

COLORADO WATER UTILITY COUNCIL
Rocky Mountain Section of the American Water Works Association

MINUTES
COLORADO WATER UTILITY COUNCIL MONTHLY MEETING

November 5, 2010 10:00 a.m.

Denver Water

1600 W. 12th Avenue
Three Stones Building

CDPHE—Ron Falco

- Ron introduced Tyson Ingles. He is the lead engineer and has been with the Division for about a year. Tyson has been working on:
 - acute situation responses;
 - the implementation of Policy 4;
 - sanitary surveys of wastewater dischargers to surface water;
 - a new policy on groundwater under the direct influence of surface water which will be forthcoming;
 - the needs survey.Tyson will start updating the design criteria for drinking water in the spring of 2011. In the future, design criteria for both water and wastewater will occur on a more regular basis than in the past.
- Due to the recent election, there will be some changes at CDPHE starting in January. There could be a new executive director, chief medical officer, and director of environmental programs.
- Budget

The Division has not received any additional word on budget cuts, pay cuts, or furloughs. The state budget deficit is \$1.1 to 1.2 billion.

The new members of the Joint Budget Committee will be named soon.

It is still possible that about \$1,000,000 of drinking water funding may be cut from the general fund. If that happens, matching dollars from EPA will also be lost and the funding would

need to be filled in with fees to avoid substantial resource losses at the Division. A hearing with the Joint Budget Committee is scheduled for right before Christmas.

The Water Utility Council will provide an opinion to the JBC on the funding/fee issue. To help individual utilities make a more informed decision, Ron will provide some discussion of impacts at the next meeting, including how dollars are leveraged. Anne will draft the opinion.

- The CWUC and the Safe Drinking Water Program are on the April 2011 agenda for the Water Quality Control Commission. Work on what we want to share with them can begin after the start of the new year.
- Comments on the Revised Total Coliform Rule were submitted and they were also shared with the CWUC membership

610 Review

By law, EPA is required to review regulations every six years. These reviews are referred to as 610 Reviews and the goal is to determine the impact of rules on small systems. 610 Reviews do not have any specific follow up action prescribed, but obviously significant findings could lead to further actions.

EPA is currently asking for comments on the arsenic rule. CDPHE will most likely utilize the comment period to voice concern about the effects of requiring further reduction in the MCL without any accompanying funding. CDPHE's comments will probably also include information on the cost of compliance in Colorado.

Wastewater, Oct meeting

Al sent these notes from the October 20 WWUC meeting:

- A presentation was given by Jeff Litteral from the Colorado Water Quality Monitoring Council regarding the Council's work and the data sharing project.
- Mark Shugart from the EPA and Lisa Pine from the Water Quality Control Division discussed the highlights of an Energy Management Pilot program. \$300,000 is available to water and wastewater utilities to fund green projects including energy audits.
- Updates were given on the Multi Metric Index (MMI) status and the progress of the Colorado Nutrient Coalition (CNC) with the Nutrient Study.

Minutes from this wastewater meeting are posted at <http://cwwuc.org/>.

Water Conservation Committee—Alyssa

- The Best Practices Guidebook is now printed and also available on website for free.
- The conservation committee is in process of developing a certificate program that will be similar to one already in place in the pacific northwest.
- Consideration is being given to cutting Denver Water's water conservation budget, including some of the money for rebates and advertizing. The conservation budget, which includes public affairs, rebates, and advertising, will likely go from the current 11.4 million down to 9 million. The decrease was not approved yet because other cuts are still being considered.
- Denver water is 20% below their pre-drought usage numbers with an estimated 4% being a result of the depressed economy.
- The Conservation Board is looking at ways to enforce their own conservation measures.
- There are reporting requirements in House Bill 1051. DRCOG and the Colorado Municipal League are curious about how much water is being saved as a result of conservation efforts. It may be that some individuals think less money will be needed from the loan program because a savings in water might offset the dollars needed for projects.

Policy 1—Jim Miller

- Policy 1 has been finalized and signed. It should be on the website by next week.
- Steve Gunderson responded to the comments he received on Policy 1 from the CWUC and the Permit Issues Forum. A summary of the comments, and Steve's response to them, are in Attachment A on pages 5-7.

Quality and Policy Committee—Jim Miller

- Section 9 Revision

Solid Waste and water utilities will have their next meeting on 11/15. Solid Waste staff will provide a status update to their Commission on 11/16. Jim will attend the Commission meeting and is looking for others to attend. Jim will inform them of the CWUC's goal statement that was voted on and approved at the October Council meeting.

Solid Waste has split the work group into two, with water utilities in one and electric utilities in the other. The reason for this may be to allow staff to focus on issues specific to each group.

