



WATER QUALITY / QUANTITY COMMITTEE (QQ)

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QQ Quarterly Board Meeting

10 AM – 3 PM

Wednesday, March 11, 2015

Frisco, CO

AGENDA

- 10:00 Welcome and Introductions
- 10:05 Presentation: Oil and Gas Task Force Updates
Matthew Sera, Task Force member & attorney
- 10:45 O&G Updates- *Torie & Barbara*
- 11:00 Presentation: Gunnison County & Sage-grouse Listing
Paula Swenson, Gunnison County Commissioner
- 11:45 Grand Lake clarity - *Lane & Barbara*
- 12:00 Lunch
- 1:00 Member updates
- 1:15 2015 Legislative Session- *Torie*
- 2:00 Water Quality – *Seth & Lane*
- 2:30 CO Water Plan - *Torie, Lane & Barbara*
- 2:45 Upper Colorado Wild and Scenic Stakeholders - *Torie*
- 3:00 Adjourn

RECOMMENDATION TO FACILITATE COLLABORATION OF LOCAL GOVERNMENTS, COLORADO OIL AND GAS CONSERVATION COMMISSION AND OPERATORS RELATIVE TO OIL AND GAS LOCATIONS AND URBAN PLANNING

Agency Colorado Oil & Gas Conservation Commission

Recommendation: *Recommend COGCC rulemaking to address Local Government collaboration with Operators concerning locations for "Large Scale Oil and Gas Facilities" in "Urban Mitigation Areas," as defined in COGCC rules. The COGCC should initiate a rulemaking that would address three related issues:*

First, it would define and adopt a process for enhancing local government participation during the COGCC Application for Permit to Drill ("APD") process concerning location(s) of Large Scale Oil and Gas Facilities in Urban Mitigation Areas, consistent with the proposal.

Second, the rulemaking would also define what constitutes "Large Scale Oil and Gas Facilities" taking into consideration scale, proximity and intensity criteria.

Third, address the authority of, and procedures to be used by the Director of the COGCC to regulate the location when permitting Large Scale Oil and Gas Facilities for the purpose of reducing impacts to and conflicts with communities. This shall include siting tools to locate facilities away from residential areas when feasible. Where siting solutions are not possible, the Director would require mitigations to limit the intensity and scale of the operations, as well as other mitigations, to lessen the impacts on neighboring communities.

Process: This process is intended to provide interested local governments a defined and timely opportunity to participate in the siting of such large-scale multi-well oil and gas production facilities, before an Operator finalizes such locations. This would also provide an opportunity to address location of right-of-way for pipelines, facility consolidation, access routes, and to otherwise mitigate impacts within the Urban Mitigation Area. The purpose of this new rule would be to create an incentive for early resolution of concerns about siting in urban areas, and could be done as part of an Operator's permitting process at the COGCC. Unless an agreement was already in place with an interested affected local government concerning locations within its local boundaries, an Operator must obtain local government consultation during the Operator's COGCC's APD approval process concerning such facilities in Urban Mitigation Areas. Other local governments may continue to use the current local government designee ("LGD") comment, permit condition and hearing process.

Nothing in this recommendation is intended to or shall be interpreted to alter any existing land use authority local governments may have over oil and gas operations.

As set forth, this process would not apply in cases where the Operator and the local government have already negotiated an MOU, site plan review, comprehensive development plan or have otherwise agreed on the location of a multi-well production facility.

When an Operator intends to permit an oil and gas location that meets the criteria for the process, the following steps would be involved:

1. If a local government has in place a comprehensive plan or master plan that specifies locations for oil and gas operations, and if an application would be consistent with the terms of that plan, the COGCC shall include a provision in its rules that provides for expedited consideration of the application.
2. Prior to selecting an oil and gas location, the Operator must offer to meet with the LGD and a designated representative of the COGCC to seek local government consultation concerning locations for such large-scale facilities. Such consultation, based on the local government planning perspective, would be designed to anticipate community concerns. Should the local government decide to use this process, the first meeting begins a collaboration by which the Operator and the local government, and recognizing the requests and concerns of the surface owner on whom such facilities may be located, can agree on site location and operational practices. These agreements can be documented in:
 - a. Memorandum of Understanding (MOU)
 - b. Best Management Practices (BMPS's) on the COGCC permit
 - c. Comprehensive Drilling Plan (CDP).
 - d. Unconventional Resource Units
 - e. Local Government Land Use Permit
 - f. Or any other mechanism in which agreement is established
3. Operator and local government are required to work towards a compromise concerning locations, and the Operator is required to submit the agreement reflected in paragraph 1 upon submittal of an Oil and Gas Location Assessment ("OGLA"; Form 2A) to the COGCC, or otherwise indicate whether the local government has approved the location for the multi-well production facility.

The COGCC staff and local government liaison would be charged, if necessary, with convening meetings of the local government, Operator, and COGCC staff to consider alternative locations for multi-well production facilities and to encourage locations that consider distances between building units and/or high occupancy units.

4. A local government's request concerning location must be based on a set of established set of reasonable standards or criteria addressing land use and surface related issues resulting from the proposed oil and gas operation, balanced with consideration of responsible development, production, and utilization of the natural resources of oil and

gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources, and include consideration of surface and mineral owner wishes.

5. If a compromise cannot be reached concerning proposed locations within reasonable time frame (to be determined during rulemaking) after the first meeting, but before the OGLA is submitted, the Operator shall offer to engage in mediation with the local government. If the local government agrees to mediation, they shall jointly select a mediator or mediators and shall share in the cost of mediation. Upon selection of a mediator(s), the process shall conclude within 45 days unless the two parties jointly agree to an extension. The parties may request the assistance of COGCC staff, and if they do so the COGCC Director shall exert his or her best efforts to provide the requested technical assistance. If mediation does not occur, the Operator may submit its OGLA and APD for processing and approval.
6. If the parties reach agreement, they may memorialize that agreement in any of the forms outlined above.
7. If the parties are unable to reach agreement, on their own or with the mediation, and the timing process of mediation has lapsed, the Operator will finalize its OGLA with its settled location and then will be required to present its OGLA to the full COGCC at an expedited hearing. The COGCC will hear evidence from the local government, the Operator and the COGCC staff before the OGLA can be approved. In no case will the hearing on the OGLA be greater than 90 days from the first meeting with the local government.

In order to approve the OGLA, the COGCC must weigh the data and information presented from both parties as to the proposed location(s), including the standards discussed in paragraph 4.

Rationale: The Task Force heard concerns from numerous parties about the location of large multi-well production facilities in close proximity to urbanized areas. The scale and intensity of multi-well production facilities that are in close proximity to neighborhoods has led to a need for local governments to represent their constituents to a greater degree than in the past. Local governments have expressed the need for more involvement earlier in the process of permitting oil and gas locations, in particular, to the siting of large-scale multi-oil and gas well production facilities in order to represent land use impacts and community concerns (such as those of nearby homeowners, schools, etc.). The above outlined process allows for local governments to get advance notice from Operators and begin discussions with Operators prior to locations being selected. It provides a mechanism for local governments to influence locations prior to permitting at the COGCC and establishes a mechanism for collaboration among local governments, oil and gas Operators, and the COGCC. This recommendation is consistent with COGCC Director Matt Lepore's suggestion, and that of other task force

members, including Matt Sura, that the task force consider scale, proximity, and intensity, in addressing location of multi-well production facilities.

RECOMMENDATION TO INCLUDE FUTURE OIL AND GAS DRILLING AND PRODUCTION FACILITIES IN EXISTING LOCAL COMPREHENSIVE PLANNING PROCESSES

Agency or General Assembly: Colorado Oil & Gas Conservation Commission

Description: Proposal to require operator registration with certain Local Government Designees (“LGD”), and upon the request of a municipal LGD, submission of operational information for the purpose of incorporating potential oil and gas development into local comprehensive plans. Key elements of this recommendation include:

1. Beginning on January 1, 2016, all operators registered with the COGCC shall also register with the LGD of each municipality in which it has current or planned oil and gas operations. Upon the request of a municipal LGD, the operator shall provide the following information, with a copy to the COGCC Local Government Liaison (“LGL”):
 - a. Based on the current business plan of the operator, a good faith estimate of the number of wells (not including non-operated wells) that such operator intends to drill in the next five years in the municipal jurisdiction, corresponding to the operator’s internal analysis of reserves classified as “proved undeveloped” for SEC reporting purposes.
 - b. A map showing the location of the operator’s existing well sites and related production facilities; sites for which operator has, or has made application for, COGCC permits; and, sites identified for development on the operator’s current drilling schedule for which it has not yet made application for COGCC permits.

The plan provided to the LGD is acknowledged to be subject to change at the operator’s sole discretion, and shall be updated by the operator if materially altered.

