WATER QUALITY CONTROL COMMISSION
STATE OF COLORADO

SURREBUTTAL STATEMENT OF
CHATFIELD WATERSHED AUTHORITY

IN THE MATTER OF PROPOSED ADOPTION OF 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)

Chatfield Watershed Authority ("CWA"), by and through its undersigned counsel, Somach Simmons & Dunn, submits this Surrebuttal Statement ("Surrebuttal") for the above-captioned matter to the Colorado Water Quality Control Commission (the "Commission") pursuant to the Commission's Prehearing Order entered on March 10, 2023.

I. Introduction

CWA opposes the Water Quality Control Division's (the "Division") proposal to apply its cold-water reservoir table value standard for total nitrogen ("TN") to Chatfield Reservoir. CWA requests the Commission refrain from adopting a TN standard for Chatfield Reservoir in this rulemaking proceeding. In the event that the Commission determines a need to impose a TN standard, however, the Commission should adopt the site-specific TN standard of 530 ug/L calculated for Chatfield Reservoir by the Division in its Rebuttal Statement, with a delayed effective date of December 31, 2027.

Given the ongoing evolution of the Division's proposal in this matter, which has rendered moot significant portions of CWA's prior filings, the Commission should consider this Surrebuttal to serve as CWA's final position in this rulemaking proceeding.

II. Background

CWA has been working to improve the water quality of Chatfield Reservoir for over four decades and is tasked with monitoring Chatfield Reservoir's regulatory compliance with state

nutrient standards. CWA has limited resources,[1] and administrative expenses like participation in this protracted rulemaking proceeding take away from water quality improvement projects within the watershed. The present rulemaking proceeding provides an example of how prolonged and expensive these proceedings can become for parties if proposals are not fully vetted and discussed prior to initiating a formal rulemaking.

As a result of substantial concerns regarding the Division's proposal, many of which likely could have been resolved had the proposal been shared and discussed in more detail prior to notice filing, multiple motions were filed requesting that the hearing in this matter be delayed.[2] In response to these motions and additional issues raised at the prehearing conference, the Commission delayed the hearing by approximately five months,[3] scheduled an additional status conference to discuss the delay,[4] and provided for the submission of additional pleadings not included in the original notice and schedule.[5] CWA has explained its concern with the application of the table value cold-water TN standard on Chatfield Reservoir,[6] and the EPA has indicated that table value standards are not appropriate for Chatfield Reservoir given its existing control regulation.[7] If the Commission adopts the Division's proposal to implement the table value TN standard for cold-water reservoirs on Chatfield Reservoir with a delayed effective date of 2027, CWA will almost certainly need to participate in future proceedings to seek a more appropriate standard or prepare for and develop a site-specific standard. However, if the Commission refrains from adopting a TN standard for Chatfield Reservoir at this time, CWA can continue to work with the Division outside of a formal rulemaking proceeding to further evaluate the need for a TN standard and, if appropriate, determine the correct standard.

III. Response to the Division's Modified Proposal

The Division has continually revised its proposal since the onset of this rulemaking proceeding. Most recently on March 14, 2023—less than one month before the rulemaking hearing in this matter, after the mandatory prehearing conference, and without any plan for parties to submit written responses prior to the hearing—the Division sent a revised proposal recommending a delayed effective date of December 31, 2027, for the proposed nutrient standards.[8] Prior to this modification to its proposal, the Division had advocated for the table value standards to go into effect immediately.[9] Given the uncertainty surrounding the Division's

---

[1] CWA's Responsive Prehearing Statement (Dec. 21, 2022) at 2.
[2] *See* Joint Motion to Continue Rulemaking Hearing (Aug. 31, 2022); *see also* Joint Motion for (1) Immediate Stay of Responsive Prehearing Statements and (2) Extension of Time of Rulemaking Deadlines and Hearing (Aug. 29, 2022).
[3] Commission's Procedural Order Regarding Joint Motions to Continue Hearing (Sept.7, 2022) at 1.
[4] *Id*. at 2.
[5] Prehearing Order of the Water Quality Control Commission (Mar. 10, 2023) at 8; *see also* Procedural Order Regarding Revised Hearing Deadlines and Status Conference (Sept. 19, 2022) at 1-2.
[6] *See* CWA's Responsive Prehearing Statement (Dec. 21, 2022); *see also* CWA's Rebuttal Statement, (Feb. 15, 2023).
[7] EPA's Responsive Prehearing Statement (Dec. 21, 2022) at 21.
[8] Division Revised Lakes Nutrients Proposal Options for Table and Regulation Mark-ups (Mar. 14, 2023) at 1.
[9] Division's Rebuttal Statement (Feb. 15, 2023) at 136.