Solid Waste would like to gather more data from each of the groups, and will likely focus first on the implementation of the regulation at Type B facilities. There has been no word

regarding the request for a cost benefit analysis. DORA has not forwarded the request to solid waste yet.

- **Policy 4 Guidance**

A draft of the guidance will be out next week. The Division will be looking for comments on the content of the guidance. Division staff will work on redesigning the document to be shorter and more user-friendly.

- The effluent guideline for turbidity (280 NTU) at construction sites is being challenged. EPA acknowledges the limit was not set appropriately. The limit has been stayed until EPA does further work.
- The Colorado Water Conservation Board has submitted a rebuttal statement in response to comments received regarding the revision of the floodplain regulations. See Attachment B, pages 8-16. Comments were made by Weld County, the City of Greeley, Denver Water, Mesa County, and the CO Stone, Sand & Gravel Association. A cost benefit analysis was done but it lacks input from utilities.

Legislative Committee Report—Chris/Bud

- No report.

Membership committee report--Greg Moore

- Send updates to Greg.

Open Discussion

- Sara Clark—EPA is considering more changes to the lead and copper rule.
- Sean—Regarding nutrients, the idea of a control regulation has support from the division. The next meeting is 11/9/10 at 1.
- At the October meeting, we briefly discussed asking Sara to help us work on a nutrient criteria position for the June hearing. We're unsure about how we would pay for this. Sara will do some checking to see if she can fit it into her schedule. It will be easier to work on our position when we know more details of what the Division is proposing.
- Randy—Westminster has new extended work hours for the days of Mon – Thurs, and generally no working hours on Friday. Should we reconsider the time and or date of our regularly scheduled meetings? This will be on the December agenda.

Next Meeting

- The next meeting will be on December 3rd, same time/place.

STATE OF COLORADO

Bill Ritter, Jr., Governor
 Martha E. Rudolph, Executive Director

Dedicated to protecting and improving the health and environment of the people of Colorado

4300 Cherry Creek Dr. S. Laboratory Services Division
 Denver, Colorado 80246-1530 8100 Lowry Blvd.
 Phone (303) 692-2000 Denver, Colorado 80230-6928
 TDD Line (303) 691-7700 (303) 692-3090
 Located in Glendale, Colorado
<http://www.cdphe.state.co.us>



Colorado Department
 of Public Health
 and Environment

November 2, 2010

Ms. Christine E. Johnston, Chair
 Permit Issues Forum

Mr. Tom Montfort, Chair
 Colorado Water Utility Council

Dear Christine and Tom:

Thank you and the Forum and Council members for the consolidated comments we received in response to draft Policy 1, the Division's Implementation Policy Framework. The comments contained in your letters of October 14 and 15, 2010, were reviewed, considered and reproduced in the table below, along with our response. We will make the indicated revisions in draft Policy 1. In addition, we will include revisions that resulted from internal and other stakeholder reviews. For example, we will add a sentence to the Policy that will make it clearer that Policy 1 does not apply to or affect actions of Colorado's Water Quality Control Commission or Board of Health.

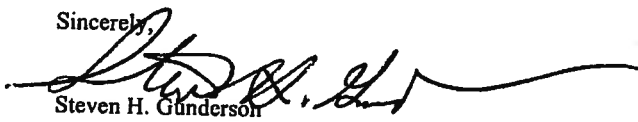
COMMENT	RESPONSE
<p>There may be some confusion with respect to strict adherence to "procedures." For example, on page 2, it states that "procedures which are not set forth in rules, but rather in internal policies or stand alone documents, are not binding, but nevertheless should be adhered to by the Program." It may be difficult to be not binding and adhered to at the same time. Guidance should also be provided as to when Division staff may vary from Division policy.</p>	<p>The Division's implementation policies and associated procedures are not meant to be binding as rules, so they are exempt from formal rulemaking otherwise required by statute. Nevertheless, for the policies or procedures to have value with respect to achieving transparency, consistency and efficiency in decision-making, they should be generally applicable, and provide for exceptions when appropriate. Paragraph 6 of draft Policy 1 provides flexibility, managerial control of deviations and stakeholder knowledge of when a deviation has been made. Implementation of paragraph 6 will address any confusion that may otherwise arise.</p>
<p>It would be more beneficial if the policies set forth guidelines for decision-making, especially use of best professional judgment. The policies could identify key facts that could make for different resolutions or decisions.</p>	<p>Agrec – To address this comment, a new policy statement 2 will be inserted (and subsequent paragraphs renumbered) that reads as follows: "2. Each implementation policy may include guidelines for decision-making, factors that influence best professional judgment or key facts that could lead to different resolutions or decisions."</p>
<p>We recommend that new program policies should also be reviewed and approved by the Division Director, in addition to the appropriate Program Manager. This measure would ensure consistency of implementation and that the Division as a whole is congruent in opinion of a new policy.</p>	<p>The decision to vest approval of implementation policies with the Program Managers rather than the Division Director was deliberate. Given the detailed regulatory nature of implementation policies, the Program Manager is seen as the most knowledgeable person to decide if the policy is needed and appropriate. There are built-in opportunities for Division Director knowledge of and participation in the policy development and coordination</p>