2. The Planning Department of participating municipalities will prepare a comprehensive map of the potential future drilling and production sites within its jurisdiction, overlaid on the existing Comprehensive Plan Map.
3. Beginning on July 1, 2016, and upon material alteration, the municipality will provide the Comprehensive Plan Map, overlaid with future drilling and production sites to each of the registered operators and to the LGL. On such map, the municipality will identify sites that it considers compatible with the current and planned future uses of the area; sites where it anticipates minor issues to be resolved by negotiation with the operator; and, sites where it anticipates significant conflicts with current and planned future uses as indicated in the Comprehensive Plan.

#20-revised 2/20/2015

4. Disputes between local governments and operators will be resolved through mediation as more thoroughly described in Recommendation 13b.

Rationale: Local governments throughout the state have complicated and lengthy processes to develop Comprehensive Plans. The plan ultimately reflects the community's goals and aspirations in terms of land development and preservation. The plan guides public policy in terms of transportation, utilities, land use, open space, recreation and housing.

Oil and gas development is within the purview of the State of Colorado, and long-term planning to the extent it is performed, is often disjointed and not coordinated with local governments, most acutely in municipalities. Accordingly, when oil and gas development comes to a municipality, it can result in conflict with the existing, documented, community goals and aspirations. This proposal is to recommend the framework which will facilitate incorporation of drilling plans into municipal comprehensive planning.



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To: COGCC Director Matt Lepore
Colorado Oil and Gas Conservation Commission
1120 Lincoln Street, Suite 801,
Denver, CO 80203
matt.lepore@state.co.us
DNR_COGCC.Rulemaking@state.co.us

RE: COGCC Floodplain Rulemaking, Docket No. 150300178

February 13, 2015

Dear Colorado Oil and Gas Conservation Commission and COGCC Director Matt Lepore,

Northwest Colorado Council of Governments Water Quality/ Quantity Committee (“QQ”) wants to thank the COGCC for undertaking the rulemaking to implement the recommendations contained in the COGCC report, “Lessons Learned’ in the Front Range Flood of September, 2013.” We support adoption of all of the recommendations in the report, including the recommendation that, “Tanks, tank batteries and production equipment should be located as far from waterways as possible and practical in individual circumstances.” The rules should also recognize the important role local governments play in regulating oil and gas development within Colorado’s floodplains.

As local governments we have different challenges when it comes to managing floodplains within our jurisdictions, but the same responsibility to protect the health and welfare of our communities. Eighteen months after the flood of September 2013, many Front Range local governments are still spending the majority of their time, and a great amount of resources, on flood recovery. We expect those recovery efforts for our communities, infrastructure, and ecology will take years to complete.

QQ local governments did not experience flooding in 2013 but recognize that, with their topography, flash floods can occur in a matter of hours and without warning and the necessity of sound land use planning to protect the headwaters that serve as the water supply source for most of the state.

QQ represents a diversity of residents, geographies, and perspectives. But we all agree that regulating development within a floodplain is a great responsibility, and it is a responsibility that lies with local governments.

Local Government Authority in Floodplains

The proposed COGCC rules do not acknowledge that substantial floodplain regulations have already been promulgated by the state and local governments. Local governments are under a federal mandate to pass floodplain regulations in order to qualify for the National Flood Insurance Program.¹ The Colorado Water Conservation Board (CWCB) has issued a model floodplain ordinance that outlines the minimum standards local governments must pass in order to qualify for the National Flood Insurance Program.² (Attachment 1) The CWCB has also codified this model ordinance in its rules.³ This “Colorado Floodplain Damage Prevention Ordinance,” or some version of the ordinance, has been passed by 54 counties and more than 200 Colorado cities.⁴ The ordinance recognizes that the legislature of State of Colorado has “delegated the responsibility of local governmental units to adopt regulations designed to minimize flood losses.”⁵ The CWCB floodplain regulations recognize that the model regulations are “minimum standards,” which local governments may exceed.⁶

The model floodplain regulations require a “Floodplain Administrator” who will administer the floodplain rules and will consider permit applications for “development” within the floodplain. The state floodplain regulations and model local regulations define “development” as “[a]ny man-made changes to improved or unimproved real estate, including, but not limited to, buildings or other structures, mining, dredging, filling, grading, paving, excavation or **drilling operations.**”⁷

In short, local governments have unquestionable regulatory authority over development within designated floodplains. Given this, we ask that the COGCC rules acknowledge that authority in the COGCC rules with the following proposed language:

603.h. **Statewide Floodplain Requirements.** When operating within a defined Floodplain:

(3) No provision in this section shall be construed as prohibiting a local government from adopting regulations containing requirements which are more stringent than those requirements herein.

We have attached our proposed revisions to the end of this letter.

¹ 44 C.F.R. § 60 Subpart A “Requirements for Flood Plain Management Regulations”

² Department of Natural Resources, Colorado Water Conservation Board, “Colorado Floodplain Damage Prevention Ordinance”, 2011. Available at: http://cwcb.state.co.us/water-management/flood/documents/comodelordinance_12_7_12.pdf

³ 2 Colo. Code Regs. § 408-1.

⁴ Aldo Svaldi, LARGE PARTS OF COLORADO REJECT FEDERAL FLOOD INSURANCE PROGRAM, Denver Post, June 8, 2014. Available at: http://www.denverpost.com/business/ci_25916263/large-parts-colorado-reject-federal-flood-insurance-program

⁵ CO Floodplain Damage Prevention Ord. Art I, § A.

⁶ 2 Colo. Code Regs. § 408-1:19; CO Floodplain Damage Prevention Ord. Art III, § F.

⁷ “Rules and Regs. for Regulatory Floodplains in CO” Rule 4 – Definitions. (Emphasis supplied).

Locate Tank Batteries and Production Equipment as Far from Waterways as Possible

The COGCC's Lessons Learned report recommends:

Tanks, tank batteries and production equipment should be located as far from waterways as possible and practical in individual circumstances. "Practicality" should balance the needs of surface owners, operators and topography.⁸

QQ agrees with this recommendation in concept, but has offered modified language. QQ is well-acquainted with Federal Emergency Management Agency (FEMA) maps. For clarity and consistency, this recommendation should focus on "floodways"—the areas most likely to suffer damage in the flood.

QQ proposes the following language:

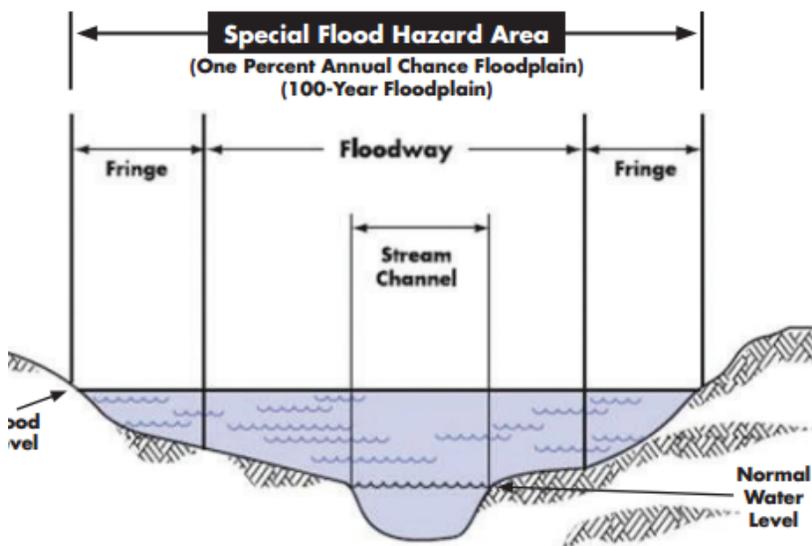
603.a (3) Oil and gas production facilities shall not be located within a designated Floodway if suitable sites outside of the Floodway are technically feasible and economically practicable. The COGCC may waive this requirement for a specific site if 1) it determines that locating the facility outside of the Floodway would pose a greater risk to public health, safety, or welfare, including the environment and wildlife resources and 2) the local government has permitted the development.

The CWCB regulations and local ordinances define "floodway" to mean, "The channel of a river or other watercourse and the adjacent land areas that must be kept free of obstructions in order to discharge the base flood without cumulatively increasing the water surface elevation more than a designated height."⁹ The model regulations also state that the floodways are "extremely hazardous area due to the velocity of floodwaters which carry debris, potential projectiles and erosion potential" and prohibits encroachments into the floodway unless they receive a "no-rise" certification.¹⁰ We have incorporated this language into a proposed definition for the COGCC rules.

⁸ Lessons Learned p. 29.

