the Division regarding most of these errors and critical technical issues. Northern Water met with Division staff on July 7 and July 25, 2022, as soon as possible after the draft standards and portions of the underlying methodology were provided to stakeholders. It was not until July 25, however, that the Division provided Northern Water—upon Northern Water's request—with the complete set of

information (data files, usable scripts, and documentation) necessary to fully evaluate the overall process and see how the information from various sources was combined and processed to determine the proposed standards. Affidavit of J.M. Boyer ¶ 5. Similarly, CWWUC retained an expert as soon as feasible after the draft criteria and Tetra Tech report were available, and was able to meet with Division staff in August to discuss concerns. Despite Northern Water and CWWUC raising these concerns, it was apparent from these meetings that the Division is not willing to seriously consider the majority of these technical issues because of the Division's scheduling limitations and overarching goal to conduct this rulemaking hearing in November 2022. The exception to this has been the Division's correction of a limited set of data errors associated with the first processing of Northern Water's data and some noted typos in lake names that resulted in certain lakes being represented twice and differently. *See id.* ¶ 7. This review, however, only covered a small portion of the overall dataset, and the errors identified in that subset of data call into question the accuracy and reliability of the remainder of the dataset and how those data were used by the Division.

Through their limited review and to the extent possible in the time available to date, Northern Water and CWWUC have identified significant technical concerns with the overall methodology and approach to developing the proposed standards. Fully analyzing, discussing, and addressing these fundamental and critical issues will require months beyond the 34 days allowed to prepare responsive prehearing statements, the current deadline for which is now less than two weeks away. *Id.* ¶¶ 8-9. The Division has also continued to seek feedback from stakeholders regarding the data used, and has indicated that it will address revisions to the proposed standards resulting from data corrections in its consolidated proposal, which is not due until November 3, 2022, less than two weeks before the hearing. Division PHS at 3-4. This

approach appears to mean that during the course this rulemaking proceeding, including before and after the parties' responsive prehearing statement deadline, the Division will continue to work with an actively changing dataset, where changes to one lake's data could impact TVSSs applicable to all lakes.

The Division's approach is problematic because parties to the rulemaking will not have sufficient time to review and evaluate needed changes in time for the November 14 hearing date. Moreover, revisions will not simply result in minor updates to the Division's proposal, but will necessitate broader review and meaningful discussion regarding the Division's technical assumptions and chosen methodology. *See* Affidavit of J.M. Boyer ¶¶ 8-9.

C. Additional Time is Needed for Cost-Benefit Analysis and Water Rights Consultation

In addition to providing more time to allow for stakeholder engagement and correct implementation of accurate data, the Commission should continue the rulemaking hearing to allow for the preparation of the cost-benefit analysis requested by two parties and for the water rights consultation requested by multiple parties. *See* Joint Motion for (1) Temporary Stay of Responsive Prehearing Statements and (2) Extension of Time of Rulemaking Deadlines and Hearing submitted on August 29, 2022, by Arapahoe County Water and Wastewater Authority and other water suppliers ("Water Rights Motion"). Although the Joint Parties agree at least 90 days as set forth in the Water Rights Motion is necessary, it is inefficient and inappropriate to address the impact on water rights and a cost-benefit analysis of the currently proposed standards before addressing the technical data, assumptions, and methodological issues raised in this motion, which are more complex, require the involvement of more parties, and will take a longer period of time to resolve.

Should the Commission grant a one-year continuance of the rulemaking as requested by the Joint Parties, an evaluation of the impact of the proposed regulatory changes on water rights and the cost-benefit analysis should appropriately address any proposed nutrient standards as may be revised following a more robust stakeholder process, *e.g.*, a cost-benefit analysis of the Division's current proposal may no longer apply if the proposed standards change following additional stakeholder feedback. The one-year period of time requested by the Joint Parties should allow for both refined development of the nutrient standards as well as associated water rights consultation and cost-benefit analysis as part of a continued rulemaking hearing.

D. The Commission Should Continue Hearing Date and Deadlines for One Year

The Commission should continue the November 14, 2022 hearing date and all associated prehearing deadlines for a period of at least one year to allow sufficient time for reasonable and meaningful stakeholder interactions with the Division. This length of time is necessary to allow for (1) the development of a well-vetted and properly-processed dataset, with thorough quality assurance and quality control (QA/QC) review by the Division, data providers, and stakeholders; (2) detailed discussions among stakeholders and the Division regarding technical data assumptions, technical concerns with the methodology used to develop new standards, and implementation of those standards; and (3) revisions to the proposed standards that may result from these additional steps. *See* Affidavits of J.M. Boyer ¶ 8; J. McCutchan ¶ 5.

This time is needed because the additional work goes well beyond correcting clerical errors in the data set, and would include a more thorough evaluation and feedback process with stakeholders regarding the proposed standards. For example, data should be reviewed on a site-specific basis to identify anomalous values, and should be the subject of a more reasonable QA/QC period informed by how the data are being used (*i.e.*, longer than the two weeks and with

more context than provided by the Division in 2021), re-evaluation of minimum sample sizes, re-calculation of seasonal mean values, and identification of statistically significant relationships (or not), among other factors. Affidavit of J. McCutchan ¶¶ 5-12.

Beyond making necessary data interpretation, processing, and QA/QC revisions, and clarifying and resolving the assumptions on how data are treated (and in a consistent manner), needed revisions to the Division's approach will require extensive discussion and multiple iterations. This will take a significant amount of time, and recognizing that the availability of Division staff will be limited, the overall schedule for working through the issues that need resolution will be lengthy.

E. Delaying Rulemaking is Not Unprecedented

Although the Joint Parties recognize that a one-year continuance is significant, such a delay is not unprecedented. The 2012 nutrients rulemaking was first delayed at the Division's request in 2009, and was then delayed further by the Commission to accommodate the completion of a cost-benefit study. Even though those delays occurred before the rulemaking hearing had formally started, they reflected a long-standing approach to nutrients development in Colorado that emphasizes stakeholder involvement and the development of standards that are appropriate for Colorado's water bodies.

As another example, a 2017 hearing on molybdenum standards was continued much closer to the hearing date. At the November 29, 2017, prehearing conference (less than two weeks before the hearing), the hearing chair decided to continue the hearing by two years, until November 2019, partially to allow time for finalization of a federal report.

Nothing in the Commission's regulations, applicable statutes, or previous decisions regarding nutrients precludes a one-year continuance here, and, as noted above, Regulation 21

expressly allows the Commission to continue a rulemaking hearing. *See* Reg. 21.3(C)(7), 21.3(K). Although the Commission has previously “anticipated” that this rulemaking would take place in 2022, there is no statutory or regulatory obligation for that to happen. *See* Reg. 31.55. In addition, although the Colorado APA requires the Commission to adopt a rule or terminate a rulemaking within 180 days after the last public hearing on the proposed rule, this requirement does not limit the Commission’s flexibility to reschedule the public hearing because the hearing itself is the event that triggers this statutory deadline. C.R.S. § 24-4-103(4)(d). If the Commission believes otherwise, and interprets this statutory obligation to require adoption of a rule within 180 days from the date of the notice here, then the Commission should terminate this rulemaking in order to allow time for the stakeholder process and other outstanding issues described above.

III. Conclusion

The Joint Parties respectfully ask the Commission to continue the nutrients rulemaking hearing currently scheduled for November 14, 2022, and as it relates to the Division’s proposed changes to Regulations 31 and 32-38 for a period of at least one year. This additional time is needed to allow for the reasonable and meaningful stakeholder feedback and consideration of concerns contemplated by the Roadmap and the Commission’s previous decisions regarding nutrients standards. This includes technical review of the data, assumptions, and methods relied upon by the Division to ensure that any proposed nutrients standards for Colorado’s lakes and reservoirs are appropriate, protective of designated uses, and scientifically supported. The lack of such reasonable and meaningful stakeholder involvement to date, coupled with the technical concerns identified to date regarding data, assumptions, and methods, constitute good cause for such a delay. The Joint Parties also ask that the Commission extend the dates in Regulation 31

that allow for implementation of interim nutrient standards from December 31, 2022, to December 31, 2023 in order to allow for completion of the rulemaking.