	<p>process. For example, Figure 1 shows that the Division Director will be involved in situations when policies are to be discussed with the Water Quality Control Commission or Board of Health. The Division Director is also routinely briefed by each Program Manager on a frequent basis. Additionally, we believe the coordination and issue resolution avenues addressed in draft Policy 1 statements 3 and 7 will be sufficient to ensure that staff with a role in policy implementation has an opportunity to have their opinions valued in the development process.</p>
<p>In several places, the policy discusses the need for a periodic and/or triggered review, but does not discuss the process or time period as to when this would occur. This policy should clearly state that each policy must clearly state the review schedule and the circumstances for which a triggered review might occur. We also recommend that the Division maintain clear document control on the policy and procedures that are developed.</p>	<p>Implementation of draft Policy 1 is an ambitious undertaking that will improve the transparency, consistency and efficiency of programmatic decision-making over time. While we would like to commit to a fixed schedule for reviewing all policies, this is not feasible within existing and possibly shrinking resources. As exceptions to policies are made, the Program will evaluate the need to consider revising the policy to reflect the exception. We agree that clear document control of promulgated policies and procedures is necessary and believe draft Policy 1 statement 5 adequately addresses this concern.</p>
<p>It appears that Policy Number 1 is intended for new policies and procedures; however, it is not clear as to how existing policies will be handled. The policy should include further guidance as to the process and timing for bringing existing policies and procedures under this policy.</p>	<p>Policy 1 is intended to address new policies and procedures. The pace and timing of efforts to integrate old policies will depend on program priorities, resource availability, other mandates, and EPA/Colorado PPA commitments.</p>
<p>We recommend that the first sentence of the Policy be expanded as follows: Colorado statutes that protect the public health and the environment authorize the Colorado Water Quality Control Commission and the Colorado Board of Health to promulgate regulations applicable to public water systems, wastewater dischargers, industrial dischargers, stormwater dischargers, and other regulated sectors. and bathing beach and swimming pool operators. We feel that because this is a Division policy, it should focus solely on areas under the purview of the Division.</p>	<p>Additions to the first sentence of the policy will be made to include "industrial dischargers, stormwater dischargers, and other regulated sectors". The reference to the Board of Health and bathing beaches and swimming pool operators is appropriate and will be retained as these functions are under the purview of the WQCD.</p>
<p>It was unclear how the referenced Implementation Policy Framework Procedure 1 (page 3) complements the Policy since it was not attached and could not be evaluated.</p>	<p>Procedure 1 will lead to defining internal actions, such as forms and workflow among program units. We intend to continue development of Procedure 1, consistent with the availability of resources as we begin implementing Policy 1. Until Procedure 1 is developed, the Division will ensure that each of the steps identified in Section 3 of Policy 1 is met. If progress on the procedure reveals the need, a Policy 1 revision effort can be initiated.</p>
<p>We recommend that the seventh bullet on page 3, under Policy, paragraph 2, and in paragraphs 3 and 4 on this page, and in paragraphs 6, 7, and 8 on page 4, Program Manager should replace or be supplemented with Division Director.</p>	<p>As explained above, the decision to vest authority for implementation policy approval with Program managers rather than the Division Director was deliberate and appropriate for the reasons cited.</p>
<p>Paragraph 6 (page 4) concerns when a policy is not</p>	<p>Agree. The narrative in Paragraph 6 will be revised to</p>

