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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

SUBJECT: Legal Report for June 6, 2023, TAC Meeting

DATE: May 30, 2023

I. Site-Specific TN Standard for Chatfield Reservoir

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

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

Pros: If Regulation 73 includes a nitrogen standard, it could provide more clarity regarding implementation. If ultimately needed (i.e. Chatfield Reservoir isn't meeting an adopted site-specific standard), a TMAL could be developed for nitrogen, and CWA could develop a nitrogen trading program similar to phosphorus (which would help with future consolidation of facilities, for example).

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

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

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

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

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

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

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

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

1. CWA should review its existing water quality data, particularly for 2023 when available, to determine whether that data can be used in a site-specific analysis, or if CWA needs to restrict such an analysis to post-reallocation project data.

2. CWA should determine whether the Division's proposed "site-specific lite" method of calculating a site-specific nitrogen standard for Chatfield Reservoir is appropriate.

    a. The first step would be to assess whether the Division's calculation of 530ug/L makes sense. If so, we can use that as our proposal; if not, we need to determine whether the Division's equation would work with different data/analysis, or if we need to pursue another calculation method.

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

As of the date of this memorandum, the Chatfield State Park Water Quality Fee bill (SB23-267) has passed both the Senate and House, and is awaiting Governor Polis' signature. Regardless of whether the Governor ends up signing the bill, it will become law unless expressly vetoed. Assuming the bill does indeed become law, the following process applies:

1. The Colorado Parks and Wildlife Commission ("CPWC") has until July 1, 2024, to promulgate rules establishing a process by which CWA may request that the CPWC create by rule a water quality fee to be collected by the Division from visitors to Chatfield State Park.

    a. The rules will also include criteria for approving a request for a water quality fee, as well as criteria for determining which visitors to Chatfield State Park should be required to pay the fee.

    b. The CPWC shall not unreasonably deny a request by CWA to create a water quality fee.

    c. The CPWC shall review the fee on January 1, 2030, to evaluate whether it should continue or is no longer necessary.

2. If and when a fee is established, CWA must spend up to 25 percent of funds collected on water quality projects within Chatfield State Park. CWA shall use remaining funds to support water quality projects, including construction operation and maintenance of nonpoint source projects, water quality monitoring, and urban runoff and erosion management and control.

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

In *Sackett v. EPA*[1], the U.S. Supreme Court limited the federal government's jurisdiction pursuant to the Clean Water Act over "adjacent wetlands" to those having a continuous surface connection to bodies that are "waters of the United States" ("WOTUS"). This requires the party asserting jurisdiction over adjacent wetlands to establish (1) that the adjacent body of water constitutes a water of the United States (*i.e.*, a relatively permanent body of water connected to traditional interstate navigated waters) and (2) that the wetland has a continuous surface connection with that water with no clear demarcation between the

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

"waters" and wetlands. [2] The decision disposes of the "significant nexus" test that was previously in use for determining the CWA's jurisdictional reach, which could have included wetlands "adjacent" to or "neighboring" covered waters even when they were separated by dry land.

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

In short, the policy commits to forego enforcement for projects in *Sackett* Gap Waters[3] that comply with the federal 404 permitting requirements for such discharges prior to the *Sackett* decision. The purpose of the policy is to maintain the status quo vis-à-vis current protections for state waters and collect information on the number of projects impacting *Sackett* Gap Waters as the Division considers developing a dredged and fill regulatory program. The Division does not intend to take enforcement action for unpermitted discharges of dredged or fill material into state waters if:

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

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[2] *Id.* at 22.
[3] "*Sackett* Gap Waters" are state waters that were WOTUS pursuant to the pre-2015 federal regulations but that are no longer considered WOTUS post-*Sackett*.