Respectfully submitted this 31st day of August, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing JOINT MOTION TO CONTINUE RULEMAKING HEARING was sent via email on this 31st day of August, 2022, addressed to:

Colorado Water Quality Control Commission
cdphe.wqcc@state.co.us

/s/ Calli George

Calli George

COLORADO WATER QUALITY CONTROL COMMISSION, STATE OF COLORADO

THE WATER QUALITY CONTROL DIVISION'S RESPONSE TO ARAPAHOE *et al.*'s MOTION FOR EXTENSION and NORTHERN *et al.*'s MOTION TO CONTINUE

REVISIONS TO THE BASIC STANDARDS AND METHODOLOGIES FOR SURFACE WATER (REGULATION NO. 31); REVISIONS TO CLASSIFICATIONS AND NUMERIC STANDARDS FOR ARKANSAS RIVER BASIN (REGULATION NO. 32), UPPER COLORADO RIVER BASIN AND NORTH PLATTE RIVER (PLANNING REGION 12) (REGULATION NO. 33), SAN JUAN RIVER AND DOLORES RIVER BASINS (REGULATION NO. 34), GUNNISON AND LOWER DOLORES RIVER BASINS (REGULATION NO. 35), RIO GRANDE BASIN (REGULATION NO. 36), LOWER COLORADO RIVER BASIN (REGULATION NO. 37), AND SOUTH PLATTE RIVER BASIN, LARAMIE RIVER BASIN, REPUBLICAN RIVER BASIN, SMOKY HILL RIVER BASIN (REGULATION NO. 38); REVISIONS TO NUTRIENTS MANAGEMENT CONTROL REGULATION (REGULATION NO. 85)

INTRODUCTION

On August 29, 2022, a subset of the parties to the Lakes Nutrients Rulemaking filed a motion for extension requesting a 90-day delay of all remaining hearing deadlines (Arapahoe *et al.* Mot. for Ext.). On August 31, 2022, a different subset of parties filed a motion for a continuance requesting a one-year delay¹ of all remaining hearing deadlines (Northern *et al.* Mot. to Continue) (collectively “Motions for Extension” and the “Parties”). The Lakes Nutrients Rulemaking is currently scheduled for a hearing before the Water Quality Control Commission (Commission) on November 14, 2022.

Instead of granting either motion, the Water Quality Control Division (Division) requests an alternative: postponing the Lakes Nutrients Rulemaking and all relevant deadlines to the April 10, 2023 Commission hearing. As detailed below, although any extension will

¹ In addition to the one-year delay, Northern requests the Commission extend the dates in Regulation 31.17(h) which allow for implementation of interim chlorophyll a standards from December 31, 2022 to December 31, 2023. There is no need to open Regulation 31 solely for this change. The language specifically states that the Commission may implement these standards in the basin regulations after this date. This is not a self-implementing provision, and the Commission would use this in future hearings to adopt these standards on specific segments in Regulations 32-38. This can be addressed when the other considerations are made at the time the Commission determines to hold this hearing.

Furthermore, although not directly at issue, see Northern Mot. to Continue at 2, the Division proposes to extend the Commission's discussion on Regulation 85 and the Voluntary Incentive Program Policy 17-1 to April 10, 2023 as well. This will allow for the Commission to consider the nutrients proposals at the same time.

impact the Division’s already heavy workload, an extension to April 2023 is the best option and would allow for extra time to consider the issues raised by the Parties, while recognizing the extensive stakeholder outreach that has already occurred.

STANDARD OF REVIEW

The Parties’ Motions for Extension should be decided under the following standards. According to Regulation 21.3(C)(7), “[t]he Commission may continue a hearing to another date by issuing written notice to that effect at any time prior to the close of the record, or by announcement at the date, time and place of the original hearing.” The Commission also has the authority to “set the time and place for continued hearings” if “good cause” is shown. Reg. 21.3(E)(3). The Colorado Rules of Civil Procedure echo this language, providing that “[m]otions for continuances of hearings or trials . . . shall be granted only for good cause.” C.R.C.P. 121, sec. 1-11. Thus, case law interpreting the term “good cause” in the context of the Civil Rules is relevant and the Hearing Chair, “[i]n determining whether to grant a continuance, . . . should consider the circumstances of the particular case, weighing the right of the party requesting the continuance to a fair hearing against the prejudice that may result from delay.” *Butler v. Farner*, 704 P.2d 853, 858 (Colo. 1985).

ARGUMENTS

I. Regulation 21 presumes the Hearing Chair will resolve the Motions for Extension.

The Division first addresses Arapahoe’s argument that the full Commission, not the Hearing Chair, should resolve its motion. Arapahoe Mot. for Ext. ¶ 14. Although such an option is permissible under Regulation 21, the Division does not believe it is necessary in this case and thus requests the Hearing Chair resolve the Motions for Extension.

Under Regulation 21, “[a] Commission member acting as Hearing Chair may rule upon a nondispositive pre-hearing motion or pleading, though the Hearing Chair retains discretion to refer any pre-hearing motion or pleading to the full Commission for decision.” Reg. 21.3(F).

As this language makes clear, the default presumption is for the Hearing Chair to rule on nondispositive pre-hearing motions unless there are reasons which require participation of the full Commission. Here, Arapahoe provides no explanation as to why the Hearing Chair should upset this default and instead burden the full Commission with the Motions. See Arapahoe Mot. for Ext. ¶ 14. Indeed, the motions are not dispositive and present only the question of whether a delay is appropriate. And, although there are weighty topics in the rulemaking, these will be resolved through processes already in place, such as the State Engineer’s Office (SEO) and Colorado Water Conservation Board’s (CWCB) consultation process or the cost benefit and regulatory analysis process outlined by the Administrative Procedure Act (APA), all of which will be considered by the full Commission in due course. Thus, the

Division requests that the Hearing Chair rule on the Motions for Extension herself as permitted and presumed by Regulation 21.3(F).

II. An extension of the Lakes Nutrients Rulemaking to April 2023 would allow additional time for analysis and input while limiting the prejudice to the Division caused by further delay.

Turning toward the merits, the Division requests the Hearing Chair deny the Motions for Extensions because there is a reasonable middle ground to the two Parties' requests: an extension of the Lakes Nutrients Rulemaking to April 10, 2023. This extension will balance the concerns of the Parties while limiting the prejudice to the Division caused by further delay.

A. An April 2023 hearing will allow time for additional input and ensure a thorough consideration of all issues.

In order to help visualize how this extension might work, the Division proposes the following schedule:

- December 21, 2022: responsive prehearing statement due and parties should submit economic information for cost benefit and regulatory analyses to the Division
- February 15, 2023: rebuttal due
- February 22, 2023: last day to submit motions
- March 1, 2023: complete outstanding issues index
- March 7, 2023: prehearing conference
- March 16, 2023: negotiations cutoff
- March 30, 2023: consolidated proposal due
- March 31, 2023: cost benefit analysis due
- April 5, 2023: regulatory analysis due
- April 10, 2023: hearing

This proposal will give the Parties one year from the time the draft criteria and supporting methodology were shared with the larger stakeholder group before the rulemaking hearing. This proposal allows over five full months to review the July 12, 2022 Notice of Public Rulemaking Hearing, almost five months to review the Division's August 3, 2022 Prehearing Statement (DPHS), and will extend the time for all parties to provide responsive prehearing statements (RPHSs) by almost four months.