⁹ 2 Colo. Code Regs. § 408-1:4

¹⁰ CO Floodplain Damage Prevention Ord. Art V. §D.



de Terms and Definitions

The **Special Flood Hazard Area (SFHA)** is that portion of the floodplain subject to inundation by the base flood and/or flood-related erosion hazards. SFHAs are shown on FHBMs or FIRMs as Zones A, AE, A1-A30, AH, AO, AR, V, VE, and V1-V30.

See [page 10](#) to learn about the floodway, the area of the floodplain where floodwaters usually flow faster and deeper.

Figure 1. Taken from CWCB’s, “Floodplain Management in Colorado - Quick Guide” Page 9. (Attachment 2).

Rather than adopting the recommendation that tanks and production facilities be “located as far from waterways as possible” the Local Government proposal focuses on the “extremely hazardous” floodways. For the most part, floodways are already mapped, and development within those areas is already well-regulated by local governments.

Conclusion

QQ believes the proposed COGCC regulations would be helpful but should be strengthened to discourage Oil and Gas Production facilities from being located in the Floodways and should acknowledge the important role local governments play in the regulation of land uses within Colorado floodplains.

Please contact Torie Jarvis, QQ’s co-director, at 970-596-5039 or qqwater@nwccog.org if you would like to discuss this further.

Sincerely,

James Newberry
Grand County Commissioner and QQ Chair

QQ Recommended Amendments to Proposed COGCC Floodplain Rules

100 SERIES – DEFINITIONS

FLOODPLAIN shall mean any area of land that a Colorado Municipality, Colorado County, State Agency, or Federal Agency has officially declared to be in a 100 year floodplain.

FLOODWAYS are located within Floodplains federally-designated as “Special Flood Hazard Areas”. Floodways are hazardous areas due to the velocity of floodwaters which carry debris, potential projectiles and erosion potential. Floodways are mapped by the Federal Emergency Management Agency.

600 SERIES – SERIES SAFETY REGULATIONS

603. STATEWIDE LOCATION REQUIREMENTS FOR OIL AND GAS FACILITIES, DRILLING, AND WELL SERVICING OPERATIONS

603. STATEWIDE LOCATION REQUIREMENTS FOR OIL AND GAS FACILITIES, DRILLING, AND WELL SERVICING OPERATIONS

603.a. Statewide location requirements.

- (1) At the time of initial drilling, a Well shall be located not less than two hundred (200) feet from buildings, public roads, major above ground utility lines, or railroads.

Rule 604 setback requirements apply with respect to Building Units and Designated Outside Activity Areas.

- (2) A well shall be located not less than one hundred fifty (150) feet from a surface property line. The Director may grant an exception if it is not feasible for the Operator to meet this minimum distance requirement and a waiver is obtained from the offset Surface Owner(s). An exception request letter stating the reasons for the exception shall be submitted to the Director and accompanied by a signed waiver(s) from the offset Surface Owner(s). Such waiver shall be written and filed in the county clerk and recorder's office and with the Director.

- (3) Oil and gas production facilities shall not be located within a designated Floodway if suitable sites outside of the Floodway are technically feasible and economically practicable. The COGCC may waive this requirement for a specific site if 1) it determines that locating the facility outside of the Floodway would pose a greater risk to public health, safety, or welfare, including the environment and wildlife resources and 2) the local government has permitted the development.

603.g. **Statewide equipment anchoring requirements.** All equipment at drilling and production sites in geological hazard areas shall be anchored. Anchors must be engineered to support the equipment and to resist flotation, collapse, lateral movement, or subsidence.

603.h. **Statewide Floodplain Requirements.** When operating within a defined Floodplain:

- (3) No provision in this section shall be construed as prohibiting a local government from adopting regulations containing requirements which are more stringent than those requirements herein.

COLORADO COURT OF APPEALS
Court Address: 2 East 14th Avenue
Denver, CO 80203

Appeal from Larimer County District Court
The Honorable Gregory M. Lammons
Case No. 2013CV31385

Appellant:
CITY OF FORT COLLINS, COLORADO
v.
Appellee:
**COLORADO OIL AND GAS
ASSOCIATION**

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▲ COURT USE ONLY ▲

Case No. 2014CA001991

**BRIEF OF NORTHWEST COLORADO COUNCIL OF GOVERNMENTS
ACTING BY AND THROUGH ITS WATER QUALITY QUANTITY
COMMITTEE IN SUPPORT OF APPELLANT**

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

1. The brief complies with C.A.R. 28(g)

Choose one:

- It contains ___ words
- It does not exceed 30 pages.

2. The brief complies with C.A.R. 28(k):

- For the party raising the issue:

It contains, under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

- For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

/s/ Torie Jarvis

Torie Jarvis, #46848

Attorney for Northwest Colorado Council of Governments

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Northwest Colorado Council of Governments (“NWCCOG”), acting by and through its Water Quality Quantity Committee, respectfully submits this Brief, pursuant to C.A.R. 29, as *amicus curiae* in support of Appellant, the City of Ft. Collins, Colorado (the “City”).

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

NWCCOG adopts and incorporates by reference the statement of the issues presented for review in the City of Fort Collins’ Opening Brief.

II. STATEMENT OF THE CASE AND STANDARD OF REVIEW

NWCCOG adopts and incorporates by reference the statement of the case and statement regarding the standard of review in the City of Fort Collins’ Opening Brief.

III. INTRODUCTION

Colorado’s land use planning and regulation jurisprudence has long been informed by the principle that residents familiar with and invested in their communities are best situated to decide whether particular land uses are compatible with local character and development goals. For this reason, “[l]egislative attempts to address land use legislation on a statewide basis [have] largely failed.” *Droste v. Board of Cnty. Comm’rs of Pitkin County*, 159 P.3d 601, 605 (Colo. 2007) (“*Droste*”) (citing Barbara J. Green & Brant Seibert, *Local Governments and*

House Bill 1041: A Voice in the Wilderness, 19 *The Colorado Lawyer* 2245 (Nov. 1990)). Coloradan's have relied on the inherent protections of this system in making fundamental personal and financial decisions, such as where to work, buy a home, or raise a family. At issue in this appeal is whether Colorado's communities will be stripped of a major component of their traditional land use planning authority – the ability to pause, analyze, understand, and strategize before potentially enacting land use regulations, commonly identified as a “moratorium.”

It is important to state, up front, that this *amicus curiae* brief does not advocate for or against the development of oil and gas, nor does this brief seek to resolve whether components of that development such as fracking, horizontal drilling, and storage of waste by-products are, in all cases, consistent with public health, safety, and welfare. Rather, this *amicus curiae* brief advocates for safeguarding the authority of local governments to obtain and retain the trust of their citizens to ensure that oil and gas development is consistent with their public health, safety, and welfare. Safeguarding of local government authority begins with ensuring the availability of a first step in exercising local government police power - the opportunity to stop, observe, and study proposed or anticipated activity. The district court decision threatens to take away the longstanding right of local governments to enact moratorium and to upend well-accepted Colorado

preemption jurisprudence. NWCCOG respectfully submits this brief as *amicus curiae* to inform the Court of the serious public policy and legal consequences of the district court decision to local governments in northwest Colorado and throughout the state.

IV. INTEREST OF AMICUS CURIAE

NWCCOG is an association of county and municipal governments in the mountain region of northwest and central Colorado that work together on a regional basis. NWCCOG appears as *amicus curiae* by and through its Water Quality and Quantity Committee, a subcommittee of NWCCOG whose mission includes the protection and implementation of local government authority to protect water resources. A priority for NWCCOG is to foster informed and responsive local government, a priority at risk if the district court decision stands. Member jurisdictions of NWCCOG represent a southern portion of the gas-rich Piceance Basin which, like the Front Range of Colorado, is experiencing dramatically increased development of natural gas. NWCCOG regularly engages in planning for and reasonably regulating local impacts from oil and gas development.

All local government members of NWCCOG regularly exercise their police power to protect public health, safety, and welfare through land use planning and

regulation. Among their essential land use planning tools is the power to impose moratoria. For example, the Town of Minturn currently has a moratorium in place on duplexes, multifamily units, accessory buildings, and accessory dwelling units in order to better define massing of these types of dwelling units. Minturn, Colo., Ordinance 7 (Sept. 17, 2014), <http://www.minturn.org/pdf/TownCouncil/ResOrdinances2014/Ord07-2014.pdf>. In 2006, the City of Aspen enacted a moratorium on new land use applications in order to review and revise the land use code as it was not keeping pace with development pressures. Aspen, Colo., Ordinance 19 (April 24, 2006), <http://205.170.51.183/WebLink8/DocView.aspx?id=75943&dbid=0>. Finally, Pitkin County imposed a moratorium on development while it developed a master plan for unincorporated county areas. *E.g.*, Pitkin County, Colo., Ordinance 13-2003 (April 2, 2013), <http://records.pitkincounty.com/WebLink8/DocView.aspx?id=31124&dbid=0>. This moratorium was challenged, and then upheld by the Colorado Court of Appeals as an appropriate use of a moratorium in *Droste*, 159 P.3d 601. NWCCOG therefore submits this brief to support the right of member jurisdictions to adopt moratoria as a land use planning tool to fully understand and protect public healthy, safety and welfare of their communities.