<p>appropriate. The wording appears to make it seem that any deviation is unauthorized. Perhaps this section should refer back to "good cause" referenced earlier in the document, e.g., "When there is good cause to not apply an approved policy or an approved procedure, a decision to not be consistent with a policy or procedure may be made if the following conditions are met..."</p>	<p>read as follows: "6. When there is good cause to not apply an approved policy or an approved procedure, a decision not consistent with a policy or procedure may be made if the following conditions are met..."</p>
<p>It is not clear in Paragraph 8 (page 4) whether the reference to initial publication is to a "public" or "internal" publication.</p>	<p>Draft Policy 1 statement 5 establishes a requirement for policies and procedures to be accessible to the regulated community and the public on the Division's web site no later than their effective date. This is applicable regardless of whether a policy or procedure is new or revised.</p>
<p>As discussed in the Permit Issues Forum meetings, we would like to be aware of the policies and procedures that govern Division action, in particular as those actions relate to discharge permits. For example, the recent Standard Operating Procedure for Permit Process Participation Opportunities. It appears that according to Paragraph 8 on page 4, this SOP would not have been provided to stakeholders and as we have discussed, the workgroup feels very strongly that this SOP should have been vetted in the workgroup process before being issued. The policy should be clear about what policies and procedures should go through the stakeholder process.</p>	<p>Draft Policy 1 is narrowly focused on program implementation policies and the associated procedures by which the policies will be implemented as defined in Draft Policy 1. It does not attempt to address all procedures the Division might develop outside of implementation policies and the possible forums for stakeholder coordination within Division programs. Where a procedure would have a direct impact on the regulated community, the Division would see benefit in coordinating with stakeholders before that procedure is implemented. The Program Managers are in the best position to balance the additional resource costs of upfront stakeholder coordination with the degree to which stakeholders may be impacted by any policy or procedure. We believe that with the high level of stakeholder interest in Program decisions, this process will be efficient with respect to limited program resources.</p>
<p>We believe the policy should address whether MOAs and MOUs are instruments of policy, and whether or not they are subject to Policy 1. If they are, the policy needs to address the issue and if not the policy should specifically state that they do not apply.</p>	<p>Policy 1 is narrowly crafted to apply to program implementation policies issued when it is necessary to interpret or determine the appropriate approach to exercising flexibility in the law or regulations while making case specific decisions. It carefully defines the terms: WQCD Program, Law, Rule or Regulation, Policy, Implementation Policy, and Procedure. Policy 1 is not applicable to MOA's or MOU's. We believe that the definitions provided in Policy 1 make it sufficiently clear that MOA's and MOU's are not addressed by Policy 1.</p>
<p>We would also appreciate the Division's periodic publication of the list of policies under development as well as the maintenance of a list of policies in effect. This will help the regulated utilities stay up to date and in compliance with division recommendations or policies applying to their operations.</p>	<p>Agree. We intend to publish all new policies on the Division's web page. The pace and timing of efforts to integrate old policies into this effort will depend on resource constraints, other mandates, and EPA/Colorado PPA commitments.</p>

Again, thank you for your comments.

Sincerely,



Steven H. Gunderson
 Director, Water Quality Control Division

BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

Rebuttal Statement of Staff of the Colorado Water Conservation Board

IN THE MATTER OF THE CWCB STAFF'S RECOMMENDATIONS FOR REVISING THE
RULES AND REGULATIONS FOR REGULATORY FLOODPLAINS IN COLORADO

2 CCR 408-1

Pursuant to the CWCB's authority to promulgate rules and regulations concerning floodplains and flood loss reduction in Colorado, 2 CCR 408-1 ("Rules), the Staff ("Staff") of the Colorado Water Conservation Board ("CWCB") hereby submits its Rebuttal Statement in response to certain statements from other parties in their Prehearing Statements regarding Staff's recommendations to revise the Rules.

REBUTTAL OF STATEMENTS MADE BY WELD COUNTY

Statement #1: "...the amended Rule 6 should specifically exempt oil and gas production and treatment facilities from the definition of "covered hazardous materials."

Rebuttal: This subject was discussed at the final meeting of the Technical Advisory Committee (TAC) in response to concerns brought forward by Weld County and other parties. The TAC elected to present the final definition of Critical Facilities as posted on September 30, 2010. The TAC intentionally left oil and gas facilities in the final definition. The TAC stated that these remain obvious issues of public health, safety, and welfare, and that technical and feasible design and location solutions exist to meet these requirements. Further, nothing in these Rules prohibit these activities from occurring within floodplains as long as the safety issues are addressed.

Statement #2: "Proposed Rule 8 would eventually result in the designation of approximately 50 percent of currently delineated floodplains as half-foot floodway. That amounts to a 30 percent increase in the areas affected by the floodway in Weld County."

Rebuttal: Weld County has provided no evidence to support this allegation. As stated in their supporting documents, Weld County asserts that the "1/2 foot floodway was calculated by the City of Greeley and is estimated as the approximate location of vertical midpoint between the current 1 foot floodway and the 100-year floodplain." While this may be acceptable for a rough approximation of the impact of the floodway, this is not a proper scientific calculation of the 1/2 foot floodway, and should not be treated as such.