Additionally, the SEO and CWCB will have almost four months to review the Parties' RPHSs and assess their full allegations of material injury to water rights. And, the Division will have an additional four months to complete the requested cost benefit and regulatory analyses.

Furthermore, this proposal would provide an opportunity for the Division to continue to conduct outreach and facilitate discussions with the parties. For this to be an effective use

of time, the Division requests that the Parties concerned about the Division's outreach conducted to-date provide specific recommendations for what topics need to be addressed and how outreach and collaboration should be conducted moving forward. The Division's goal is to ensure any delay in the hearing schedule is used as an opportunity to improve the proposal and resolve issues and concerns as early as possible. Therefore, suggestions should be provided to the Division no later than the end of September 2022.

B. Although any delay will impact and compound the Division's workload, an April 2023 hearing is the best option.

Although any delay will impact the Division's heavy workload in and after 2023, an April 2023 hearing would be the most effective option to facilitate a successful Lakes Nutrients Rulemaking. Completing the Lakes Nutrients Rulemaking no later than April 2023 would reduce the impact of a delay and the prejudice caused to the Division from the compounding workload from its numerous other obligations in and after 2023.

As the Commission is aware, the Lakes Nutrients Rulemaking is only one of many rulemakings scheduled for this year and into 2023. [Exhibit 1](#), Commission, Long-Range Schedule.² Any delay to the Lakes Nutrients Rulemaking beyond November will cause overlap between the Lakes Nutrients Hearing and the June 2023 hearings, in particular. For example, the Division and other entities are scheduled to develop proposals for three separate rulemaking hearings for the June 2023 Commission meeting: Regulations 32 and 36 triennial review, Regulations 33 and 38 temporary modifications, and Regulations 31 and 33 molybdenum water supply standards. Regulations 32 and 36 are up for triennial review with four discharger specific variances (DSVs) to assess and numerous potential external proposals. Regulations 33 and 38 are proposed for review of temporary modifications which expire on December 31, 2023. Regulations 31 and 33 are included in the rulemaking hearing to consider Climax Molybdenum Company's proposal for revised molybdenum standards for water supply. The Division and other parties are tentatively scheduled to submit proposals for the notice for these hearings on January 30, 2023, prehearing statements in early March 2023, and responsive prehearing statements in early April 2023. Thus, delaying the Lakes Nutrients Rulemaking would cause the extensive work the Division puts into rulemakings to overlap with other rulemakings, impacting the Division's ability to develop comprehensive and effective materials for the Commission and engage with and support stakeholders and other parties.

But, a one-year delay would have even greater impacts. If the Lakes Nutrients Rulemaking is postponed into fall 2023, there will be competing deadlines with other core work and the 10-Year Water Quality Roadmap (Roadmap). Arapahoe Exhibit A. The Roadmap sets goals to develop and implement numerous other water quality criteria beyond nutrients. *Id.* The Division is scheduled to prepare draft ammonia and arsenic (pending release of EPA's risk assessment) criteria in 2023 and release draft selenium criteria in 2024. Field work in preparation for these must occur in 2023 and has already been delayed due to the nutrients

² <https://drive.google.com/file/d/14UKyKRF4mlVdM8bmeJNuLXVuKUIA2RT2/view> (last visited Sept. 2, 2022)

workload and the COVID-19 pandemic. Additionally, selenium, ammonia and arsenic technical advisory committees (TACs)³ are all slated to kick off after June 2023. There would be limited capacity to initiate these critical committees in 2023/2024 if there are fall 2023 rulemaking hearings. In short, a delay beyond April will cause exactly what the Parties complain of: failure to achieve the goals set by the Roadmap.

Finally, the Division is short-staffed and has already postponed DSV work due to capacity constraints. A delay of the Lakes Nutrients Rulemaking past April 2023 will exacerbate these constraints and eliminate time for training new staff. It will also delay a much-needed update of the standards database.

III. A longer extension is unnecessary.

Perhaps more importantly, a longer extension to the Lakes Nutrients Rulemaking timeline is unnecessary. Contrary to what the parties claim, the Division engaged in an unprecedented and extensive public stakeholder process before initiating the formal rulemaking process. DPHS § VIII at 24. Although the Division released the draft criteria in May 2022, much of the data and methodologies underpinning the use of data were available in the fall of 2021. *Id.* at 25. Additional methodologies supporting the final criteria were made available throughout the winter of 2021-2022 as soon as the Division and the contractor developed them. *Id.* Thus, none of the materials and potential impacts from the proposed rules should come as a surprise, making a longer extension unnecessary.

A. The Division engaged in an extensive public stakeholder process before initiating the formal rulemaking process.

The Division's stakeholder process leading up to the formal Lakes Nutrients Rulemaking was extensive and provided numerous opportunities for input over several years.

As indicated by the 10-year Roadmap, the 2022 Lakes Nutrients Rulemaking has been planned for years. The Division developed the Roadmap during a 2017 rulemaking on nutrients and began engaging stakeholders shortly after this. The Division discussed the Lakes Nutrients Rulemaking at the first quarterly Roadmap meeting on May 3, 2018 and has discussed this topic at nearly every quarterly meeting since, for a total of sixteen meetings as of May 2022. DPHS § VIII at 24; DPHS [Exhibit D](#), Table of Lakes Nutrients Public Outreach. At each meeting, the Division allowed for questions and comments and provided at least two Division contacts for stakeholders to ask questions outside of the larger meetings.

Indeed, notifications regarding quarterly Roadmap workgroup meetings, including agendas and meeting materials, are sent to all stakeholders on the Roadmap mailing list,

³ TACs are small and focused groups that are a central component of the Division's Roadmap. These groups work on tasks related to developing recommended criteria and/or developing information related to feasibility (technical or financial) needed to successfully complete the Roadmap. CDPHE, Technical Advisory Committees, Factsheet, <https://drive.google.com/file/d/1uNf-mpz9TJAQsF1n9qASvPFtJ0pIBSU3/view> (last visited Sept. 1, 2022).

which has 951 registered emails ([Exhibit 2](#), Roadmap Mailing List). Most of the entities (and/or the attorneys representing the entities) included in or in support of the two motions are on this Roadmap mailing list and had the opportunity to participate in the Roadmap workgroup process, including:

- Arapahoe County Water and Wastewater Authority
- Barr Lake and Milton Reservoir Watershed Association
- Centennial Water and Sanitation District
- City of Aurora
- City of Brighton
- City of Colorado Springs, by and through its enterprise, Colorado Springs Utilities
- City of Fort Collins
- City of Loveland
- City of Northglenn
- Colorado Wastewater Utility Council
- East Cherry Creek Valley Water and Sanitation District
- Lower Arkansas Valley Water Conservancy District
- Northern Colorado Water Conservancy District
- Parker Water and Sanitation District
- Town of Erie

Furthermore, notifications for quarterly Roadmap workgroup meetings were sometimes sent to other mailing lists. For example, the Division shared information regarding the August 17, 2022 Roadmap meeting with stakeholders on the Permits - Webinars and Updates mailing list, which is sent to 11,159 registered emails.

