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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 – January 3, 2023, TAC Meeting

DATE: December 27, 2022

I. Lakes Reservoirs Nutrients Criteria Rulemaking Update

CWA filed its responsive prehearing statement ("RPHS") 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 December 21, 2022.

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

As approved by both TAC and the CWA Board of Directors, CWA's RPHS requested that the Commission:

- Decline to impose the Colorado Water Quality Control Division's (the "Division") proposed cold-water table value total nitrogen ("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 RPHS laid out concerns with the Division's method of categorizing the state's lakes and reservoirs into two categories based on aquatic life use, which placed Chatfield Reservoir in the cold-water reservoir category, despite receiving flow from both cold-water (South Platte) and warm-water (Plum Creek) sources. A technical report completed by James McCutchan, Ph.D., and to which CWA contributed funding, indicated that there are likely better ways to categorize the state's reservoirs, such as by water temperature. CWA's RPHS also laid out its concern with the Division's decision to allow a sample size of one to be used in the calculation of the appropriate standard and in future compliance determinations.

B. The Responsive Prehearing Statements of Other Parties That May Prove Relevant to CWA's Request(s)

Numerous other parties filed responsive prehearing statements with the Commission. Of particular interest are those filed by the Northern Colorado Water Conservancy District ("Northern") and Arapahoe County Water and Wastewater Authority, East Cherry Creek Valley Water and Sanitation District, and United Water and Sanitation District (the "Water Suppliers"), which many parties cite and consent to in their own prehearing statements; the United States Environmental Protection Agency ("EPA"), which specifically requests that the Division recalculate its proposed TN standard for Chatfield Reservoir; and the Plum Creek Water Reclamation Authority ("PCWRA"), which requests a delayed site-specific standard for Chatfield Reservoir. The Cherry Creek Basin Water Quality Authority ("CCBWQA") requests a delayed effective date of December 31, 2025, for the warm water table value TN and TP standards to apply to Cherry Creek Reservoir, to provide additional time for CCBWQA to develop site-specific standards for the reservoir.

i. Northern Colorado Water Conservancy District

Northern, which was particularly aggressive in its earlier request to delay the rulemaking proceeding by at least one year, reiterates its request for a delay throughout its RPHS. Northern also alleges that the Division's proposal is unwarranted because the proposed nitrogen and phosphorus standards are based on a dataset that continues to be modified but that continues to include erroneous and misapplied data. Northern also alleges that the proposed standards are overly broad and go beyond EPA's initial recommendations by applying to all lakes rather than just to high-yield lakes.

Northern also compares the proposed standards to regulations in other states and alleges that no other state regulates nutrients in the manner proposed by the Division; South Carolina has the most similar regulatory structure but differentiates lakes based on eco-region, and only one small eco-region in the state regulates nutrients similarly to how the Division proposes to regulate the entire State of Colorado.

Northern includes with its RPHS an alternative proposal "that addresses the data and scientific deficiencies of the Division's proposal for the Commission's consideration." Northern RPHS, pg. 15. The alternative proposes the following standards (in ug/L):

For high-yield cold lakes:	TP, 25; TN, 400
Fir non-high-yield cold lakes:	TP, 44; TN, 650
For high-yield warm lakes:	TP, 59; TN 690
For non-high-yield warm lakes:	TP, 109; TN 1,300

ii. Arapahoe County Water and Wastewater Authority, East Cherry Creek Valley Water and Sanitation District, and United Water and Sanitation District

The Water Suppliers allege that the Division proposes "infeasible water quality standards for most reservoirs that divert from the South Platte River north of Denver" and that the Commission "should not adopt water quality standards that cannot be met." Water Suppliers' RPHS, pgs. 2, 16. The Water Suppliers primary concern is that the proposed standards will negatively impact decreed water rights, but creating the possibility that the State Engineer will have the authority to deny the operation of exchanges and augmentation plans due to water quality concerns. The Water Suppliers request the Commission to insert specific language in the regulations that prevents this from happening and argue that without such language, even if the State Engineer assures parties that it will not exercise its authority in such a manner, concerns with future administration remain.