Weld County also performed a floodway analysis for a sample reach along Lone Tree Creek near Ault. The CWCB is not rebutting the results of this sample reach, but it has not been sufficiently demonstrated that this small reach can be extrapolated to the entire county as a whole. In fact, a review of Weld County floodplain maps indicates that the vast majority of the County is mapped as approximate floodplains (Zone A). Both the draft Rules and published FEMA Guidance

(FEMA 480, as referenced in the CWCB Prehearing Statement) are very clear that floodway regulations only apply in areas of detailed study, which incorporate only a small portion of mapped stream reaches in Weld County. Should Weld County decide to apply floodway regulations to areas of approximate floodplains that would be a local decision but is not a requirement based on these Rules. If the County decides to administer floodplain regulations only for detailed stream reaches, then the stream miles subject to floodway regulations would be small compared to the total delineated stream miles in the County.

While staff acknowledges that areas of floodway designation will increase, the estimate of 30% should be treated as only an estimate. For some stream reaches, there would be little to no change, and for others, there could be a more noticeable change. The level of change is dependent on specific site conditions.

Statement #3: “Under the proposed amended Rule 8, the approximately 90 square miles of new floodway in Weld County... would be undevelopable and subject to a drop in value.”

Rebuttal: The quantification of new floodway areas in Weld County has not been substantiated – see rebuttal to Statement #2. In addition, Rule 8 does not make floodways undevelopable. There are many examples of development in floodways in Colorado. Rule 8 does require safer construction that may require mitigation or other design modifications, as the proposed Rules do not render the floodway areas as undevelopable.

Statement #4: “Proposed amended Rule 8 does not offer an option for a rural standard more appropriate for agricultural areas.”

Rebuttal: The goal of these Rules is to provide uniform standards for the State of Colorado. Treating rural areas differently than urban areas opens the door for many potential problems or inequities including how a rural area is defined and how disaster assistance would be applied to areas of different standards. As outlined in the rebuttal to Statement #2, the vast majority of rural areas in Colorado are mapped using approximate methods, and this is unlikely to change in the future. As such, most rural areas, most notably those with no regulatory floodplains or with only approximate regulatory floodplains, will not be subject to Rule 8.

Statement #5: “Proposed amended Rule 8 would not require mapping the half-foot floodway for floodplains currently only mapped to a level of detail that FEMA calls “Approximate Zone A.” The majority of FEMA-designated floodplains in Weld County have been mapped as Approximate (Zone-A), without detailed maps, BFEs [base flood elevations], floodways, survey data or cross-sections, or computer modeling. However, under the proposed amended Rule 8, as a point of consistency, Weld County would have to request that any new development project provide maps showing the half-foot floodway in order to ensure that we do not allow new structures in the new floodways as we think ahead to future uses of those structures.”

Rebuttal: Weld County correctly states that Rule 8 does not apply to approximate floodplains. If they elect to extend Rule 8 to approximate floodplains, this is a local decision but is not required by these Rules.

REBUTTAL OF STATEMENTS MADE BY THE CITY OF GREELEY

Statement #6: “The Benefit-Cost Analysis...provided for the ½ Foot Floodway, Rule 8, uses assessed values rather than actual values when calculating the land value impact to property owners...The one time land value impact to property owners should be based on actual values, not assessed values. Actual values of vacant parcels in the 1 foot floodway for the studied stream reach are approximately 345% of the assessed values.”

Rebuttal: The original calculations computed benefits and costs in terms of assessed valuation because the assessed values are more directly linked to the local government benefits and costs because they are the basis for municipal taxes. However, in order to address concerns for the City of Greeley, Staff has performed a revised analysis that presents results based on actual valuation as opposed to assessed valuation. These results are presented in the addendum to this report, issued on November 1, 2010, and referenced in Staff’s Prehearing Statement.

Statement #7: “The Benefit-Cost Analysis provided miscalculates the reduced tax revenue to the County. Section 3.4.3 states that an average mil (sic) levy of 75.0 is being used. However, the reduced tax revenues listed in the Benefit-Cost Analysis appear to use an average mil (sic) levy of 7.5.”

Rebuttal: Staff acknowledges this oversight and incorporated the correct value in the addendum referenced in the rebuttal to Statement #6.

Statement #8: Greeley attached their own benefit-cost analysis results and referred to them as “The Corrected Benefit-Cost Analysis.” They stated in their Prehearing Statement that “[t]he Corrected Benefit-Cost Analysis...substantiates the City of Greeley’s contention that the fiscal impacts of a ½ foot floodway to individual property owners and the general public will be substantial.”