Contrary to what Northern alleges, Northern *et al.* Mot. to Continue at 6, the Roadmap meetings frequently provided additional information and facilitated new discussions on Lakes Nutrients. The August 2019 meeting directly addressed Lakes Nutrients and the methodology behind the chlorophyll a provisions scheduled for statewide adoption in 2022. DPHS [Exhibit D](#). The November 2019 meeting addressed the formation of the Lakes Technical Advisory Committee (TAC) and described opportunities to submit comments to the TAC. *Id.* The February 2020 meeting included a focus discussion on the lakes nutrients criteria. *Id.* And, every meeting from May 14, 2020 through May 19, 2022 included an update and/or discussion about progress on the lakes nutrients criteria. *Id.*

In addition to the Roadmap meetings, the Division also facilitated 11 meetings of the TAC with the first meeting held on December 16, 2019 and the most recent meeting on June 23, 2022. DPHS § VIII at 25-27. The following entities, many of whom are parties or consultants for parties to the 2022 Lakes Nutrients Rulemaking, have been members of the TAC: the Division, EPA, USGS, Colorado Parks and Wildlife, Metro Wastewater Reclamation District, Aurora Water, the City of Boulder, the City of Westminster, the Colorado Water Conservation District, the Cherry Creek Basin Water Quality Authority, the Barr Milton

Watershed Authority, Hydros Consulting, Inc., and Leonard Rice Engineers. *Id.* at 26. Indeed, one of the consultants that Northern relies on in its Motion attended the first TAC meeting but did not continue on through the process. *Id.* at 26; Northern Mot. to Continue, Exhibit E. The TAC was critical to the process. It discussed and developed the technical aspects of the nutrients standards in an open forum and kept detailed notes for the public to review should they not be able to attend. Meeting notes and materials were all posted to a public website, and TAC members were encouraged to discuss topics with others in and out of their organizations. DPHS § VIII at 26.

To provide additional opportunities for non-TAC members interested in lakes nutrients standards to receive TAC updates and have an opportunity for additional discussion, the Division hosted “pre-TAC” meetings on November 9, 2021, December 6, 2021, and February 1, 2022, as well as “Town Hall” meetings on May 2, 2022 and June 21, 2022. *Id.* at 24. Each of these meetings allowed for public comment and discussion.

Additionally, each week since May 26, 2022, the Division has held weekly office hours open to all stakeholders. *Id.* The following entities have made use of the office hours: City of Boulder (Leila Benampour, Kate Dunlap and Meghan Wilson), City of Longmont (Azra Bilgin), City of Thornton (Caleb Owen), Morrison Creek Water and Sanitation District (Geovanny Romero and Gabe Racz), Colorado Wastewater Utility Council (WWUC) (Justine Beckstrom). In instances where office hours timing was not able to be made, the Division scheduled additional meetings with Northern Water (Jean Marie Boyer and Jen Stephenson), WWUC (Justine Beckstrom, James McCutchan and Gabe Racz). Seven of the twelve weeks, there was no attendance by stakeholders at office hours, with the majority of the engagement beginning mid-August.

The Division has held numerous meetings with individual stakeholders as well, including stakeholder meetings to facilitate discussion of concerns unique to waterbodies that are part of Control Regulations Nos. 71-74, and individual meetings with water authorities slated to have revised standards applied. *Id.* at 24.

The Division developed a form for stakeholders to submit questions and concerns, which was stored on the website. *Id.* at 25. The document was introduced during the quarterly Roadmap workgroup meeting on May 5, 2019. The Division checked the form weekly (on Wednesdays) for questions and comments to ensure responses were provided promptly. The form was used only twice, by the City of Arvada.

Although it is true that the Division’s goal was to release the draft criteria in the fall of 2021 (one year prior to the rulemaking), the Division was delayed in the release of the draft criteria due to issues with the data compilation and working through the data with the contractor, as well as impacts from the COVID-19 pandemic and other rulemaking hearings. In short, the Division has had to balance the need to maintain quality control of the data with achieving its promised goal of releasing the criteria before the 2022 Lakes Nutrients Rulemaking.

That said, all the components of the criteria development were made available to stakeholders as they were developed, with a data set and work describing final decisions made in the TAC regarding data usage (i.e., appropriateness of using a single sample for a summer average) in the fall of 2021. *Id.* at 24. Work in support of the stressor-response analysis was released as it was developed and prior to the release of the draft criteria values. *Id.* at 25. The Division also released draft technical pieces of the prehearing statement to the TAC for review in February 2022.

Additionally, in an effort to increase transparency, components of the criteria that were discussed with the TAC were shared in written form via a publicly-available Google Drive and reported out on during quarterly Roadmap workgroup meetings. Many of the issues cited by Northern were discussed in the TAC. For example, the decision to use a minimum sample size of 1 as opposed to 3 was discussed extensively in the TAC meetings (TAC #2, TAC #3, TAC #5, TAC #6, TAC #7) and was addressed in the quarterly Roadmap workgroup meeting held August 17, 2021. *See id.* at 27. The Division disagrees that a difference of opinion constitutes an issue warranting a delay in the Lakes Nutrients Rulemaking.

Finally, in regards to the opportunity for an external comment period, as discussed above, there have been numerous opportunities for input prior to the submission of the proposal to the Commission office for the Lakes Nutrients Rulemaking through the various public meetings, individual meetings, comment forms, data review, and office hours. The Division has repeatedly created opportunities to collaborate with stakeholders throughout the criteria development process, but cannot require stakeholders to engage.

B. The data, methodologies, and analyses supporting the Division's proposal are sound and were provided to stakeholders for review in 2021 with limited feedback provided.

As indicated above, the TAC developed the Division's final proposal through a comprehensive and interactive process. DPHS § VIII at 27. For example, the TAC discussed minimum sample requirements, sampling frequency, analytical methods for chlorophyll a and nitrogen, and compared linear regression models to quantile regression, with a decision to use the latter. *Id.* All of these meetings were public and reported out to the larger stakeholder groups through the Roadmap meetings. *Id.* Despite this, as demonstrated by [Exhibit E](#) to the Division's PHS, only one entity took advantage of the TAC comment forms and only one of the Parties on the Motions for Extension participated in the TAC. *Id.* at 26.

On September 3 and 4, 2021, respectively, the Division requested the TAC and external stakeholders, including Alpine Environmental Consultants, Arvada, Aurora, Bear Creek Watershed Association, Boulder, Cherry Creek Basin Water Quality Authority, Colorado River Water Conservancy District, CPW, Denver, EPA, Fort Collins, Greeley, Hydros Consulting, Longmont, Loveland, Metro, Northern Water, USGS, and Westminster, review the dataset for quality assurance. DPHS [Exhibit M](#), Data QA Requests and Guidance. Because of concerns about delay, the Division requested a response from these stakeholders within two weeks. Given the tight timeline, the Division explained that the review was not limited to the

contacted persons and could be done by others within the organization or consultants. Only one entity (not a party to the rulemaking) responded within this timeline, with a total of only three entities responding at all. The database to develop the criteria was next made available in October 2021 for review by all stakeholders.

Finally, the methodology to develop the criteria was vetted through the TAC in 2021 and 2022. For example, the TAC discussed sample size as early as the July 7, 2020 TAC meeting and the use of paired or unpaired data and nonlinear modeling at the December 16, 2021 TAC meeting. These decisions were then shared with the Roadmap workgroup in a number of ways, including presentations of materials at quarterly Roadmap meetings as well as notes from the TAC meetings available on the website.

In short, the Division's process to develop the data and methodologies which support the proposed criteria was extensive, transparent, and attempted to engage stakeholders at every point.

C. The Division has been working on nutrients for decades.

Finally, Colorado must continue to make progress on its long-term nutrients goals and should consider this rulemaking hearing in the context of the extensive history of engagement on nutrients.