V. BACKGROUND AND PUBLIC POLICY IMPLICATIONS

The public policy implications of the district court's decision are alarming; the decision flies in the face of core principles of good public policy and public process. Government at all levels - federal, state and local - has the obligation to ensure the welfare, health, and safety of its citizens; the integrity of the environment; and the protection of living beings. An important measure of good public policy is the degree to which the impacts of new development are understood by the public and appropriately mitigated. There is a positive, synergistic value in integrating federal, state, and local planning and regulatory processes to allow constituent stakeholder voices to be reflected at every level of regulation.

A. Growth In Oil and Gas Development.

Gas extraction employing the modern techniques combining horizontal drilling and high-volume fracking, together with storage of waste by-products, is one of the highest profile and controversial issues in Colorado, and undeniably, the nation. In the last decade, Colorado has experienced tremendous growth in oil and gas development spurred by new technology, including in the NWCCOG region and the Front Range. Oil and gas development increasingly is coming into already existing communities, triggering significant public and local government concern.

There are local benefits such as “...[g]ood-paying jobs, rising incomes, new businesses, a tidal wave of fresh tax revenue;” but along with those come “a fair share of problems” such as “higher crime rates, heavy truck traffic and overcrowded schools.” Brad Plumer, *The economic dark side of the West’s oil and gas boom*, Washington Post (Dec. 12, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/12/12/the-dark-side-of-the-west-s-oil-and-gas-boom/>.

Local governments often have to react to rapidly changing conditions associated with oil and gas development because the industry is moving into areas where it never existed before. “Examples of spatial planning for petroleum development were nearly non-existent in 2007. Because old technology had to bore straight down, surface locations were inflexible. To respond to new technologies of ‘steerable’ or ‘directional’ drilling, [counties] had to be creative” in their planning and zoning. Kim Sorvig, *What to Do When the Drillers Come to Town*, Planning Mag., Vol. 80 Issue 3, 16 (Aug/Sept. 2014). Governor Hickenlooper noted the need for responsible local government regulations as well, stating that “(t)he increased oil and gas activity that is occurring in new areas of Colorado’s Front Range and that involves new technology such as horizontal drilling combined with hydraulic fracturing (“fracking”) has caused a number of local jurisdictions to revisit the adequacy of their own regulations associated with

oil and gas operations.” Colo. Exec. Order No. B 2014-005, “Creating The Task Force On State And Local Regulation Of Oil And Gas Operations” (Sept. 8, 2014).

The current and rapid expansion of oil and gas development presents challenges to how local governments approach land use planning and regulation in a manner that protects public health, safety and welfare, promotes the reasonable development of oil and gas where appropriate, and survives judicial review. “The pace of growth is driving many communities to make decisions without access to comprehensive and reliable scientific information about the potential impacts of hydraulic fracturing on their local air and water quality, community health, safety, economy, environment, and overall quality of life.” *Science, Democracy, and Fracking: A Guide for Community Residents and Policy Makers Facing Decisions over Hydraulic Fracturing*, The Center for Science and Democracy, 2 (Aug. 2013), <http://www.ucsusa.org/sites/default/files/legacy/assets/documents/centerforscience-and-democracy/fracking-informational-toolkit.pdf>. A local government moratorium can be an essential first step in preparing local regulations that are responsive to changing technologies and localized community impacts.

The district court’s order frustrates a local government’s ability to plan for and potentially regulate oil and gas development in a time of rapidly changing technologies in new locations. Among the localized consequences that deserve

local government attention are potential emission of pollutants into soil, water or atmosphere; potential landscape and viewshed modification; potential impacts of heavy trucks to roadways and traffic; potential noise and light pollution; and potential incompatibility with neighboring land uses. See Samuel Gallaher, *Local, Regional, and State Government Perspectives on Hydraulic Fracturing-Related Oil and Gas Development*, Buechner Institute for Governance, 9, <http://narc.org/wp-content/uploads/Government-Perspectives-on-Oil-and-Gas-Development-Full-Report-2013-Gallaher.pdf> (last visited Feb. 6, 2015). Because a single operational site, known as a well pad, may be used to drill multiple horizontal wells, and because each well may be re-fractured multiple times, the duration of these potential consequences may be immediate to long term in duration. Well pads may also exist in isolation or near proximity, and may be concurrently or consecutively developed, lessening or magnifying the impacts.

Potential harm in some communities may be less influenced by the above factors than by incompatibility with the community's development goals or the local economy that relies on agriculture, tourism, outdoor recreation, or access to wildlands and wildlife. For example, because tourism comprises 48% of all jobs in the region, NWCCOG communities are "highly dependent on and vulnerable to changes in environmental conditions that impact tourism." Coley/Forrest Inc.,

Water and its Relationship to the Economies of the Headwaters Counties, Northwest Colorado Council of Governments, 10 (December 2011) http://nwccog.org/docs/qq/QQStudy_Outreach%20Summary%20Jan%202012.pdf.

Damage may also come from a community's loss of identity and desirability as a place to live. The arrival of an incompatible land use may be a harbinger that "the neighborhood is taking the first step toward becoming something other than the neighborhood where I chose to live. Although difficult to place in quantitative terms, the loss is great." Bradley C. Karkkamen, *Zoning: A Reply to the Critics*, 10 J. Land Use & Env'tl. L. 45, 73 (1994). The district court's order diminishes local government ability to address oil and gas impacts that may directly affect citizen quality of life.

B. A Social License to Operate is Essential to the Industry.

Oil and gas operators have a vested interest in developing the public's trust that oil and gas resources will be developed safely and responsibly, often referred to as a social license to operate. As the oil and gas developer Encana describes, "Creating long-term shareholder value and protecting our social license to operate are significant elements of Encana's strategy for sustained financial success." *Stakeholder Relations Guide: Our Guide to Effective Stakeholder Management*, Encana, http://www.encana.com/pdf/communities/canada/stakeholder_relations_

guide.pdf (last visited Feb. 5, 2014). At the same time,

“[a] social license to operate in the United States is not a legal or physical license. Rather, it is an implied grant of ongoing approval by the public and other stakeholders. Such a license allows a company to engage in a certain activity in relative harmony with the local community and other stakeholders... A company earns the license by conforming to jointly construct(ed) norms of legal compliance and standards for appropriate business conduct that are trusted and accepted by the public. A company that fails to acquire such a license may have the legal right to operate, but will likely face ongoing conflict and controversy due to practical, economic or moral obstacles.”

Evan J. House, *Fractured Fairytales: The Failed Social License For Unconventional Oil and Gas Development*, 13 Wyo. L. Rev. 5, 51 (2013).

Objection to and denial of public discourse, debate, analysis, and strategizing are prime causes for failure to obtain and maintain this social license. The best way to encourage a social license to operate is through the public process found at the local level of government. Local government moratoria allow for a “time out” from swift development that allows for local government to facilitate public discourse to better understand and address community concerns.

C. Moratoria are Essential Tools to Local Government Planning and Land Use Regulation.

Local government authority to evaluate, and then potentially regulate, new land use is well established in United States jurisprudence. As early as 1876, the U.S. Supreme Court expanded local governments “police power” to include the

principle that “(w)hen one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.” *Munn v. Illinois*, 94 U.S. 113, 126 (1876). The Supreme Court later upheld regulations creating a red-light district as a proper use of the police power, finding “[t]he management of these vocations ... affect directly the public health and morals ... The ordinance is an attempt to protect a part of the citizens from the unpleasant consequences of such neighbors.” *L’Hote v. New Orleans*, 177 U.S. 587, 596 (1900). The Supreme Court has continued to affirm broad land use authority of local governments. *See e.g., Welch v. Swasey*, 214 U.S. 91 (1909) (sustaining building height restrictions for the City of Boston that differed between two areas, of the city); *Reinman v. Little Rock*, 237 U.S. 171 (1915) (upholding a local government ordinance banning the operation of livery stables in the central business district of Little Rock); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (affirming a Los Angeles ordinance excluding an existing brickyard from a residential area).

In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (“*Euclid*”), the most important of the foundational cases for local land use authority, the Court

expresses its strong deference to the local government land use decisionmaking process:

“[T]he coming of one apartment house, if followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun ... and bringing ... the disturbing noises incident to increased traffic ... and the occupation, by means of moving and parked automobiles, of larger portions of the street thus detracting from their safety ... until, finally, the residential character of the neighborhood and its desirability ... are utterly destroyed ... [T]he reasons are sufficiently cogent to preclude us from saying ... that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.”

