SOMACH SIMMONS & DUNN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

1155 CANYON BOULEVARD, SUITE 110, BOULDER, CO 80302
OFFICE: 303-449-2834 FAX: 720-535-4921
SOMACHLAW.COM

M E M O R A N D U M

TO: Chatfield Watershed Authority ("CWA") Technical Advisory Committee ("TAC")

FROM: Michael Daugherty, Somach Simmons & Dunn ("SSD")

SUBJECT: Legal Report – April 4, 2023, TAC meeting

DATE: March 29, 2023

I. Lakes Reservoirs Nutrients Criteria Rulemaking Update

CWA filed its rebuttal statement ("Rebuttal") in the Colorado Water Quality Control Commission's (the "Commission") ongoing rulemaking proceeding for revised nutrients criteria for the state's lakes and reservoirs (Regulations 85 and 31-38) on February 15, 2023.

A. CWA's Rebuttal Requests a Delayed Site-Specific Standard for Chatfield Reservoir

As approved by CWA's Technical Advisory Committee ("TAC"), CWA's Rebuttal reaffirms its request for a delayed site-specific total nitrogen ("TN") standard. Specifically, CWA requests in its responsive prehearing statement and its Rebuttal that the Commission take the following action:

- Decline to impose the Colorado Water Quality Control Division's (the "Division") proposed cold-water table value TN standard on Chatfield Reservoir in 2023;
- Allow for the development of a site-specific TN standard for Chatfield Reservoir once CWA has completed work on its revised TMAL (expected in 2026); and
- Refrain from imposing any TN standard on Chatfield Reservoir until a site-specific standard is in place.

CWA's Rebuttal also responds to the U.S. Environmental Protection Agency's ("EPA") and the Plum Creek Water Reclamation Authority's ("PCWRA") responsive prehearing statements, both of which specifically addressed the Division's proposal for Chatfield Reservoir. CWA appreciates EPA pointing out that Chatfield Reservoir has site specific standards for both chlorophyll a and phosphorus, which supports CWA's request for a site-specific nitrogen standard as well. CWA disagrees with EPA's assertion that adopting a

standard now and changing it in the future is the preferable action, arguing that this is inappropriate and unfair to the regulated community and the public. CWA supports PCWRA's request that the Commission develop a site-specific TN standard for Chatfield Reservoir, and also raises concerns regarding PCWRA's (which is a dues-paying member of CWA) estimated cost of complying with the proposed nutrient standards.

Finally, as requested by TAC, CWA's Rebuttal emphasizes the fact that Chatfield Reservoir is one of only four reservoirs in Colorado subject to a control regulation promulgated by the Commission pursuant to C.R.S. 25-8-205, and that CWA has been working to improve the reservoir's water quality for nearly four decades.

B. The Rebuttal Statements of Other Parties Relevant to CWA and Chatfield Reservoir

Numerous other parties filed rebuttal statements in this rulemaking, all of which are available here. Those of the Division, EPA, Colorado Parks and Wildlife ("CPW"), PCWRA, and Centennial Water and Sanitation District ("CWSD") are of particular relevance to CWA.

i. Division's Rebuttal Statement

The Division acknowledges in its 177-page Rebuttal that the Commission has adopted four watershed protection control regulations, including Regulation 73 for Chatfield Reservoir. The Division reiterates its proposal to apply the table value TN standard on Chatfield Reservoir immediately "to protect the public swim beach." Division's Rebuttal, pg. 136. The Division also acknowledges EPA's request in its responsive prehearing statement for the Division to reevaluate the standard proposed for Chatfield Reservoir to consider the site-specific chlorophyll a standard that has already been adopted. *Id*. at 137. The Division did increase the table value TN standard for warm-water reservoirs from 610 ug/L to 670 ug/L, but did not change the table value TN standard for cold-water reservoirs. *Id*. at 17. The Division also provides details regarding the future development of site-specific nutrient standards, but ultimately concludes that "no unreasonable practical effects would be expected by adoption of the [D]ivision's proposal." *Id*. at 139-142.