Rebuttal: Staff disagrees with this opinion. The “Corrected Benefit-Cost Analysis”, attached to the City of Greeley’s Prehearing Statement, asserts that costs associated with the floodway impact should be referenced to actual values (stated to be 345% higher than assessed values) but the analysis implies that benefits associated with avoided flooding should be associated with the lower assessed values. This is incorrect. As both sides of the equation (benefits and costs) are a function of the same basis, they must both either use assessed values or actual values. In the original report, assessed values were used. In response to the City of Greeley’s comments (see Statement #6), the analysis was restudied using actual values. Results still show that the benefits outweigh the costs.

Statement #9: “The number of parcels impacted by the floodway will increase by an estimated 66% (220 to 366 – see Exhibit B).”

Rebuttal: While many parcels would be impacted by new floodways when they are mapped in the future, a large number of parcels in the entire floodplain are positively impacted. This proposed Rule 8 calls for wiser development that will avoid pushing up flood levels on these

already developed properties, thus working to avoid higher damages to these existing structures that would have resulted without the proposed rule in place.

REBUTTAL OF STATEMENTS MADE BY DENVER WATER

Statement #10: “Water Utilities should be given a specific exemption similar to the exemption given to waste water treatment plants.”

Rebuttal: Staff brought this concern to the final meeting of the TAC. The TAC, composed of outside stakeholders at the municipal, county, state, and federal level, disagreed with this position. The TAC stated that while waste water facilities and hydroelectric power plants by their very nature must be located near waterways with few, if any, design alternatives available, there are many considerations that could be applied to water treatment facilities. Denver Water acknowledged this fact during meetings with CWCB staff to discuss this subject. Denver Water expressed concern that while they can, and generally do, avoid floodplains now, they are concerned about their historic facilities. However, these Rules are not retroactive to existing facilities. Supply of clean drinking water to citizens, even during times of natural disasters, is an obvious issue of public health, safety, and welfare.

Statement #11: “A public utility should have to prove the redundancy of its utility plant facilities to the local authority receiving service from the public utility and not the local authority which has jurisdiction as the authority which has jurisdiction may not necessarily receive the service from the local utility and may not be in a position to determine the reliability of the public utility’s system.”

Rebuttal: Staff disagrees with this suggestion, and, in fact, believes if it were to be incorporated into these Rules that it would violate minimum standards of the National Flood Insurance Program. It is a basic tenet of floodplain management that local jurisdictions have the authority and responsibility to manage their own floodplains based on criteria set at state and federal levels, or stricter criteria outlined in their own local ordinance. Removing this ability and placing it within the hands of an external entity merely because they are the beneficiary of the activity not only violates this basic tenet, but also sets a dangerous precedent for other types of activities. The local authority with land use jurisdiction is still responsible for activities within its regulatory floodplains, regardless of who ultimately uses the service. If this is not withheld, staff believes the local authority could be in violation of the National Flood Insurance Program and subject to sanctions by FEMA.

Statement #12: “The term ‘new addition’ should be stricken because it is redundant as a result of the incorporation of the term ‘substantial change’, and is extremely broad in its definition.

Rebuttal: Staff disagrees with this opinion. The term “addition”, specifically defined in the Rules, has a different definition than “substantial change”, and is not redundant. Additions are treated differently than substantial changes in how the regulations are applied. The definition of addition is clear and is not “extremely broad”. This is the case with existing regulations, and the CWCB is not proposing to change FEMA standards and/or current processes.

Statement #13: “Local authorities lack the technical expertise to make a determination of a facility’s value because frequently critical facilities are unique, [and] serve a specialized purpose. The value of a structure should be determined based upon the owner’s estimate of the replacement cost of the structure.”

Rebuttal: Substantial change determinations are a longstanding and current process of the National Flood Insurance Program. These Rules set higher criteria upon determination of the Substantial Change but intentionally do not alter how the processes are conducted and decisions are made. The method for making this determination in place today will continue to be the method used if these Rules are enacted, and this is a basic and minimum requirement of the National Flood Insurance Program. Removing the authority and responsibility to make these decisions from the local jurisdiction having land use authority may render that jurisdiction in violation of the National Flood Insurance Program and subject to sanctions by FEMA, similar to Statement #12. It is Staff’s suggestion that the utility work with the local government during these processes, and it is Staff’s experience that in cases when the “local authorities lack the technical expertise”, they often do, in fact, consult with the facility owner when making the determination.

REBUTTAL OF STATEMENTS MADE BY MESA COUNTY

Statement #14: “If stricter standards are a national need FEMA should be taking the initiative to implement stricter minimum standards by making the NFIP minimums stricter.”