Euclid, 272 U.S. at 394-395.

Analogizing to the context-based nature of nuisance law, the Court in *Euclid* also found that constitutional exercise of land use authority could not be achieved by “abstract consideration” of the utility or harm of a regulated use, “but by considering it in connection with the circumstances and the locality.” *Id.* at 387-8. Under this rubric, the more noxious the use, the greater discretion the local government may exercise regarding it. The Supreme Court had “no difficulty” in sustaining zoning regulations designed to “divert an industrial flow from the course which it would follow.” *Id.* at 390. Local governments have the power and

responsibility to avoid the negative consequences of incompatible land uses within the context of the community as a whole.

Before a regulator exercises the power to regulate land uses, as affirmed by the U.S. Supreme Court, moratoria are commonly employed to temporarily maintain the status quo or pause decision-making while a regulator researches and formulates prudent and appropriate permanent regulations. “[T]emporary development moratoria promote effective planning. First, by preserving the status quo during the planning process, temporary moratoria ensure that a community’s problems are not exacerbated during the time it takes to formulate a regulatory scheme...” *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764, 777 (9th Cir. 2000), *aff’d*, 535 U.S. 302 (2002). “Moratoria are widely used among land use planners to preserve the status quo while formulating a more permanent development strategy. Moratoria, or ‘interim development controls’ as they are often called, are an essential tool of successful development.” *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 337-38 (2002) (“*Tahoe-Sierra*”). “[T]he widespread invalidation of temporary planning moratoria would deprive state and local governments of an important land-use planning tool with a well-established

tradition. Land-use planning is necessarily a complex, time-consuming undertaking for a community...” *Tahoe-Sierra Preservation Council*, 216 F.3d at 777.

A moratorium is a planning tool that facilitates local government consideration of important issues to then potentially develop responsive permanent regulations. At its essence, the district court decision bars local governments from enacting moratoria which is equivalent to barring local government ability to *think* and *plan* before they regulate.

It must be noted that “*every delay is not the same as a total ban.*” *Tahoe-Sierra*, 535 U.S. at 331-332 (emphasis added). ““Stop-gap’ regulations are, by their very nature, of limited duration and are designed to maintain the status quo pending study and governmental decision making.” *Williams v. Central City*, 907 P.2d 701, 706 (Colo. App. 1995). “We acknowledge that, given that moratoria are, by definition, temporary, it is redundant to refer to a moratorium as a ‘temporary moratorium’... [A moratorium is] a ‘waiting period set by some authority’...” *Tahoe*, at n. 21 (citations omitted). A ban, on the other hand, is permanent.

VII. LEGAL FRAMEWORK

A. Authority Of Local Governments.

The district court’s decision must be viewed first in the context of the authority of Colorado local governments. The authority of Colorado local

governments to regulate oil and gas development comes from their authority to regulate the use and development of land under the local government police power, i.e. the power to regulate activities to protect the public health, safety, morality, general welfare and the environment. The Local Government Land Use Enabling Act gives local governments the authority to regulate land use on the basis of its impact on the community or surrounding areas, and “to plan for and regulate the use of land” so as to provide for the orderly use of land and the protection of the environment, consistent with constitutional rights. C.R.S. § 29-20-104; *see generally* C.R.S. § 29-20-101 *et seq.*

Home rule municipalities also have Constitutional land use authority. The Colorado Constitution, Article XX, Section 6, “reserves” for home-rule municipalities “the full right of self-government in both local and municipal matters.” A home-rule city's ordinances pertaining to local and municipal matters “shall supersede within the territorial limits ... any law of the state in conflict therewith.” *Id.*

Colorado courts have confirmed that under the Colorado Constitution the “exercise of zoning authority for the purpose of controlling land use within a home rule city’s municipal border is a matter of local concern.” *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061, 1064 (Colo. 1992) (“*Voss*”). *See also* *Town of Telluride v. San*

Miguel Valley Corporation, 185 P.3d 161, 168 (Colo. 2008); *National Advertising Co. v. Dept. of Highways*, 751 P.2d 632, 635 (Colo. 1988); *City and County of Denver v. State*, 788 P.2d 764, 767 (Colo. 1990). Importantly, “[l]ocal governments have a legally protected interest in enacting and enforcing their land use regulations governing the surface effect of oil and gas development.” *Bd. of County Comm’rs of La Plata County v. Colorado Oil and Gas Conservation Commission*, 81 P.3d 1119, 1124 (Colo. App. 2003) (“*La Plata*”). See also *Voss*, 830 P.2d at 1066.

B. Authority of the State of Colorado.

The State of Colorado obviously also has an interest in oil and gas development and operations. That interest is expressed directly in the Colorado Oil and Gas Conservation Act (the “Act”), the declared purposes of which include “to foster, encourage, and promote the development, production, and utilization of the natural resources of oil and gas in the state of Colorado.” C.R.S. § 34-60-102. Colorado courts have confirmed the state’s interest in the development of oil and gas. *Bowen/Edwards Associates, Inc. v. Bd. of County Comm’rs of La Plata County*, 830 P.2d 1045, 1058 (Colo. 1992) (“*Bowen/ Edwards*”).

C. Preemption Doctrine Serves to Reconcile Conflicts between State and Local Government Regulations.

The preemption doctrine establishes a priority between conflicting laws enacted by state and local governments. There are three ways in which a state statute may preempt a local regulation: express preemption, implied preemption and preemption based on operational conflict.

Express preemption occurs when a statute expressly states that state regulation is intended to preempt local regulation. The Act expressly preempts local authority in only two circumstances inapplicable to this case.¹ Implied preemption exists “if the state statute impliedly evinces a legislative intent to *completely* occupy a given field by reason of a dominant state interest.” *Bowen/Edwards*, 830 P.2d at 1056-57 (emphasis added). In Colorado, the General Assembly has not intended that the state occupy the entire field of oil and gas regulation. The Act does not “militate in favor of an implied legislative intent to preempt all aspects of [local government’s] statutory authority to regulate land use within its jurisdiction merely because the land is an actual or potential source of oil and gas development and operations.” *Bowen/Edwards*, 830 P.2d at 1058.

¹ See C.R.S. § 34-60-106(5) precludes local government from charging an operator for the cost of the local government to inspect operations regulated by the Colorado Oil and Gas Conservation Commission; C.R.S. § 34-60-106(17)(a) gives the Commission “exclusive authority to regulate the public health, safety, and welfare aspects, including protection of the environment, of the termination of operations and permanent closure . . . of an underground natural gas storage cavern.”

Finally, local regulation of oil and gas development may be preempted by virtue of an operational conflict. Operational conflict occurs “where the effectuation of a local interest would materially impede or destroy the state interest.” *Id.* at 1059. Operational conflict preemption is determined through a fact-intensive inquiry determined on a case-by-case basis. *Id.* at 1059-60.

The Act expressly preserves local governmental authority. “The general assembly hereby declares that nothing in this Act shall establish, alter, impair, or negate the authority of local governments to regulate land use related to oil and gas operations.” C.R.S. 34-60-128(4). “[I]f such regulations do not frustrate and can be harmonized with the development and production of oil and gas in a manner consistent with the stated goals of the Oil and Gas Conservation Act, the city's regulations should be given effect.” *Voss*, 830 P.2d at 1069.

VIII. ERRORS BY THE DISTRICT COURT

Other parties to this litigation are providing an analysis of significant legal issues. *Amicus curiae* NWCCOG respectfully adds its own brief supplement.

The district court erred in its legal basis for finding the Moratorium preempted because: (1) the court first characterized the temporary Moratorium as a permanent ban; (2) having characterized the Moratorium as a permanent ban, the court incorrectly applied the test for “implied preemption;” and (3) the court then,

as a fall-back, incorrectly applied to the Moratorium the test for “operational conflict preemption.”

A. The District Erred By Characterizing The Fort Collins Moratorium as a “Ban”.

Even though the Moratorium is temporary, the district court relies on three cases involving *permanent* bans in its evaluation of the Moratorium. *See Voss*, 830 P.2d at 1062 (where the City of Greeley enacted a *permanent* ban on any oil and gas drilling within the City); *Colo. Min. Ass’n. v. Bd. of Cnty. Comm’rs of Summit County*, 199 P.3d 718 (Colo. 2009) (where County completely banned the use of cyanide and other toxic chemicals for mineral processing); *Webb v. City of Black Hawk*, 295 P.3d 480 (Colo. 2013) (“*Black Hawk*”) (where City instituted a *permanent ban* of bikes on roadways). These cases are inapposite because each one involves *permanent* prohibitions, continuing into perpetuity, and without a purpose other than the ban itself.