As the Commission is likely aware, rulemakings on nutrients are not new. Colorado began working on nutrients standards in the 1980s. DPHS [Exhibit H](#), 2012 WQCD PHS at 2. By 1984, Colorado had adopted site-specific numeric total phosphorus and chlorophyll a standards for Cherry Creek, Chatfield, and Dillon Reservoirs. *Id.* A narrative standard for Bear Creek Reservoir followed in 1992. *Id.*

In the fall of 2001, EPA requested that states develop a nutrient criteria plan by 2004. *Id.* Consistent with this timeline, a formal stakeholder group process began in September 2001 with a meeting to begin talking about concepts that should be included in Colorado's Nutrient Criteria Development Plan. *Id.* Participation in the Nutrients Work Group evolved over the years to a mailing list of approximately 380, with approximately 100 people participating in each of the 2011 work group meetings. *Id.*

In August 2009, the Division presented its initial proposed nutrient criteria for lakes and reservoirs. *Id.* at 3. The Commission ultimately rescheduled the rulemaking hearing on these proposed criteria to May 2012. *Id.*

In March 2012, the Commission adopted a two-part strategy for addressing nutrients: Regulations 85 and 31.17. DPHS § IV at 9. Regulation No. 85 was created as a statewide nutrient control regulation to establish technology-based treatment requirements for many domestic and some industrial wastewater dischargers, enhanced nutrients control requirements for stormwater dischargers, provisions encouraging voluntary controls of nonpoint sources, and monitoring requirements to develop better information to refine

Colorado's nutrients management efforts over time. In Regulation 31.17, the Commission adopted interim numeric nutrient table value standards for chlorophyll a to protect the Aquatic Life, Recreation, and Direct Use Water Supply uses and table value standards for total nitrogen and total phosphorus to protect the Aquatic Life and Recreation uses in lakes, reservoirs, rivers, and streams.

In 2016, EPA approved the numeric values for chlorophyll a, approved with recommendations the numeric values for total nitrogen and total phosphorus for lakes and reservoirs, and took no action on the numeric values for total nitrogen and total phosphorus for rivers and streams or the delayed effective dates. *Id.* at 21. Because EPA approved the chlorophyll a standards for lakes and reservoirs, the Division attempted to leave as much of the criteria development from 2012 intact as possible while only changing those aspects that were commented on by EPA in its July 2016 action letter. But, because of EPA's concerns, the Division also had to adjust the other criteria.

Throughout this entire process, many of the same parties in the current Lakes Nutrients Rulemaking have engaged. For example, the following entities participated in the 2012 rulemaking hearing and are currently participating as parties for the 2022 hearing: Arapahoe County and Wastewater Authority, Aurora, Centennial Water and Sanitation District, Central Colorado Water Conservancy District, City of Boulder, City of Colorado Springs and Colorado Springs Utilities, City of Fort Collins, and Northern Colorado Water Conservancy District. [Exhibit 3](#), 2012 Prehearing Order.

Thus, although the specific details for the 2022 Lakes Nutrients Rulemaking may be new, the Division's long-term plan to achieve nutrients standards and processes for involvement are not. The Division urges the Commission to consider this long history when deciding the Parties' Motions for Extension.

IV. The Division is following the process outlined in law to consult with the State Engineer's Office regarding water rights.

The Division is also following a detailed and transparent process to consult with the SEO and CWCB. The Commission and Division are required by statute to refrain from causing material injury to water rights. § 25-8-104(1), C.R.S. ("Nothing in this article shall be construed, enforced, or applied so as to cause or result in material injury to water rights."). To effectuate this, "[t]he commission and division shall consult with the state engineer and the water conservation board or their designees before making any decision or adopting any rule or policy which has the potential to cause material injury to water rights." § 25-8-104(2)(d), C.R.S.

The Commission has entered into a memorandum of understanding (MOU) with the SEO and CWCB regarding the consultation process. [Exhibit 4](#), 2017 MOU. Under the MOU, the Commission, SEO, and CWCB have agreed to limit assessment of "material injury to water rights . . . to the evaluation of whether the action will result in a diminution of the available water supply that a water rights holder would otherwise enjoy at the time and place and in

the amount of demand for beneficial use.” MOU p. 2. Thus, the Parties must ultimately demonstrate material injury to water rights by showing a diminution of the available water supply at the point of diversion. Additionally, “[i]n making this determination, the SEO and CWCB will review the information submitted on the record to the WQCC regarding the decision, rule, or policy in question.” MOU ¶ 3.b.

Although consultation is infrequent, the Commission and Division have engaged in this process before. [Exhibit 5](#), Nov. 17, 2017 Consultation. For example, in 2017, Climax Molybdenum Company proposed an increase in the table value standards for molybdenum. The Town of Frisco alleged material injury to its water rights due to concerns that degradation of water quality in a specific segment would reduce the volume of water available for the Town’s water supply.

The SEO and CWCB concluded that no material injury to water rights would result, stating:

While we understand that changes to water quality may affect whether water will be diverted by a particular user and applied to municipal or other uses, we do not regard this as “material injury to water rights,” as articulated in the language of the statutory consultation provision. Specifically, we do not see that the proposal will result in a diminution of the available water supply that Frisco would otherwise enjoy at the time and place and in the amount of their demand.

Thus, although the Division does not know what the SEO and CWCB’s final determinations will be, it does know that the consultation process works and trusts the SEO and CWCB to dedicate sufficient time to fully considering the Parties’ claims.

The Division also has experience addressing concerns with water rights and water supply planning through issuing 401 certifications. The Division is required to provide water quality 401 certifications for many water supply projects, and 401 certifications for past projects included discussions on impacts from nutrient pollution and conditions to address potential concerns.⁴ The Division has also considered how water supply projects are potentially connected and worked with water supplier/401 project applicants to develop meaningful conditions to support long-term water supply planning in a thoughtful way.

Again, the Division takes this process seriously but believes that the existing consultation structure will address the Parties’ concerns.

⁴ See, e.g., Northern Integrated Supply Project 401 Certification at 80-83 https://drive.google.com/file/d/1QBswTBLE5Pa2xteLeI7_mseXxv5OzkRK/view.

V. The Division is following the process outlined in law to complete a cost benefit and regulatory analysis.

Similar to the water rights consultation piece, the process to develop and distribute cost benefit and regulatory analyses is provided by the APA. § 24-4-103(2.5)(a), C.R.S. The decision to proceed with a cost benefit analysis is up to the Department of Regulatory Agencies (DORA), and the deadlines for completing these analyses are set by statute.

The statute requires consideration of slightly different factors for a cost benefit analysis (CBA) versus a regulatory analysis (RA). For a CBA, the Division must consider five specific factors and submit its final cost benefit analysis “at least 10-days before the hearing.” *Id.* For the RA, the Division must consider six different factors and submit the final analysis “at least five days prior to the rulemaking hearing.” § 24-4-103(4.5)(a), (c). Although not explicitly stated in the APA, it is clear from this timing that both analyses are designed to inform the Commission’s consideration of the issues at hearing. Had the Legislature wanted a different process, it would have set a different timeline.

Moreover, it is partially up to the Parties to help inform the final analyses. The APA requires the Division to consider in the CBA, “[a]ny adverse effects on the economy, consumers, private markets, small businesses, job creation, and economic competitiveness” Thus, the Division requests that the Parties provide information to this effect in their RPHSs.

Finally, the Parties provide an incomplete picture of the 2011 Cost Benefit Analysis (2011 CBA)⁵ completed for the 2012 hearing. The 2011 CBA found the following costs and benefits:

Table 7-6. Aggregate Benefits and Costs Statewide

Aggregate (River Basin or Statewide)	Component	Tier 1*	Tier 2*	Tier 3*
Statewide Aggregate	Benefits	\$1,939,389,000	\$2,355,941,000	\$3,355,043,000
	Costs	\$2,464,897,000	\$5,034,419,000	\$24,992,516,000
	Benefit-Cost Ratio	0.79 : 1	0.47 : 1	0.13 : 1

* Expressed in Present Value 2010 Dollars

Arapahoe Exhibit C at 7-7. Although Arapahoe cites the final column’s (Tier 3) cost in their Motion, what the Parties do not state is that the Division proposed, and the Commission adopted, the Tier 2 proposal. Arapahoe also does not note that the 2011 CBA did not “evaluate the beneficial effect on the tourist economy in counties, Manageable Units, and the state as a whole.” 2011 CBA at 1-20. In addition, treatment technologies have undoubtedly improved since 2012. Thus, although the CBA was useful to inform the 2012 rulemaking, it does not present a complete picture of how costs and benefits from the 2022 hearing may be

⁵ The Colorado Water Resources and Power Development Authority funded the 2011 CBA. 2012 DPHS at 4.

quantified. The 2022 analyses will be provided for this rulemaking in accordance with the statutory requirements.