proposal for Chatfield Reservoir, CWA requests additional time to further review and collect additional TN data prior to imposition of a TN standard.

A. CWA requests that the Commission refrain from imposing a TN standard on Chatfield Reservoir at this time.

While CWA appreciates that the Division's current proposal would provide additional time for the parties to better understand the appropriateness and accuracy of the table value nutrient standards, CWA continues to request that the Commission refrain from imposing the table value TN standard for cold-water reservoirs on Chatfield Reservoir. In fact, Chatfield Reservoir is one of four reservoirs in the state subject to a control regulation promulgated by the Commission pursuant to C.R.S. § 25-8-205.[10] Chatfield Reservoir has a history of regulatory compliance with Regulation 73 and a general lack of issues with toxic algal blooms.[11] Most importantly, CWA has presented evidence that the Division has improperly categorized Chatfield Reservoir as a cold-water reservoir.[12] As such, regulating TN levels in Chatfield with the table value standard for cold-water reservoirs would be improper.

The Division's varied TN calculations and recommendations for Chatfield Reservoir over the course of this rulemaking point to uncertainty regarding the proposed TN standard for Chatfield Reservoir. The Division first proposed a TN standard of 330 ug/L for Chatfield Reservoir in its Prehearing Statement,[13] then increased the proposed standard to 380 ug/L in its Supplemental Prehearing Statement after inclusion of additional Chatfield Reservoir data,[14] and then calculated an alternative TN standard for Chatfield Reservoir of 530 ug/L after the U.S. Environmental Protection Agency (the "EPA") pointed out that the Division's proposed value was not calculated from the chlorophyl a standard that the Commission has already adopted for Chatfield Reservoir.[15] Given this discrepancy, combined with the fact that the Commission has already adopted an alternative regulatory approach for Chatfield Reservoir through promulgation of Regulation 73, CWA requests the Commission refrain from imposing a TN standard on Chatfield Reservoir in the present proceeding. Because Chatfield Reservoir is currently in compliance with its existing nutrient standards, additional regulation at this time with insufficient supportive evidence of the need and accuracy of the proposed TN standard is not necessary to protect the reservoir's public uses.

B. If a TN standard is imposed, CWA requests the Commission adopt the site-specific TN standard for Chatfield Reservoir calculated by the Division.

As explained above, CWA requests that the Commission decline to impose a TN standard on Chatfield Reservoir at this time. In the event the Commission determines a need to impose such a standard, however, CWA requests the Commission adopt the TN standard of 530 ug/L, as

[10] *See* Chatfield Reservoir Control Regulation No. 73, 5 Colo. Code Regs. § 1002-73 ("Regulation 73").
[11] CWA's Responsive Prehearing Statement (Dec. 21, 2022) at 2.
[12] *Id*. at 4-6.
[13] Division's Prehearing Statement (Aug. 3, 2022) at 4.
[14] Division's Supplemental Prehearing Statement (Oct. 5, 2022) at 5.
[15] EPA's Responsive Prehearing Statement (Dec. 21, 2022) at 21-23.

calculated by the Division specifically for Chatfield Reservoir,[16] with a delayed effective date of December 31, 2027.

In its Rebuttal Statement, the Division uses its own recommended methodology for calculating site-specific nutrient standards[17] to calculate a site-specific TN standard for Chatfield Reservoir at the request of the EPA. The Division's calculation resulted in a site-specific TN standard of 530 ug/L for Chatfield Reservoir.[18] The Division opposes adoption of this standard, citing a need to consult with stakeholders first.[19] Based on CWA's review of Chatfield Reservoir's nitrogen data, and without endorsing the proposal, 530 ug/L appears to be a more appropriate TN standard for Chatfield Reservoir than the Division's proposed table value TN standard for cold-water reservoirs.

