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M E M O R A N D U M

TO: Chatfield Watershed Authority ("CWA") Board of Directors ("Board")

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

SUBJECT: Legal Report – April 17, 2023, Board meeting

DATE: April 10, 2023

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

The Colorado Water Quality Control Commission (the "Commission") began the rulemaking hearing in this proceeding on April 10, 2023. After significant negotiation, 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 ("Rebuttal"), and surrebuttal statement ("Surrebuttal"), and CWA supports the Division's consolidated proposal as provided to parties on April 3, 2023.

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 has since revised its proposal to not seek to add a TN standard to Chatfield Reservoir at this time.

The Division has repeatedly revised its proposal throughout the rulemaking 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 in this proceeding. CWA supports this revised proposal, which is the result of significant negotiation and discussion with the Division.

As of the drafting of this report, the Commission has not yet concluded the rulemaking hearing in this proceeding, and it is unclear whether the Commission will adopt the Division's proposal. The Commission is scheduled to issue its final decision in this rulemaking proceeding on May 8, 2023, and the revised standards are scheduled to go into effect on September 30, 2023.

i. Application for Reconsideration and Judicial Review

While CWA supports the Division's consolidated proposal as of April 3, 2023, the Commission may reject the Division's proposal or adopt it with amendments. 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 May 8, 2023, as scheduled, CWA would have until June 7, 2023, to file an application for reconsideration or to seek judicial review.

Given the Division's consolidated proposal, which does not seek to add a TN standard to Chatfield Reservoir, conforms with CWA's position, it is unlikely the Commission will issue a decision that CWA will want to appeal. However, CWA has a TAC meeting scheduled for June 6, 2023, during which the opportunity for appeal could be discussed. 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 how it will affect CWA, and whether to recommend TAC discuss the option of appeal.

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 recommended against in this 2023 rulemaking proceeding, and TAC agreed.