CONCLUSION & RECOMMENDED ACTION

In sum, the Commission should deny the Parties' Motions for Extension and instead issue an order extending the Lakes Nutrients Rulemaking hearing to April 10, 2023 for the reasons stated above.

Respectfully submitted this 2nd day of September 2022.

/s/ Rebecca Fischer

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Colorado Attorney General's Office
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Division PHS Exhibits Referenced

Exhibit D	Table of Lakes Nutrients Public Outreach
Exhibit E	Responses to Questions and Suggestions for Lakes TAC
Exhibit H	2012 Division Prehearing Statement
Exhibit M	Data QA Requests and Guidance

New Exhibits to the Response

Exhibit 1	Commission, Long-Range Schedule
Exhibit 2	Roadmap Mailing List
Exhibit 3	2012 Prehearing Order
Exhibit 4	2017 Water Rights Consultation MOU
Exhibit 5	2017 SEO CWCB Consultation on proposal by Climax Molybdenum Company to adopt revised standards for molybdenum

CERTIFICATE OF SERVICE

The undersigned certifies that on this 2nd day of September, a true and correct copy of the foregoing, the Water Quality Control Division's Response to the Parties' Motions for Extension and accompanying exhibits, were served all parties to the rulemaking as detailed in [Party Status List_v4](#).

/s/ Rebecca Fischer

Rebecca Fischer,
Counsel for the Division

WATER QUALITY CONTROL COMMISSION
COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

PROCEDURAL ORDER REGARDING JOINT MOTIONS TO CONTINUE HEARING

IN THE MATTER CONCERNING THE ADOPTION OF REVISIONS TO THE NUTRIENTS MANAGEMENT CONTROL REGULATION, REGULATION #85 (5 CCR 1002-85) AND REVISIONS PERTAINING TO LAKES NUTRIENTS CRITERIA IN THE BASIC STANDARDS AND METHODOLOGIES FOR SURFACE WATER, REGULATION #31 (5 CCR 1002-31) ALONG WITH REVISIONS TO THE CLASSIFICATIONS AND NUMERIC STANDARDS FOR:

- ARKANSAS RIVER BASIN, REGULATION #32 (5 CCR 1002-32);
 - UPPER COLORADO RIVER BASIN AND NORTH PLATTE RIVER (PLANNING REGION 12), REGULATION #33 (5 CCR 1002-33);
 - SAN JUAN RIVER AND DOLORES RIVER BASINS, REGULATION #34 (5 CCR 1002-34);
 - GUNNISON AND LOWER DOLORES RIVER BASINS, REGULATION #35 (5CCR 1002-35);
 - RIO GRANDE BASIN, REGULATION #36 (5 CCR 1002-36);
 - LOWER COLORADO RIVER BASIN, REGULATION #37 (5 CCR 1002-37); AND
 - SOUTH PLATTE RIVER BASIN, LARAMIE RIVER BASIN, REPUBLICAN RIVER BASIN, SMOKY HILL RIVER BASIN, REGULATION #38 (5 CCR 1002-38).
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On August 29, 2022, Arapahoe County Water and Wastewater Authority, Cache La Poudre Water Users Association, Central Colorado Water Conservancy District, Groundwater Management Subdistrict of the Central Colorado Water Conservancy District, and Well Augmentation Subdistrict of the Central Colorado Water Conservancy District, City of Aurora, City of Brighton, City of Colorado Springs, by and through its enterprise, Colorado Springs Utilities, City of Loveland, City of Northglenn, East Cherry Creek Valley Water and Sanitation District, Front Range Feedlots, LLC, Parker Water and Sanitation District, United Water and Sanitation District, and Water Supply and Storage Company submitted a joint Motion for (1) immediate stay of responsive prehearing statements and (2) extension of time of rulemaking deadlines and hearing (“Joint Motions”). On August 31, 2022, Barr Lake and Milton Reservoir Watershed Association submitted a joinder to join this motion.

On August 31, 2022, Northern Water Conservancy District, Colorado Wastewater Utility Council, Lower Arkansas Valley Water Conservancy District, Arapahoe County Water and Wastewater Authority, East Cherry Creek Valley Water and Sanitation District, United Water and District, Centennial Water and Sanitation District, Town of Erie, City of Loveland, Central Colorado Water Conservancy District, Front Range Feedlots, LLC, City of Brighton, City of Northglenn, Cache la Poudre Water Users Association, and Water Supply Storage Company submitted a joint Motion to continue the rulemaking hearing (“Joint Motions”).

On August 30, the Hearing Chair issued an order staying the filing deadlines for responsive prehearing statements and rebuttal statements and establishing a deadline for responses to the Joint Motions by 12:00 p.m. on Friday, September 2, 2022. The City of Fort Collins, Colorado Monitoring Framework, Colorado Parks and Wildlife, Environmental Protection Agency, and the Water Quality Control Division submitted timely responses.

The Hearing Chair, having considered the Joint Motions and responses, hereby ORDERS as follows:

1. The rulemaking hearing concerning this matter is **continued** and shall be rescheduled to **April 10, 2023**.

WATER QUALITY CONTROL COMMISSION
COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

PROCEDURAL ORDER REGARDING REVISED HEARING DEADLINES AND STATUS
CONFERENCE

IN THE MATTER CONCERNING THE ADOPTION OF REVISIONS TO THE NUTRIENTS MANAGEMENT CONTROL REGULATION, REGULATION #85 (5 CCR 1002-85) AND REVISIONS PERTAINING TO LAKES NUTRIENTS CRITERIA IN THE BASIC STANDARDS AND METHODOLOGIES FOR SURFACE WATER, REGULATION #31 (5 CCR 1002-31) ALONG WITH REVISIONS TO THE CLASSIFICATIONS AND NUMERIC STANDARDS FOR:

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 - SAN JUAN RIVER AND DOLORES RIVER BASINS, REGULATION #34 (5 CCR 1002-34);
 - GUNNISON AND LOWER DOLORES RIVER BASINS, REGULATION #35 (5 CCR 1002-35);
 - RIO GRANDE BASIN, REGULATION #36 (5 CCR 1002-36);
 - LOWER COLORADO RIVER BASIN, REGULATION #37 (5 CCR 1002-37); AND
 - SOUTH PLATTE RIVER BASIN, LARAMIE RIVER BASIN, REPUBLICAN RIVER BASIN, SMOKY HILL RIVER BASIN, REGULATION #38 (5 CCR 1002-38).
-

On September 7, 2022, the Hearing Chair issued an order continuing and rescheduling this rulemaking hearing from November 14, 2022 to April 10, 2023. A status conference was held on September 14, 2022 to discuss and establish a new schedule of events related to this hearing.