The Division concedes that "[a]s with Cherry Creek Reservoir, the division agrees that information to support an appropriate and protective site-specific standards proposal . . . could be developed for consideration by the [C]omission at an upcoming Regulation No. 38 triennial review rulemaking hearing." Division's Rebuttal, pg. 143. The Division, however, rejects CWA's request for the Commission to refrain from imposing the proposed table value TN standard on Chatfield Reservoir. The Division argues that "[t]o do so would not be protective of the uses in Chatfield Reservoir, and, based on CWA's absence of a plan to develop site-specific standards as soon as possible, this lack of protection would be indefinite." *Id*. The Division does not acknowledge CWA's limited resources in its request to begin work on a site-specific TN standard once work on the revised TMAL is completed.

In response to EPA's request for the Division to reevaluate the proposed nutrient standards for Chatfield Reservoir, the Division provides an "approximate outcome of site-specific standards derived using a method that would be expected to maintain the site-specific chlorophyll a standards." *Id*. The Division concedes that this calculation results in a site-specific TN standard for Chatfield Reservoir (530 ug/L) that is well above the proposed table value cold-water reservoir standard of 380 ug/L. *Id*. at 144. The Division does not propose this standard be adopted by the Commission, but indicates that any future site-specific standards "should be developed in close collaboration with stakeholders." *Id*.

The Division's Rebuttal indicates that its original notice provides for the expectation that a site-specific TN standard would be sought for Chatfield Reservoir, and also indicates that "there are relatively few lakes that are expected to have existing quality where chlorophyll a and one nutrient are in attainment, but the other is not. In such cases, site-specific standards may be appropriate." Division's Rebuttal, pg. 23. This is promising in the event that CWA indeed does move forward with proposing a site-specific TN standard for Chatfield Reservoir in the future.

ii. EPA's Rebuttal Statement

EPA's Rebuttal indicates that EPA "see[s] no compelling reason not to assign a TN standard" to Chatfield Reservoir immediately. EPA's Rebuttal, pg. 30. Overall, EPA requests "application of a TN standard to Chatfield Reservoir as an outcome of the current rulemaking action with the understanding that, in the future, site-specific standards can be developed and adopted if they are shown to be appropriate." *Id*.

EPA's Rebuttal also responds to numerous parties' (including CWA) argument that the Division's chosen method of classifying lakes and reservoirs may not be appropriate for nutrient standard determinations. EPA "support[s] the Division's classification approach that derives separate cross-lake relationships for cold and warm lakes," but also indicates that "the Division is doing some additional work to evaluate whether classification results are similar using the initial and final versions of the lakes dataset." EPA's Rebuttal, pg. 4.

iii. CPW's Rebuttal Statement

CPW indicates in its Rebuttal that "CPW supports the addition of TN standards [for Chatfield Reservoir], but would not oppose a 2-year delayed effective date to give time for site-specific standards at the next South Platte hearing. CPW Rebuttal, pg. 3. CPW confirms that "Chatfield occasionally has algae blooms, but has never tested positive for algal toxins." *Id*. at 18. CPW also states that it "is concerned that CWA has not shared its most recent TN data with [the Division]." *Id*. at 19.

iv. PCWRA's Rebuttal Statement

In its Rebuttal, PCWRA agrees "with the CWA's proposal that a site-specific nitrogen standard be developed once the CWA completes its work on its revised TMAL in 2026." PCWRA Rebuttal, pg. 7. PCWRA specifically addresses EPA's general assertion that the Commission should adopt a standard immediately, even if not the correct standard, and fix it later. According to PCWRA, "[r]ushing to adopt an improper standard that is not supported by the scientific evidence or conditions in Chatfield Reservoir, based on the promise of future 'fine-tuning,' has serious implications." *Id*. at 8.