The Water Suppliers also respond to the Division's recommendation that certain parties concerned with the table value standards "should request variances from the nutrient standards." Water Suppliers' RPHS, pg. 16. The Water Suppliers argue that the "proposed approach by the Division (every user obtaining a variance) is cumbersome, expensive, and from a policy perspective, irrational." *Id*. Instead, the Division should adopt realistic water quality standards that can generally be met by the regulated entities. Numerous parties, including cities and towns with decreed water rights, joined the Water Suppliers' RPHS, and we expect these entities to continue negotiating with the State Engineer and the Division regarding revised language that is protective of water rights.

iii. U.S. Environmental Protection Agency

Overall, EPA strongly supports adoption of the Division's proposed standards. However, EPA does explicitly "ask the Division to reevaluate the proposed standards for Chatfield Reservoir (TN) and Cherry Creek Reservoir (TN and TP)" because "the proposed values were not calculated from the chl-a standards that have been established as goals for these two water bodies. EPA's RPHS, pg. 2. For Chatfield, EPA "strongly support[s] the Division's proposed approach of applying a TN standard to be paired with the TP standard." Id. at 21. However, EPA expresses concern with the proposed TN standard for Chatfield Reservoir, which "is calculated from the cold lakes TVS for chlorophyll-a . . . even though site-specific chlorophyll-a standard for this particular lake is 10 ug/L." Id. EPA requests that the Division respond to this comment in its rebuttal statement.

In response to concerns that the proposed standards are unrealistic and will prove difficult for most parties to meet, EPA provides that "any standard that is adopted as a result of this rulemaking action would be subject to the triennial review requirement," which "means that fine-tuning changes can be made to the standards over time as new scientific information becomes available." *Id*. EPA does not address the concern of many parties that it

is often difficult to reduce standards once implemented due to public concern that this constitutes a weakening of water quality efforts.

We considered including in the RPHS CWA's concern that the proposed TN standard for Chatfield Reservoir was not calculated using the existing site-specific standard for chlorophyll a, but decided to focus on the request for a site-specific standard, given that our internal calculations using the site-specific standard and the Division's method of calculating a TN standard resulted in a negligible change from the Division's proposed table value TN standard. However, EPA's inclusion of a request to recalculate the proposed TN standard for Chatfield Reservoir will allow us to evaluate what the Division determines is the appropriate standard based on the reservoir's site-specific chlorophyll a standard.

iv. Plum Creek Water Reclamation Authority

PCWRA's RPHS specifically requests the Commission to delay the adoption of a total nitrogen standard for Chatfield Reservoir due to concerns that the proposed nitrogen standard would be applied as an end-of-pipe limit in PCWRA's renewal permit. PCWRA alleges that the proposed standards would result in costs of $207 million for treatment improvements and an increase of $7.7 million in operational costs. PCWRA's RPHS, pg. 6. PCWRA further alleges that "these enormous costs are entirely unnecessary and would not result in water quality benefits for Chatfield Reservoir," as "nitrogen and phosphorus are only regulated to ensure that the underlying chlorophyll a standard is achieved." *Id*. PCWRA claims that "the Division appears to have lost sight of the purpose of the nutrient regulations and ignores the relationship between chlorophyll a, nitrogen, and phosphorus." *Id*.

Persuasively, PCWRA argues that "because the chlorophyll a standard is attained in Chatfield Reservoir, there would be no benefit to requiring expensive and infeasible reductions of nitrogen by point source discharges including PCWRA." *Id*. at 6-7. We coordinated with PCWRA in the drafting of our prehearing statement. CWA also considered requesting that the Commission refrain from imposing any TN standard to Chatfield Reservoir, but after significant discussion, CWA's TAC and Board of Directors determined to request time to develop a site specific standard instead.

v. Cherry Creek Basin Water Quality Authority

CCBWQA takes a similar approach to CWA by requesting additional time to develop and implement a site-specific TN standard for Cherry Creek Reservoir. The Division is also proposing a table value TP standard for Cherry Creek Reservoir, however, and CCBWQA requests additional time to develop a site-specific TP standard as well. CCBWQA also proposes a delayed effective date of December 31, 2025, for the warm water table value TP and TN standards to apply to Cherry Creek Reservoir, so presumably CCBWQA would accept the proposed table value standards for both TP and TN in the event that site-specific standards are not developed prior to 2026.

C. Procedural Timeline

Based on the Commission's revised timeline laid out in its September 19, 2022, Procedural Order Regarding Revised Hearing Deadlines and Status Conference, the next deadline in the rulemaking proceeding is for rebuttal statements, which are due February 15, 2023. The Division will likely file a rebuttal statement that hopefully addresses some or all of the concerns provided in CWA's RPHS.

The last day for submittal of motions if February 22, 2023. We expect several parties to file additional motions that request to further delay the rulemaking proceeding. SSD supports further delays to provide the Division time to address concerns raised regarding the dataset used to calculate the proposed standards and to provide CWA with additional time to assess nitrogen levels in Chatfield Reservoir and the potential effects of the Division's proposed standards.

A mandatory prehearing conference is scheduled for March 7, 2023, the negotiations cutoff deadline is March 16, 2023, and the rulemaking hearing is currently scheduled for April 10, 2023. SSD will provide an update if the Commission makes any further modifications to the rulemaking timeline and schedule of deadlines.