The following table represents the Hearing Chair's decisions with respect prehearing deadlines:

SCHEDULE OF IMPORTANT DATES

Proponent's supplemental prehearing statement	10/5/2022 5:00 pm	Additional information below.
Responsive prehearing statements due	12/21/2022 5:00 pm	Additional information below.
Rebuttal statements due	02/15/2023 5:00 pm	Additional information below.
Last date for submittal of motions	02/22/2023 by noon	Additional information below.
Complete Outstanding Issues Index Form	03/01/2023	Additional information below.
Prehearing Conference (mandatory for parties)	03/07/2023 2:00 pm	Remote Via Zoom Additional Information below.
Negotiations cutoff	03/16/2023	N/A
Consolidated Proposal	03/30/2023	N/A
Rulemaking Hearing	04/10/2023	Sabin Cleere Conference Room

	9:00 am	Department of Public Health and Environment 4300 Cherry Creek Drive South Denver, CO 80246 Or Remote Via Zoom
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An amended notice for the rulemaking hearing will be made available via the Secretary of State’s Office in the Colorado Register and on the [commission’s website](#).

During the status conference, the Water Quality Control Division requested to submit a supplement to its prehearing statement including a revised dataset containing any new/revised data received and any resulting changes to modeling equations and/or revised proposed standards. No party objected to the Water Quality Control Division submitting supplemental information by close of business on October 5, 2022, as reflected in the table above.


Per the Memorandum of Understanding Between the Colorado Water Quality Control Commission, Colorado State Engineer’s Office (“SEO”), and the Colorado Water Conservation Board (“CWCB”), the SEO and CWCB may, in their discretion, request additional documentation from parties to this matter, meet with such parties, or conduct additional research. Any information requested by the SEO and the CWCB pertaining to the commission’s consultation on the claims of potential material injury to water rights may be submitted using one of the following methods:

1. Submit information to the SEO/CWCB and the commission office, and provide to all parties. Such information will be published on the commission’s website.
2. Submit confidential business information (CBI) to the SEO/CWCB and the commission office, clearly labeled as such. Materials that are CBI will not be included as part of the hearing record, but may be considered in the SEO’s/CWCB’s water rights analyses.

It was noted at the status conference that parties should use the most up-to-date version of the Party Status List available on the Commission’s website when emailing the parties.

DONE and ORDERED this 19th day of September, 2022.

Water Quality Control Commission


 April Long, Hearing Chair

COLORADO WATER QUALITY CONTROL COMMISSION
STATE OF COLORADO

SUPPLEMENTAL PREHEARING STATEMENT
OF THE WATER QUALITY CONTROL DIVISION

REVISIONS TO THE BASIC STANDARDS AND METHODOLOGIES FOR SURFACE WATER (REGULATION NO. 31); REVISIONS TO CLASSIFICATIONS AND NUMERIC STANDARDS FOR ARKANSAS RIVER BASIN (REGULATION NO. 32), UPPER COLORADO RIVER BASIN AND NORTH PLATTE RIVER (PLANNING REGION 12) (REGULATION NO. 33), SAN JUAN RIVER AND DOLORES RIVER BASINS (REGULATION NO. 34), GUNNISON AND LOWER DOLORES RIVER BASINS (REGULATION NO. 35), RIO GRANDE BASIN (REGULATION NO. 36), LOWER COLORADO RIVER BASIN (REGULATION NO. 37), AND SOUTH PLATTE RIVER BASIN, LARAMIE RIVER BASIN, REPUBLICAN RIVER BASIN, SMOKY HILL RIVER BASIN (REGULATION NO. 38); REVISIONS TO NUTRIENTS MANAGEMENT CONTROL REGULATION (REGULATION NO. 85)

I. STATEMENT OF FACTUAL AND LEGAL CLAIMS

The Water Quality Control Division (division), serving as staff to the Water Quality Control Commission (commission), is providing supplemental information concerning its revisions pertaining to lakes nutrient standards in the Basic Standards and Methodologies for Surface Water (Regulation No. 31) and the basin regulations (Regulation Nos. 32-38). The following supplemental information does not apply to the proposed modifications for Regulation 85 noticed¹ with the changes to Regulations 31-38.

II. WRITTEN TESTIMONY

In this hearing, the division proposes to revise the total nitrogen and total phosphorus standards for lakes and reservoirs to address EPA's 2016 recommendations and ensure protective standards are adopted on lakes and reservoirs with Aquatic Life and/or Recreation uses. The proposed revised total nitrogen and total phosphorus standards were developed via a targeted analysis in collaboration between the division and the lakes nutrients technical advisory committee (TAC), and included stakeholder outreach through the 10-year Water Quality Roadmap workgroup.

In accordance with the commission's September 19, 2022 Order², the division submits this supplemental prehearing statement (sPHS). The division appreciates the opportunity to submit this sPHS, and offers revised Exhibits C and N in support. These revised exhibits

¹ 2023 Regulation Nos. 85, 31, and 32-38 Nutrients Management Control Regulation and Lakes Nutrients Rulemaking Hearing Notice: <https://drive.google.com/file/d/1HGV7qcL6NDKkDwxUZlyQcksQokHPnh07/view>

² WQCC Procedural Order Regarding Revised Hearing Deadlines and Status Conference: <https://drive.google.com/file/d/1rlL49nk4aOWAg-Au7jp-KuosFQqi33EU/view>



include a revised dataset containing any new/revised data received from parties to the rulemaking hearing (RMH) (revised Exhibit C), data processing code (revised Exhibit N), as well as resulting changes to modeling equations (revised Exhibit N) and revised proposed standards for total nitrogen and total phosphorus for lakes and reservoirs (Section III(C)).

As the division noted at the September 14, 2022 status conference, there is a need for a sPHS because multiple parties to the RMH shared updates or corrections to their own data contained in the dataset after the division submitted its August 3, 2022 Prehearing Statement (PHS). The parties were planning to submit their updated data in responsive prehearing statements (RPHS), originally scheduled for September 7, 2022. However, the commission issued an order continuing and rescheduling this rulemaking hearing from November 14, 2022 to April 10, 2023³. Therefore, in the interest of allowing all parties to review and use the most up to date revised dataset in the development of their RPHS, now due December 21, 2022, the division proposed this sPHS.

The division will continue to work with parties to the RMH and any interested stakeholder via the Roadmap workgroup/Lakes Nutrients TAC, Roadmap website, and direct communication to make progress and resolve as many outstanding issues throughout the RMH as possible. The division will also review the RPHSs and provide comments and a recommendation to the commission in rebuttal.

III. CHANGES FROM PREHEARING STATEMENT

Revisions to the total nitrogen and total phosphorus standards for lakes and reservoirs were developed using a statewide dataset included in the PHS (Exhibit N). The division developed the initial dataset by compiling data from various sources, including many of the parties to this RMH (PHS § XI(A)(1)). The division standardized this data and embarked on an extensive internal quality assurance (QA) effort. The division released the draft dataset for external review in September 2021.

The division has continued to work with stakeholders since the PHS to continue to identify issues, correct errors, and generally refine the dataset. The division is grateful to the stakeholders who provided further QA and comments in a timely manner to inform the refinement of the dataset (Section A) and processing code used to screen the data (Section B). The resulting dataset was reanalyzed and the proposed revised standards reflecting the most up-to-date data and processing are shown in Section C below.

A. Changes to the Dataset

Based on the comments from parties, the division updated the dataset as appropriate. The following data files were originally included in the division's PHS as Exhibit N, Appendix 1, and have been revised as described below.

1. CCBWQA: Chlorophyll *a* data that had previously been unincorporated was located and included. Data in the source database for total nitrogen for a limited time frame (i.e., 1993) were found to be erroneous and removed.