PCWRA also supports CWA's concern with the method of lake classification chosen by the Division. PCWRA Rebuttal, pg. 5. Specifically, PCWRA's Rebuttal provides that "Chatfield Reservoir demonstrates why it was inappropriate to rely on a single method of categorizing lakes." *Id*. PCWRA argues that "had the Division more appropriately partitioned the data based on temperature, and had the Division considered other site-specific conditions, it may have significantly altered the proposed total nitrogen limit for Chatfield Reservoir." *Id*.

PCWRA also reiterates its concern regarding the enormous estimated cost that PCWRA would have to endure to comply with the proposed nutrient standards. Accordingly, PCWRA argues that "the Commission should reject the proposed nitrogen standard for Chatfield Reservoir because of its enormous costs compared to no water quality benefits." PCWRA's Rebuttal, pgs. 5-6.

v. CWSD's Rebuttal Statement

CWSD's Rebuttal points out that Chatfield Reservoir "attains both the phosphorus and chlorophyll a standards," indicating that water quality is protected "through the regulation of phosphorus alone." CWSD's Rebuttal, pg. 5. CWSD uses Chatfield Reservoir as an example of the Division's failure to consider site-specific conditions and instead require that all three nutrient standards be attained in every lake with proposed standards involved in the hearing, "even where it is unnecessary to protect a waterbody's classified uses and would require the expenditure of hundreds of millions of dollars to implement needless treatment." *Id*.

C. Motions and Orders

Two motions were filed this month in this rulemaking: (1) the first by the Lower Arkansas Valley Water Conservancy District (LAVWCD) requesting leave to file a rebuttal statement, and (2) the second by numerous parties requesting the Commission to extend the deadline to file motions.

i. LAVWCD's Motion to Admit Rebuttal Statement

LAVWCD's motion requests the Commission to admit LAVWCD's rebuttal statement despite not filing a responsive prehearing statement. To support its motion, LAVWCD explains that EPA and Colorado Parks and Wildlife ("CPW") raised in their responsive prehearing statements for the first time in this hearing the issue of environmental justice and the Division's failure to include disproportionately impacted communities ("DICs") in this rulemaking's stakeholder process. LAVWCD encompasses five counties that qualify as disproportionately impacted communities under the Colorado Environmental Justice Act. LAVWCD alleges that "EPA has not accurately represented the interests of DICs in environmental justice in the Lower Arkansas Valley" and that the "Valley's DICs deserve to be heard in this proceeding themselves, rather than misrepresented by a third party without consultation." LACWCD's Motion, pgs. 2-3.

ii. Motion to Extend Motions Deadline

The second motion, which requests the Commission extend the deadline for filing motions in this rulemaking, was filed by Arapahoe County Water and Wastewater Authority, the City of Aurora, Parker Water & Sanitation District, Denver Water, the City of Fort Collins, the City of Loveland, Centennial Water and Sanitation District, Colorado Wastewater Utility Council, East Cherry Creek Valley Water and Sanitation District, Morrison Creek Water and Sanitation District, Plum Creek Water Reclamation Authority, Northern Colorado Water Conservancy District, Lower Arkansas Valley Water Conservancy District, the City of Colorado Springs, and United Water and Sanitation District. The motion indicates that the filing parties "have requested a cost-benefit analysis and regulatory analysis from the [Division], and a consultation report from the State Engineer's Office and the Colorado Water Conservation Board to better understand—and allow the Commission to consider—the economic impacts and potential for material injury to water rights resulting from the Commission's adoption of the Division's proposal." Joint Motion to Extend the Motions Deadline, pg. 1. The motion requests the Commission to extend the motions deadline until three days after the last of the cost-benefit analysis, regulatory analysis, and consultation report are issued "in order to receive and consider any motions arising from these reports." *Id*. at 2.

iii. Commission's Order(s)

The Hearing Officer issued an Order on February 16, 2023, that addressed two concerns: (1) the Division's late filing of its rebuttal statement and (2) LACWCD's motion. The Hearing Officer determined that good cause was shown for the Division's late submittal, but did not make a determination regarding LACWCD's request to file a rebuttal statement without having filed a responsive prehearing statement. The Order imposed a deadline for parties to object to admitting either rebuttal statement by February 22, 2023. No parties formally opposed the admission of either rebuttal statement.