In the district court’s order, one of the “Undisputed Facts” is that the Ordinance created a moratorium, not a ban. CF at 495. However, in its analysis the court then inexplicably calls the Moratorium a ban twenty-two times. CF at 495-503. The court failed to consider the fact that a Moratorium is not permanent and that “every delay is not the same as a total ban.” *Tahoe-Sierra*, 535 U.S. at 331-332.

B. The District Court Erred in Finding “Implied Preemption.”

The district court also erred in finding implied preemption by failing to apply correctly the correct test and by ignoring case law on point. According to *Bowen/ Edwards*, “...preemption may be inferred if the state statute impliedly evinces a legislative intent to *completely* occupy a given field by reason of a dominant state interest.” 830 P.2d at 1056-57 (emphasis added). Other Colorado courts confirm that implied preemption requires a legislative intent to completely occupy the field. *See e.g., Voss*, 803 P.2d at 1068; *Bd. Of Cnty. Comm’rs of Gunnison Cnty v. BDS International, LLC*, 159 P.3d 773, 778 (Colo. App. 2006) (“*BDS*”); *La Plata*, 81 P.3d at 1124-1125.

However, the district court misstates the test for implied preemption as being “if the state statute impliedly evinces a legislative intent to occupy a given field by reason of a dominant state interest.” CF at 498. The district court omits the key word in the key phrase of the implied preemption test, looking at whether the Act shows a dominant state interest instead of properly considering whether the Act shows intent to “*completely* occupy the field.”

The legislature has never articulated an intent to *completely* occupy the field as required to meet the implied preemption doctrine. To the contrary, as noted above, the Act confirms local authority to regulate land use related to oil and gas.

Amendments to the Act in 2007 explicitly protect “the authority of local governments to regulate land use related to oil and gas operations.” C.R.S. § 34-60-128 (4); *see also* C.R.S. § 34-60-127 (4)(c). Clearly, the legislature would not have explicitly included this language if it intended to completely occupy the field of oil and gas development and production.

Case law confirms that that Act does not evince legislative intent to completely occupy the field of oil and gas regulation. The Colorado Supreme Court has clearly stated that the Act does not “militate in favor of an implied legislative intent to preempt all aspects of [local government’s] statutory authority to regulate land use within its jurisdiction merely because the land is an actual or potential source of oil and gas development and operations.” *Bowen/ Edwards*, 830 P.2d at 1058. The district court’s implied preemption ruling is in direct conflict with existing case law.

C. The District Court Erred in Finding Operational Conflict Preemption.

The district court incorrectly applied the operational conflict test when it ruled that the Moratorium creates an operational conflict with the Act because it “prohibits what the Act permits.” The proper test for operational conflict between a local land use regulation and the Act is not whether the local regulation prohibits what the Act permits but whether “the effectuation of a local interest would

materially impede or destroy the state interest.” *Bowen/ Edwards*, 830 P.2d at 1059-60. The district court erroneously relied on the rule articulated in *Black Hawk*, a completely distinguishable case involving a completely different state statute and a *permanent ban* of bikes on roadways. 295 P.3d at 485.

The court’s ruling also was not supported by the evidence. A determination of operational conflict must be made “on an ad-hoc basis under a fully developed evidentiary record.” *Bowen/ Edwards*, 830 P.2d at 1059-60. There is no fully developed evidentiary record in this case. *See BDS*, 159 P.3d at 779 (where a fully developed evidentiary hearing was required as a prerequisite to determine extent of operational conflict with the Act).

IX. THE DISTRICT COURT’S RULING IMPLIES AN UNCONSTITUTIONAL DELEGATION OF A MUNICIPAL FUNCTION.

The district court’s ruling that the Act impliedly preempts local government regulation transforms the Act into an unconstitutional legislative delegation of a municipal function to the COGCC. Article V, Section 35 provides that “[t]he General Assembly shall not delegate to any special commission ... any power to make, supervise or interfere with any municipal improvement, money, property or effects ... or perform any municipal function whatever.” The purpose of this provision is “to prevent a legislative commission from intruding upon a city's right

of self-government in matters of local concern,” including “land use planning.” *Voss*, 830 P.2d at 1069. In finding the Act impliedly preempts the Moratorium, the decision effectively means that the Act “*completely* occup[ies]” the entire field leaving no room for the exercise of local government land use authority. *Bowen/Edwards*, 830 P.2d at 1056-57. Under this logic, the Act is a delegation to the COGCC of the important municipal function of land use planning and regulation. Such a delegation is unconstitutional.

X. CONCLUSION

Local governments are democratically accountable stewards of their populations’ well-being. They understand the crucial importance of “place” and “pace” in promoting well-being. In other words, the environment within which people live, raise families, work and play, the housing in which they live, the spaces around them, are all crucial to their health and well-being. Since local government holds many of the levers for promoting well-being in Colorado it makes sense to ensure its authority to shape the locality in a healthy direction. Local governments will face a nearly impossible task to regulate land use appropriately if they are denied the predicate opportunity to analyze, plan for, and craft the regulations without the pressure of concurrent development. The district court’s order not only ignores local government obligation and authority to address

public health, safety, and welfare in a considered manner, the order eliminates a primary local government tool to do so in contravention of Colorado law.

The district court's decision is contrary to Colorado's tradition of land use planning and regulation at the local government level, and it runs counter to the longstanding expectations of all citizens of Colorado who look to their local governments to protect their quality of life. For the reasons above, NWCCOG respectfully requests that the district court's ruling be reversed.

CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of February, 2015, a true and correct copy of the foregoing was served *via* ICCES on the following:

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QQ BILL SUMMARY
March 6, 2015

HOUSE BILLS.

HB 15-006. Invasive Phreatophyte Management Grant.

Sponsors: Reps. **Coram & Vigil**, Sens. **Sonnenberg**, Hodge, Roberts.

Status: Amended and passed House Ag Committee, headed to House Appropriations.

Bill Summary:

- Creates a \$5 million, 5-year fund within the Noxious Weed Management Fund for the management of invasive phreatophytes, “including tamarisk and Russian olive, within riparian areas of the State.” Upon amendment in House Ag, money will come from the Severance Tax Fund, not the General Fund.

- Grants awarded for management of phreatophytes to decrease their consumption of water and “to protect habitat native to each Basin.” (Quoted language added in House Ag). Granting priorities include * greatest impact on reducing water consumption by phreatophytes; * geographic diversity in funding (splitting funding between W/E Slopes)

Rationale for QQ Support: Grant fund would provide an opportunity for local government protection of water resources, strengthened water quality, and better river health in QQ region and around the State.

Recommended position: **Support.**

CRWCD: Support

CWC: Support

HB 15-1016. Incentives for Precipitation Harvesting.

Sponsors: Reps. **Coram**, Mitsh Bush, Vigil, & Sens. **Sonnenberg**, Hodge, Jones, Roberts.

Status: Passed House Ag, headed to House Finance.

Bill Analysis:

- Directs the CWCB to update criteria for the pilot program to be updated by Jan. 2016 with the goal of increasing additional pilot project applications. In testimony before the WRRC, the CWCB reported low numbers of pilot project applicants to date.

- The proposal to add redevelopment of multi-building non-residential property was removed from the bill in House Ag Committee (this proposal was to help facilitate Denver Water’s redevelopment of their campus as a pilot project).

Rationale for QQ Support: This bill supports incentive-based water conservation.

Recommended position: **Support.**

CRWCD: Support in concept

CWC: No position

HB 15-1159. Instream flow program tax incentive revisions.

Sponsors: Rep. **Arndt** and Sen. **Donovan.**

Status: Passed House Ag, headed to House Finance, then House Approps.

Bill summary:

Continues the tax credit for donation to the instream flow tax program until 2020. Eliminates the requirement that a certain amount of money must be available in the general fund before the credit is available (which meant that this tool has not been used to date). Also adds that the value of the tax credit will be calculated in part based on the extent to which the river or stream would be preserved by the donation. The tax incentive would not be available for ISF donations to improve the river condition—this language was removed from the bill in House Ag.

Rationale for QQ Support: This bill improved an existing tool to address reduced streamflows in the headwaters, improving water quality and recreational opportunities in the QQ region.

Recommended position: **Support.**

CRWCD: Monitor

CWC: No position

HB 15-1167. Study of additional available water supplies in the South Platte river basin.

Sponsors: Rep. **J. Paul Brown.**

Status: Passed House Ag Committee, headed to House 2nd readings.

Bill Summary:

Directs the CWCB to study supplemental water supply projects along the main stem of the South Platte River and importation of water from the Missouri River Basin. Amendments in House Ag allow for study alternatives not just on the mainstem, including off-river storage, and requires consultation with the Basin Roundtables.