Rebuttal: Staff respects Mesa County’s opinion on this matter. However, FEMA has long encouraged state and local governments to enact higher standards. In Title 44 of the Code of Federal Regulations Part 60.1(d), it is stated that “...any floodplain management regulations adopted by a State or community which are more restrictive than the criteria set forth in this part are encouraged and shall take precedence.” FEMA has long recognized the need for higher standards, but the implementation of these higher standards is not limited to FEMA’s actions. Many other states and many communities within Colorado have already enacted higher standards similar to those proposed in these Rules.

Statement #15: “CWCB states in the Cost, Benefit, and Regulatory Analysis dated October 14, 2010 that the cost of compliance with the new rule is effectively the same as the existing rules. Mesa County disagrees with this position...This will increase the number of property owners that need to pay for additional design work to design improvements to their properties in the floodway ways (sic) so that they do not increase the BFE.”

Rebuttal: CWCB Staff holds firm to its original statement that the costs to administer these Rules are effectively the same as with the existing rules. While these Rules set higher criteria for existing processes, the processes themselves are not altered. The regulatory infrastructure already in place (such as existing local staff resources) will not need to be increased or altered.

Mesa County appears to have misunderstood what the CWCB Staff stated. The CWCB Staff did not state that the costs during design and construction to meet these higher standards are the same as existing. CWCB Staff is not making this assertion and did not in the original report. Staff acknowledges that it may cost more to design and construct activities to meet these higher criteria, and these costs were clearly explained in the report. These can be viewed as being similar to increased design and construction costs due to plumbing, structural, and electrical

codes that may exceed minimum standards. However, like those codes, the higher criteria proposed in these Rules is being proposed for the sake of public safety, and it has been demonstrated that the benefits of these higher standards outweigh the costs.

Statement #16: “Increasing the widths of the floodway, which the ½ foot rise criteria will most likely cause, will further limit the uses of the properties in these already economically depressed areas. Residents that live in these areas do not choose to live in these areas; these are the only areas they can afford to live in.”

Rebuttal: Mesa County appears to be implying that these Rules unfairly target the lower income segment of society. These Rules are proposed to be uniform throughout the state and apply merely to the hazard, not the residents. Staff can provide numerous examples in which floodplain areas are desired and inhabited by wealthy landowners who want to live near a waterway. In many cases, floodplain land and adjacent areas can be proven to be more valuable due to the recognition of water as an amenity. In any case, it is not appropriate to ignore the safety of impoverished residents simply because they are impoverished. They are entitled to an equal level of public health, safety, and welfare. In many recent national disasters, a frequent critical opinion expressed following the disaster is that the government allows impoverished people to live in hazardous areas and does nothing to protect them. These Rules will help limit this criticism within the State of Colorado in regards to the flood hazard in regards to future construction.

Statement #17: “The result of a model is only as good as the input data or base data...With all these assumptions built into modeling, Mesa County does not believe the accuracy of the models support (sic) the ½ foot rise criteria.”

Rebuttal: These proposed Rules only set higher criteria to existing processes and models and do not in any way alter the process itself. The modeling and implementation of floodways has been in effect for decades. While Staff acknowledges the concerns regarding the precision of the models, it is the current standard for applying floodway principles, and enacting higher criteria does not reduce the precision of the existing process. Staff also believes that assumptions and limited precision are a reality in the implementation of any safety code. The presence of assumptions and limited precision does not take away from the need for safety standards to be in place.

Statement #18: “The CWCB analysis report did perform a Benefit Cost Analysis (BCA) for the implementation of Rule 8 on a test reach, which indicated a BCA of greater than 1.0 is possible with the stricter rise criteria. The input data for the BCA is very site specific. CWCB states in the analysis report that there was not enough time and funding to perform this analysis on every basin across the state. However, the CWCB analysis report implies that the stricter rise criteria will resort (sic) in a similar analysis state wide, without the actual data to back up the implication. Mesa County does not believe the BCA is an accurate state wide representation. Based on information discussed above, Mesa County is concerned that the costs will outweigh the benefits.”

Rebuttal: The test reach analysis was performed following a suggestion by the BCA Focus Group to apply the floodway rule to a real life example to an actual stream system. Because the

benefits and costs of the floodway rule are site specific (as acknowledged by Mesa County), it is impossible to conclusively analyze the entire state with a specific reach. This analysis was performed as an example based on guidance from and information provided by the BCA Focus Group and was not declared to apply to the State as a whole.

REBUTTAL OF STATEMENTS MADE BY COLORADO STONE, SAND & GRAVEL ASSOCIATION

Statement #19: “We would request that all sand and gravel mining operations be on a list of “excluded critical facilities”...Secondly, on behalf of our affiliate construction industry associations, the Colorado Asphalt Paving Association (CAPA) and the Colorado Ready Mixed Concrete Association (CRMCA), we would similarly request that all concrete and asphalt plants be added to a list of “excluded critical facilities.””

