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 – May 2, 2023, TAC meeting

DATE: April 26, 2023

---

## I. Lakes Reservoirs Nutrients Criteria (Regs. 85, 31, and 32-38) Rulemaking Update

The Colorado Water Quality Control Commission (the "Commission") held the hearing in this rulemaking proceeding from April 10-13, 2023. After significant negotiation prior to the hearing, the Water Quality Control Division (the "Division") amended its proposal to not seek a total nitrogen ("TN") standard for Chatfield Reservoir in this proceeding. This reflects CWA's requests in its prehearing statement, rebuttal statement, and surrebuttal statement, and CWA indicated support at the hearing for the Division's consolidated proposal as it relates to Chatfield Reservoir. The Division's proposal also did not propose to modify the site-specific chlorophyll a and phosphorus standards already promulgated for Chatfield Reservoir.

CWA filed a rebuttal statement in this rulemaking proceeding on February 15, 2023, and a surrebuttal statement March 30, 2023. The Surrebuttal responded to the Division's revised proposal provided to parties on March 10, 2023, and requested the Commission refrain from adding a total nitrogen standard to Chatfield Reservoir in this rulemaking proceeding. As recently as March 16, 2023, the Division was still seeking to impose the table value TN standard for cold water reservoirs on Chatfield Reservoir. However, the Division revised its proposal to no longer seek to add a TN standard to Chatfield Reservoir until 2028.

The Division changed its proposal multiple times over the course of this proceeding. First, the Division proposed to add a TN standard of 330 ug/L to Chatfield Reservoir beginning in 2023. Next, the Division proposed to add a TN standard of 380 ug/L to Chatfield Reservoir beginning in 2023. Next, the Division proposed to add a TN standard of 380 ug/L to Chatfield Reservoir with a delayed effective date of December 31, 2027. Most recently, in its consolidated proposal provided to parties on April 3, 2023—one week before the rulemaking hearing—the Division proposed not to add a TN standard to Chatfield

Reservoir until 2028 at the earliest. CWA supported this revised proposal, which was the result of significant negotiation and discussion with the Division.

At the conclusion of the rulemaking hearing, the Commission deliberated and voted to adopt the Division's proposal for Chatfield Reservoir. The Commission is scheduled to issue its final decision in this rulemaking proceeding on May 8, 2023, and the adopted proposal will take effect on September 30, 2023.

Because the Commission voted not to add a TN standard to Chatfield Reservoir at this time and did not propose to modify the reservoir's existing site-specific standards for chlorophyll a or phosphorus, SSD does not recommend appealing or seeking reconsideration of the Commission's final decision.

## II. Site Specific Nitrogen Standard

At the April 17, 2023, CWA Board of Directors meeting, the board voted to begin exploring the development of a site-specific TN standard to avoid application of the table value TN standard for cold water reservoirs to Chatfield Reservoir beginning in 2028. The draft final regulations that the Commission provided to parties on April 18, 2023, include information related to the development of site-specific nutrient standards. The pertinent provisions of the draft regulations are included below:

---

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

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

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

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

**3. Site-specific Standards for Nutrients**

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

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

***CODE OF COLORADO REGULATIONS*** ***5 CCR 1002-38***
***Water Quality Control Commission***

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

**a. Control Regulations**

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

Upper South Platte River: 6b (COSPUS06b; Chatfield Reservoir)

Cherry Creek: 2 (COSPCH02; Cherry Creek Reservoir)

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

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

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

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

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

<u>SSD recommends the TAC begin the process of developing a site-specific TN standard proposal for Chatfield Reservoir</u>.