Rationale for QQ Support: This bill helps facilitate the Front Range meeting their own future water needs before looking to Colorado River Basin water, in line with QQ principles for the Colorado Water Plan.

Recommended position: **Support.**

CRWCD: Support

CWC: Support

HB 15-1210. Environmental Rules Review.

Sponsors: Rep. **Dore.**

Status: House State Affairs Committee on March 16, where there is a good change it will die.

Bill summary: Requires legislative approval of any state agency environmental rule updates required by the EPA, before the agency can send it to the EPA for approval.

Rationale for QQ Opposition: This bill would politicize a process that is currently based on a data-driven stakeholder process. This may interfere with QQ's policy to advocate regional interests in WQCC hearings that affect the CO River Basin, defending the Regional Water Quality Management Plan (208 Plan), and other measures to protect local water quality.

Recommended Position: **Oppose.**

CRWCD: Monitor

CWC: Monitor

HB 15-1222. Pilot Projects for Voluntary Transfer of Ag Efficiency Savings to Instream Flow Program ("Son of SB 14-023").

Sponsor: Rep. **KC Becker.**

Status: Scheduled for House Ag Committee on March 9th.

Bill Summary:

- Creates up to 12 pilot projects, up to 5 in each water division with water on the West Slope (divisions 4, 5, 6, & 7), administered by the CWCB (not a water court process), to allow for the voluntary transfer of agricultural efficiency savings to the CWCB for instream uses from the point of diversion to point of historic return.
- Pilot should run for at least 10 years to collect sufficient data, and may run up to 15 more years. CWCB and State Engineer must approve guidelines for the operation and administration of the pilot projects to assure that the project will maintain stream conditions in time, manner, place and amount so as to avoid

material injury to other water rights holders. Any water used under this pilot is not subject to abandonment.

- The amount of ag efficiency water to be acquired by the CWCB may not be more than the amount that the Board “determines is appropriate as the minimum amount necessary to add to the stream flows to the extent necessary to preserve the natural environment to a reasonable degree.”

- QQ supported a similar bill (SB 14-023) last year (with the exception of the Town of Gypsum, who felt the ag efficiency water should be applied to other uses besides instream flow). That bill passed the legislature and was vetoed by the Governor. The Governor committed to work towards pilot programs for this legislative session in his veto, and is a driving force in the introduction of this current bill.

Rationale for QQ Support: QQ policies include developing strategies to improve conservation measures on the West Slope and supporting the instream flow program on the West Slope. This bill is in line with both of those QQ policies.

Recommended position: **Support.**

CRWCD: Support in concept

CWC: No position

HB 15-1225. Federal Land Coordination.

Sponsors: Reps. **Rankin & Becker, K.** & Sens. **Roberts & Donovan.**

Status: Passed House Local Gov’t, headed to 2nd reading.

Bill summary:

- Directs DNR, Dept of Ag, and DOLA to provide technical support to local governments to improve coordination with federal land management agencies, specifically mentioning support for:
 - local gov’ts entering into cooperating agency relationships with federal agencies
 - Sharing information and expertise with federal land managers
 - Developing local land use plans (according to CRS 30-28 & 31-23)
 - Hiring consultants to perform analysis of local gov’t interests
 - Entering into MOUs with federal land management agencies
 - Or any other similar method for improving coordination with federal land management agencies.
- Specifies that grant money – \$1 million per year for 5 years- may be awarded to counties from the local gov’t mineral impact fund to help fund planning, analyses, public engagement and coordination with federal land management agencies.

Rationale for QQ support: Helps build better working relationships with governmental entities on water quality and recreation issues, in line with QQ policies.

Recommended position: **Support.**

CRWCD: Monitor

CWC: No position

SENATE BILLS.

SB 15-008. Promote Water Conservation In Land Use Planning.

Sponsors: Sens. **Roberts**, Hodge, Jones & Reps. **Vigil**, Coram, Mitsch Bush.

Status: Passed Senate, headed to House Ag Committee.

Bill summary: Directs the CWCB and DOLA to develop free training programs for local government land use planners and water providers regarding best management practices for water demand management and water conservation and to make legislative, regulatory, and guidance or policy recommendations on how to better integrate water demand management and water conservation into land use planning.

Rationale for QQ Support: This bill is an effort to create additional conservation and reduced water consumption through education.

Recommended position: **Support.**

CRWCD: Support

CWC: Support

SB 15-064. Application of State Water Law to Federal Agencies.

Sponsors: Sen. **Sonnenberg** & Rep. **J. Becker**.

Status: Passed Senate, scheduled for House State Affairs.

Bill summary: Addresses the interplay between state water law and federal agency administration of water on federal lands. This bill is a State response to concerns over the scope of the Forest Service and BLM water rights directives on groundwater, ski area water rights, and water quality best management practices.

Recommended position: **Monitor.**

CRWCD: Monitor

CWC: Support

SB 15-093. Compensate mineral rights owners for diminution in value of property rights caused by regulatory restrictions on mineral extraction operations.

Sponsor: Sen. **Sonnenberg** & Rep. **J. Becker**.

Status: Passed Senate, scheduled for House State Affairs.

Bill summary: As the title indicates, the bill instructs that local or state governments must reimburse any mineral rights owner for any diminution of property values because of regulatory restrictions—even legally available land use restrictions of local governments.

Rationale for QQ opposition: This bill would threaten local governments ability to regulate the impacts of oil and gas development and production, including water quality impacts.

Recommended position: **Oppose.**

CRWCD: No position

CWC: No position

SB 15-121. Drinking Water Fund for Nonprofit Entities.

Sponsor: Sen. **Crowder.**

Status: Passed Senate, yet to be introduced in House.

Bill Summary:

- Adds “private nonprofit entities” to eligible entities for the drinking water revolving fund administered by the CO Water Resources and Power Development Authority. Currently, only local governments are eligible for this funding. This bill also changes the definition of “public water systems” to include those owned or operated by private non-profit entities.

Rationale for QQ opposition: QQ policies include insuring water development in the headwaters region does not adversely impact water quality. Funding water supply development by private nonprofit entities may make this more difficult.

Recommended position: **Oppose.**

CRWCD: Monitor

CWC: Support

SB 15-183. Concerning quantification of historic consumptive use of a water right.

Sponsor: Sens. **Hodge, Sonnenberg.**

Status: Passed Senate Ag on Thursday, March 5, headed to Senate floor.

Bill Summary:

- Provides guidance to water court on the quantification of historic consumptive use of a water right. In part, it directs that the court should look at a representative study period that “must not include years of undecreed use of the

subject water right” and “need not include every year of the entire history of use of the subject water right or periods of nonuse of the water rights.”

- This is an issue currently being appealed by Pitkin County, Eagle County, the River District and the Grand Valley’s water suppliers in the Busk- Ivanhoe case against Aurora. In that case, these West Slope parties and the State and Division Engineers challenged Aurora’s change of use for their TMD water rights to municipal because the parties used portions of the water right for municipal for years although the designated use was agricultural irrigation. The water court did not consider these years of non-use and granted the change of use. Pitkin and the Engineers are appealing this decision while Eagle, the River District and Grand Valley are challenging the Water Court’s companion ruling that storage doesn’t have to be decreed for a transmountain water right so the history of storage of the rights doesn’t affect its historical use. The counties are focused on the serious consequences of allowing TMD water to be managed and used in an undecreed manner (aka any way or for purpose the water rights holder wants).

Rationale for QQ Opposition: This bill would essentially allow a TMD water rights holder to use its water for any purpose outside of its decreed use and undermines the West Slope position in the Busk-Ivanhoe appeal.