Rebuttal: Staff brought this concern to the final meeting of the TAC. The TAC, composed of outside stakeholders at the municipal, county, state, and federal level, disagreed with these proposed exclusions. However, the TAC did not believe that sand and gravel mining operations or concrete and asphalt plants would generally be considered to be critical facilities. It is possible that certain structures within them could be on their own classified as such if they meet the definition presented in the Rules. The TAC did not believe an exemption was warranted as design or location considerations could be applied to meet the Rules in most or all cases.

Statement #20: “Substantial damage to existing buildings or structures is defined as *“50% of the value of the structure that is damaged and needs to be replaced”*. This definition promotes more subjectivity and interpretation at the local level regarding the value of the structure and the decision regarding potential replacement.”

Rebuttal: As outlined in the rebuttal to Statement #13, Substantial Change determinations are a longstanding and current process of the National Flood Insurance Program. These Rules set higher criteria upon determination of the Substantial Change but intentionally do not alter how the processes are conducted and decisions are made. The method for making this determination in place today will continue to be the method used if these Rules are enacted, and this is a basic and minimum requirement of the National Flood Insurance Program.

Statement #21: “One CSSGA member is also concerned with the new floodway rules and the possibility that this might fall into a ‘regulatory taking’.”

Rebuttal: Property owners have long asserted that floodplain regulations result in a regulatory taking. For decades, the courts have broadly upheld floodplain regulations, including the floodway requirements, as necessary for public health, safety, and welfare and not a regulatory taking. Floodplain and floodway regulations do not prohibit activities from taking place and a variance procedure is in place for use when needed. Many of the references presented in Staff’s Prehearing Statement address this issue directly, and Staff testimony during the hearing will do the same.

Staff is not rebutting any content in the Prehearing Statements by Western Sky Investments/Wright Water Engineers, the City of Boulder, the City of Fort Collins, the Urban Drainage and Flood Control District, and the Colorado Association of Stormwater and Floodplain Managers.

In addition, Prehearing Statements were not provided (as outlined in the Notice of Public Rulemaking) by Centerra Metropolitan District No. 1, the Town of Fort Lupton, and the Colorado Municipal League. As such, Staff is not able to rebut any statements made by these entities.

Dated this 1st day of November, 2010.

JOHN W. SUTHERS
Attorney General

/s/ Susan J. Schneider

SUSAN J. SCHNEIDER, 19961*
First Assistant Attorney General
Natural Resources and Environment Section
Attorneys for the Colorado Water Conservation
Board
*Counsel of Record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of November, 2010, I caused a true and correct copy of the foregoing Rebuttal to be served via electronic mail to each of the following:

City and County of Denver Daniel J. Arnold, Esq. Daniel.Arnold@denverwater.org	Mesa County Julie Constan, P.E., Sr. Engineer Julie.Constan@mcsacounty.us
Weld County Bruce T. Barker, Esq. bbarker@co.weld.co.us	City of Greeley Tom Norton, Mayor Derck Glosson, Floodplain Administrator Tom.norton@greeleygov.com Derck.glosson@greeleygov.com
Colorado Municipal League Kevin Bommer Rachel Allen kbommer@cml.org rallen@cml.org	Western Sky Investments, LLC John Williams John.williams@gatewaycanyons.com T. Andrew Earles, Ph.D., P.E. Peter R. Foster, P.E. acarles@wrightwater.com pfoster@wrightwater.com
Centerra Metropolitan District No. 1 Alan D. Pogue, Esq. Steve Hanson, District Manager apogue@isp-law.com Stevch@pinnacleconsultinggroupinc.com	Colorado Stone, Sand & Gravel Association Pete Jacobson, Managing Director Pete.jacobson@cssga.org
City of Boulder Robert J. Harberg, P.E., CFM harbergb@bouldercolorado.gov	Colorado Association of Stormwater and Floodplain Managers David L. Mallory, P.E., CFM dmallory@udfcd.org
City of Fort Collins Carrie Mineart Daggett, Deputy City Attorney cdaggett@fcgov.com	Urban Drainage and Flood Control District Paul A. Hindman, P.E., phindman@udfcd.org
City of Fort Lupton Tommy Holton, Mayor THolton@fortlupton.org	Colorado Water Conservation Board Susan J. Schneider, First Assistant Attorney General susan.schneider@state.co.us doug.maul@state.co.us
Patrick E. Kowaleski, Assistant Attorney General Prehearing Officer patrick.kowaleski@state.co.us holly.archer@state.co.us	

Holly Archer
holly.archer@state.co.us