³ WQCC Procedural Order Regarding Joint Motions to Continue Hearing:
<https://drive.google.com/file/d/1iYlxx1jDCZe-h6QHfoLDw02jpbGXAFBp/view>

2. Chatfield: Additional data for total kjeldahl nitrogen was identified and added to the dataset. An outlier point was removed and corrections were made to the naming conventions of nitrogen species.
3. Denver Water: Depth corrections were made that resolved what appeared to be duplicate measurements.
4. Ft. Collins: Secchi data that was not previously available was added to the dataset for Halligan Reservoir.
5. Loveland: Corrections were made to naming conventions that resulted in correction of data previously identified as phosphorus. True total phosphorus values were also added.
6. MWRD: Data from the file previously named “BMWA_20211110.csv” were revised to include values that were previously unincorporated. Additionally, the file name was revised to “MWRD”. Metro Water Recovery (MWRD) participates in sampling with Barr Milton Watershed Association (BMWA) but attribution of the data is more appropriate to MWRD than BMWA.
7. Northern Water: Northern Water provided an updated file that included a complete set of data appropriate for lakes and reservoirs monitored by Northern Water.
8. SWQC: Chlorophyll *a* values were not moved into the final result column and therefore previously unincorporated in the final model.
9. WQCD: Data collected by sonde was erroneously included in PHS datasets, and was thus removed from the dataset for consistency (Table 1).

Table 1. Probe/Sensor Data Screening Results: Samples Removed from the Dataset.			
Sonde/Probe Measured Values	Chlorophyll <i>a</i>	Nitrogen, mixed forms (NH ₃), (NH ₄), organic, (NO ₂), and (NO ₃)	Total Phosphorus, mixed forms
Count of Results Removed	254	68	22

10. WQCD: 721 of the 1,315 non-detect values, representing 72 of the 137 Site IDs with non-detect values, in the WQCD dataset were unintentionally calculated as $\frac{1}{5}$ the detection limit instead of the correct $\frac{1}{2}$ the value of the detection limit. The final result values for these non-detects were corrected to $\frac{1}{2}$ the value of the detection limit.
11. USGS: Several entities noted that non-surface data had erroneously been incorporated in the USGS dataset. To resolve this issue, USGS data was re-pulled using the following PCodes:

- 00003 - Depth in feet
- 00098 - Depth in meters
- 00078 - Secchi depth in feet
- 79701 - Secchi depth in meters



- 00665 - Phosphorus, mixed forms, total
- 62855 - Nitrogen, mixed forms, total
- 70953 - Chlorophyll *a*
- 00625 - Kjeldahl nitrogen
- 00630 - Inorganic nitrogen

After removing lakes below the size cutoff and limiting the timeframe to the growing season, the pull resulted in 8,052 results with multiple depths. Samples taken at a depth greater than 5 feet or 1 meter were removed. 1,500 samples had no depth associated and were subsequently removed from the dataset.

12. Multiple Data Files: Northern Water provided comments regarding the dataset used in the lakes criteria calculation and suggested an evaluation/removal of certain outliers. The division appreciates and agrees with this recommendation. The division produced time series plots of each lake's total nitrogen (TN), total phosphorus (TP), and chlorophyll *a* (Chla) values to identify and remove values that were anomalously high. A total of 8 TP, 4 TN, and 2 Chla values were identified and screened from the dataset (Table 2). The outliers removed averaged over 8 times higher than the lake time series mean concentrations for these parameters. These values are suspected to be the result of analytical or translational errors and were thus removed.

Table 2. Anomalously High Values Screening Results: Samples Removed from the Dataset.				
Lake	Parameter	Date	Source-ID	Method
Adobe Creek	TP	7/24/2013	CPW-001	Water Sampler (Other)
Chatfield	TP	9/9/2013	CPW-022	Water Sampler (Other)
Meredith	TP	8/28/2002	USGS-975154	Equal width increment
Meredith	TP	7/23/2002	USGS-975154	Equal width increment
Pueblo	TP	7/25/2013	CPW-104	Water Sampler (Other)
Ridgeway	TP	9/14/2009	10661A	Water Sampler (Other)
Windsor	TP	7/27/2007	NLA06608-1147	NA
Blue Mesa	TP	7/1/2013	CPW-010	Water Sampler (Other)
Blue Mesa	TN	7/1/2013	CPW-010	Water Sampler (Other)
Neegronda	TN	8/21/2012	NLA12_CO-101	NA
Neegronda	TN	7/13/2012	NLA12_CO-101	NA
Vega	TN	9/9/2013	CPW-145	Water Sampler (Other)
Vega	Chla	8/12/1994	11158A	Water Sampler

B. Changes to the Data Screening Code

Based on comments from parties, one update to the processing code used to screen the data was necessary. The stressor response code included in revised Exhibit N is unchanged.



1. Dissolved Fractions: An error in the code allowed for the incorporation of the dissolved form of parameters to be included in final calculations. Code lines 238-284 from the previous version of the CO Data Processing script were updated by the contractor (Tetra Tech) to appropriately exclude dissolved parameters. A full, updated script is included in the division's revised Exhibit N.

C. Resulting Changes to the Proposed Standards

The revised dataset and data screening code described above was used to calculate revised proposed total nitrogen and total phosphorus standards for lakes and reservoirs (Table 3c). These standards continue to represent growing season (July through September) average concentrations with an allowable exceedance frequency of once in five years, and apply to lakes greater than 25 acres in size and with a residence time of at least 14 days. The division continues to propose the adoption of these revised total nitrogen and total phosphorus standards into Regulation No. 31 and the basin regulations (Regulation Nos. 32-38) in this rulemaking.

In addition to the currently proposed revised standards representing the results of the analysis using the data provided in this sPHS and included in revised Exhibit N (3c), Table 3 also provides the existing interim standards at 31.17 for (3a) and the values originally proposed in the division's PHS (3b) for context. Shaded cells indicate a change in the magnitude of the proposed standards since the values published in the division's prehearing statement.

Table 3. Summary of Colorado's current chlorophyll <i>a</i>, total nitrogen, and total phosphorus standards (µg/L) for lakes and reservoirs and the division's proposed standards (µg/L).					
Parameter	Aquatic Life (chronic)		Recreation (Class E, U, or P) (chronic)		Direct Use Water Supply (DUWS) (chronic)
	Class 1 or Class 2 Cold Water	Class 1 or Class 2 Warm Water	Cold Water	Warm Water	
a. Current Interim Standards - 31.17					
Chlorophyll <i>a</i>	8	20	8	20	5
Total Nitrogen	426	910	426	910	—
Total Phosphorus	25	83	25	83	—
b. Originally Proposed Revised Standards - WQCD PHS					
Chlorophyll <i>a</i>	8	20	8	20	5
Total Nitrogen	330	600	330	600	—
Total Phosphorus	20	36	20	36	—
c. Currently Proposed Revised Standards					
Chlorophyll <i>a</i>	8	20	8	20	5
Total Nitrogen	380	610	380	610	—
Total Phosphorus	20	40	20	40	—



IV. WITNESSES

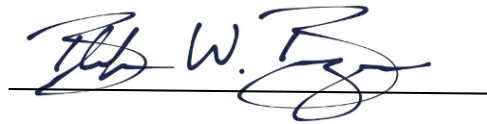
The division incorporates by reference its full witness list from its August 3, 2022 PHS. The division reserves the right to call any other witnesses, as needed, for purposes of rebuttal.

V. LIST OF EXHIBITS

- Exhibit C (REVISED) Lakes - Secchi-Based Site-Specific Equations Guidance
Appendix 1 Equations Calculator (Excel file)
- Exhibit N (REVISED) Lakes - Data and R Scripts Used to Derive Proposed Revised Total Nitrogen and Total Phosphorus Standards (CSV and R files)
Appendix 1 Processing Code and Raw Data Files (folder of multiple files)
Appendix 2 Stressor-Response Code and Files (folder of multiple files)

Respectfully submitted this 5th day of October, 2022,

FOR THE WATER QUALITY CONTROL DIVISION



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