The Hearing Office issued another Order on February 24, 2023, that ordered the Division's and LAVWCD's rebuttal statements be admitted into the hearing record, and denied the motion to extend the motions deadline. The Hearing Officer explained the decision to deny the request by indicating that "[p]arties will be able to provide testimony on information entered into the hearing record during the rulemaking hearing." Fifth Procedural Order, ¶ 3. The February 24, 2023, Order also indicates that parties need not complete an outstanding issues index form.

The Commission issued a Prehearing Order on March 10, 2023, which provides for the submittal of Surrebuttals—the only opportunity for parties to respond to the Division's revised proposal to delay the effective date of the nutrient standards adopted in this proceeding until December 31, 2027. CWA plans to submit a Surrebuttal to respond to the Division's revised proposal, and a draft is included in this meeting packet. The Prehearing Order provides CWA with seven (7) minutes to present at the hearing, which is currently scheduled for April 10, 2023.

D. Procedural Timeline

The rulemaking hearing is currently scheduled for April 10, 2023. A number of parties have submitted a letter to the Governor's Office requesting further delay of the rulemaking hearing. SSD will provide an update if the Commission makes any further modifications to the rulemaking timeline and schedule of deadlines.

E. Application for Reconsideration and Judicial Review

The Commission's final determination with regard to the proposed nutrient standards will be subject to judicial review. Any such proceeding for judicial review must be filed within thirty days after the Commission has made a final determination and shall be filed in the district court for the either Douglas County or Jefferson County. C.R.S. 25-8-404. During the time permitted for seeking judicial review of any final order or determination of the commission, CWA may also request the Commission reconsider its initial determination. The Commission must either grant or deny the application for a hearing, rehearing, or reconsideration within ten days after receipt of the application. If the application is granted, the initial determination by the Commission will not be considered final, and the Commission may affirm, reverse, or modify the pertinent order or determination. C.R.S. 25-8-403.

Accordingly, if CWA is not satisfied with the Commission's determination at the conclusion of the rulemaking proceeding, CWA may file an application for reconsideration or seek judicial review within thirty days. Assuming the Commission issues a decision on the day of the rulemaking hearing (which is scheduled for April 10, 2023), CWA would have until May 10, 2023, to file an application for reconsideration or to seek judicial review. It is unlikely that the Commission will make a determination on the day of the rulemaking hearing, however. Given the complexity of the Division's proposal, the number of parties involved,

and the economic ramifications, the Commission will likely take its time in issuing a final decision.

CWA has a Board of Directors meeting schedule on April 17, 2023, and a TAC meeting on May 2, 2023, during which the opportunity for appeal should be discussed (assuming the Commission has rendered its decision by that time). SSD recommends that the lakes-nutrients subcommittee hold a meeting as soon as possible once the Commission has made a determination to discuss the final result and CWA's options.

II. Regulation No. 93 (Colorado's Section 303(d) List of Impaired Waters) – Rulemaking Hearing

The Commission submitted a notice of upcoming hearings indicating that a rulemaking hearing regarding Regulation No. 93 (Colorado's Section 303(d) List of Impaired Waters and Monitoring and Evaluation List), 5 C.C.R. 1002-93, is scheduled for May 8, 2023. The list included in the Division's prehearing statement recommends retaining in the 2023 list all of the water bodies and pollutants related to Chatfield Reservoir presented in the 2019 list. Because CWA determined not to participate in the 2019 rulemaking, SSD and RESPEC do not recommend that CWA participate in this 2023 rulemaking proceeding.