While CWA requests adoption of a site-specific TN standard for Chatfield Reservoir in the event the Commission determines a need to adopt a TN standard for the reservoir, CWA primarily requests that the Commission refrain from imposing a TN standard on Chatfield Reservoir in the present proceeding. This would provide additional time for the Division to consult with all of the stakeholders and propose an appropriate standard—one that interested parties may understand and support—in a subsequent proceeding.

IV. Response to Other Parties' Rebuttal Statements

In addition to the Division, the following parties also submitted rebuttal statements that discuss Chatfield Reservoir: the EPA, Colorado Parks and Wildlife ("CPW"), Plum Creek Water Reclamation Authority ("PCWRA"), and Centennial Water and Sanitation District ("CWSD"). CWA provides the following responses to these rebuttal statements.

The EPA "see[s] no compelling reason not to assign a TN standard" and 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."[20] The EPA also "support[s] the Division's classification approach that derives separate cross-lake relationships for cold and warm lakes," but caveats 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."[21] CWA disagrees that it is preferable to adopt an incorrect standard now and seeks to revise it in the future rather than waiting to adopt a correct standard, and reiterates the argument on this topic contained in CWA's Rebuttal Statement.[22] In addition, CWA asserts that the Division's and EPA's uncertainty regarding the correct method of categorizing the state's lakes and reservoirs supports CWA's position that more work should be

[16] Division's Rebuttal Statement (Feb. 15, 2023) at 143-145.
[17] *See* Division's Prehearing Statement (Aug. 3, 2022), Exhibit C (in which the Division provides "Secchi-based Site-specific Equations" for calculation of site-specific nutrient standards for lakes and reservoirs).
[18] Division's Rebuttal Statement (Feb. 15, 2023) at 143-145.
[19] *Id*. at 144.
[20] EPA's Rebuttal Statement (Feb. 15, 2023) at 30.
[21] *Id*. at 4.
[22] *See* CWA's Rebuttal Statement (Feb. 15, 2023) at 2.

done prior to imposing the table value TN standard for cold-water reservoirs on Chatfield Reservoir.

CPW confirms that Chatfield Reservoir "has never tested positive for algal toxins."[23] CPW also indicates concern "that CWA has not shared its most recent TN data with [the Division]."[24] CWA is happy to share all of its data for Chatfield Reservoir with CPW; any failure to share data in the past was unintentional and the result of inadvertence.

CWA agrees with PCWRA that "[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."[25] PCWRA also points out that "[h]ad 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."[26] CWA supports PCWRA's request that the Commission refrain from adopting a TN standard for Chatfield Reservoir in the present proceeding.

CWSD points out that Chatfield Reservoir "attains both [its] phosphorous and chlorophyll a standards," indicating that the reservoir's water quality and public uses are protected "through the regulation of phosphorus alone."[27] CWA agrees.

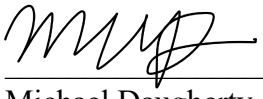
V. Conclusion

For the reasons stated above, CWA requests that the Commission reject the Division's proposal to impose the table value TN standard for cold-water reservoirs on Chatfield Reservoir with a delayed effective date. CWA requests that no TN standard be added at this time. However, in the event the Commission determines a need to impose such a standard, CWA requests the Commission adopt the site-specific standard of 530 ug/L calculated by the Division specifically for Chatfield Reservoir.

While this Surrebuttal Statement addresses specifically the Division's revised proposal, CWA's request that the Commission refrain from adopting a TN standard for Chatfield Reservoir at this time also applies to all alternate proposals presented in this proceeding.

Dated this 30th day of March, 2023.

SOMACH SIMMONS & DUNN, P.C.



Michael Daugherty
Counsel for Chatfield Watershed Authority

[23] CPW's Rebuttal Statement (Feb. 15, 2023) at 18.
[24] *Id*. at 19.
[25] PCWRA's Rebuttal Statement (Feb. 15, 2023) at 8.
[26] *Id*. at 5.
[27] CWSD's Rebuttal Statement (Feb. 15, 2023) at 5 (emphasis omitted).