Recommended position: **OPPOSE.**

CRWCD: Oppose

CWC: Support

NWCCOG Water Quality/Quantity Committee

2015 Bills of Interest

Bill No.	Description	Sponsor	Status	Calendared	Notes	Position
HOUSE BILLS						
HB 15-1006	Invasive Phreatophyte Management Grant	Reps. Coram & Vigil , Sens. Sonnenberg , Hodge, Roberts.	Passec House Ag w/ amends, to Approps		WRRC bill	Support
HB 15-1016	Incentives for Precipitation Harvesting	Reps. Coram , Mitsh Bush, Vigil, & Sens. Sonnenberg , Hodge, Jones, Roberts.	Passed House Ag, to Approps		WRRC bill	Support
HB 15-1038	Flexible Water Markets	Rep. Arndt & Sen. Hodge	Passed House Senate Ag Committee	5-Mar		POSTPONED INDEFINITELY
HB 15-1159	Tax credit for instream flow program donation	Rep. Arndt & Sen. Donovan	House Ag	2-Mar		Support
HB 15-1167	Study of additional available water supplies in the South Platte river basin	Rep. J. Paul Brown	Passed House Ag, to Approps			Support
HB 15-1210	Environmental Rules Review	Rep. Dore	House State Affairs			Oppose
HB 15-1222	“Son of SB 14-023” Pilot Projects for Voluntary Transfer of Ag Efficiency Savings to Instream Flow Program	Rep. KC Becker	House Ag	9-Mar		Support
HB 15-1225	Federal Land Coordination	Reps. Rankin & Becker, K. & Sens. Roberts & Donovan	Passed House Local Gov't			Support
HB 15-1249	WQCC Fee Structure Revisions	Rep. KC Becker & Sen. Hodge	House Finance			Monitor
SENATE BILLS						
SB 15-008	Promote Water Conservation In Land Use Planning.	Sens. Roberts , Hodge, Jones & Reps. Vigil , Coram, Mitsch Bush	Passed Senate		WRRC bill	Support
SB 15-064	Application of State Water Law to Federal Agencies	Sen. Sonnenberg	Passed Senate			Monitor
SB 15-093	Compensate mineral rights owners for diminution in value of property rights caused by regulatory restrictions on mineral extraction operations	Sen. Sonnenberg	Passed Senate			Oppose
SB 15-121	Drinking Water Fund for Private Nonprofit Entities	Sen. Crowder	Passed Senate			Oppose
SB 15-183	Concerning quantification of historic consumptive use of a water right	Sen. Hodge & Sonnenberg	Passed Senate Ag		RD- Oppose	Oppose

BEFORE THE COLORADO WATER QUALITY CONTROL COMMISSION

STATEMENT OF NORTHWEST COLORADO COUNCIL OF GOVERNMENTS

IN THE MATTER OF THE ADMINISTRATIVE HEARING REGARDING COLORADO'S
303(d) LISTING METHODOLOGY

Northwest Colorado Council of Governments (NWCCOG) includes 26 member jurisdictions in a 5-county region of northwest Colorado. NWCCOG is the Regional 208 Water Quality Agency responsible for preparing and implementing the 208 Plan for Region 12. Region 12 includes Eagle, Grand, Jackson, Pitkin, and Summit counties and the municipal governments within those counties.

INTRODUCTION

NWCCOG is participating in this administrative hearing because of our interest in the portion of the proposed 303(d) Listing Methodology which addresses categorization of impaired segments as "Category 4c". NWCCOG has met with Division staff and others through the Water Quality Forum to discuss our concerns and we appreciate that some of our issues are reflected in the Division's current proposal. The primary concerns are:

1. Maintaining flexibility within the 4c category such that the Commission has the discretion to require a TMDL when it is the appropriate mechanism to improve water quality;
2. Limiting the application of 4c category to Aquatic Life Use Impairments resulting from failing the Multi Metric Index (MMI);
3. Addressing the concentration of pollutants as a result of human induced low flows.

I. Summary of NWCCOG Concerns with 4c Categorization.

A. Maintain flexibility to require a TMDL when waters are categorized as 4c.

EPA Guidance on TMDLs provides for several categories for categorizing waters.
<http://water.epa.gov/learn/training/standardsacademy/page7.cfm> .

Where use impairment is the result exclusively of "pollution" and not the introduction of "pollutants" a water body may be categorized as Category 4c impairment. Once a water body has been categorized as 4c, EPA does not *require* the completion of a TMDL, unlike those categorized as 4c. Nevertheless, the 4c category does not prevent a TMDL process. In some cases, a TMDL may be the most appropriate way to develop a solution to the impairment, depending upon site-specific conditions. There is an implication with 4c listing that the

impairment is irreversible and so a TMDL would be futile. However, not all impairment caused by pollution is irreversible.

EPA has developed Technical Guidance to assist in improving water quality in situations where pollution is the source of impairment. For example, EPA provides examples of measures that can be undertaken where the impairment stems from hydrologic modifications such as dams. See EPA National Management Measures to Control Nonpoint Source Pollution from Hydromodifications, Chapter 4: Dams <http://www.epa.gov/owow/nps/hydrmod/index.htm>. Often, measures can be undertaken to improve water quality without removing the source of pollution, i.e. the dam.

Often a TMDL provides the best framework for evaluating opportunities to minimize use impairment and identify the parties that can implement water quality improvement strategies. NWCCOG's concern is that the Division's proposed language (which states that a TMDL **is not** required where for Category 4c waters) would miss the opportunity to take measures that could improve impaired waters. QQ proposes that language be changed to state that a TMDL is not but may be required under circumstances where the impairment is not irreversible.

B. Limit Category 4c to Aquatic Life Impairment.

The Division outlines the circumstances that lead to inclusion of waters in Category 4c. This category was intended to address aquatic life use impairment as measured by a failing MMI score in a segment below a dam or diversion where pollutants are not involved. Several segments in the NWCCOG region are "provisionally impaired" or placed on the M&E list due to uncertainty associated with the cause of the impairment, such as the Blue River downstream of Dillon Dam.

If the Category 4c is expanded to go beyond these MMI- related circumstances several issues arise, some of which are described in the Division's memo. The most important of these issues for the NWCCOG region are those associated with temperature. Given the potential problems and uncertainty from expanding 4c beyond these MMI situations, NWCCOG requests that the scope of Category 4c be limited to those circumstances where there is an Aquatic Life impairment as measured by a failing MMI score and is due exclusively to pollution.

C. Concentration of pollutants as a result of human induced low flows.

EPA's explanation of segments impaired as a result of low flow includes specific language addressing circumstances where low flows result in increased levels of pollutants that could create or compound water quality problems and use impairment. EPA's language on this matter is:

Low flow can be a man-induced condition of a water (i.e., a reduced volume of water) which fits the definition of pollution. Lack of flow sometimes leads to the increase of the concentration of a pollutant (e.g., sediment) in a water. In the situation where a

pollutant is present a TMDL, which may consider variations in flow, is required for that pollutant.

See Guidance for 2004 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d) and 305(b) of the Clean Water Act; TMDL-01-03, July 21, 2003

http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/2003_07_23_tmdl_tmdl0103_2004_rpt_guidance.pdf. NWCCOG requests that the 303(d) listing Methodology contain similar explanatory guidance for Category 4c.

II. Alternative Language for 4c.

4c. In cases where the use impairment is determined to be caused exclusively by pollution instead of pollutant(s) the impaired waterbody may be placed into Category 4c. As defined by the Clean Water Act, pollution is “the man made or man induced alteration of the chemical, physical, biological and radiological integrity of the waters,” (section 502(19)). Segments classified as Category 4c are ~~still considered impaired, and~~ a TMDL would not be may be required in limited circumstances at the Commission’s discretion. Examples of circumstances where an impaired waterbody segment may be placed into Category 4c include segments impaired solely due to lack of adequate flow or to stream channelization. Although low flows may fit the definition of pollution, where these low flows result in an increase in the concentration of a pollutant, a TMDL is required. The Commission intends to limit candidates for Category 4c to sSegments located below dams or stream diversions with impaired biological communities (indicated by a failing multimetric index (MMI score) not caused by the presence of a pollutant(s), may be candidates for Category 4e.in 2016.

Respectfully submitted January 29th 2015, the date on which I certify that the original and 14 copies of this statement were delivered to the Water Quality Control Commission, 4300 Cherry Creek Drive South, Denver CO 80220,



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C. Water Quality Control Division Response:

The division would like to thank the parties that participated in the workgroup process surrounding Category 4c. The comments and discussions have been helpful and the division recognizes that there is additional work ahead to make Category 4c an effective pathway for restoring water quality for impaired segments due to pollution.

In response to comments submitted to the division, the division proposes to keep the Category 4c language in the 2016 303(d) Listing Methodology. The division does not agree with limiting Category 4c to provisional aquatic life listings until guidance is developed, but instead supports the opportunity for the commission to consider site-specific Category 4c listings for the 2016 303(d) List. This may offer a unique opportunity for the commission, the division and the 303(d) Listing Methodology workgroup to see the various arguments and considerations for Category 4c before additional guidance language is considered for the 2018 Listing Methodology.

At this time, the division is not aware of anyone who may bring a proposed Category 4c listing before the commission for the 2016 303(d) List and the division does not plan on proposing any Category 4c listings for this upcoming list. Demonstrating that an impairment is due solely to pollution involves a thorough investigation to rule out pollutants as the cause of the impairment. The division has not yet conducted this intensive type of evaluation for segments provisionally listed for the aquatic life use, nor has the appropriate data been collected.

The division supports the recommendation by Conservation Colorado and Northwest Colorado Council of Governments to add language to the 303(d) Listing Methodology explaining that segments with increases in concentrations of pollutant(s) due to man-induced low flows require a TMDL. The division agrees with their suggestion and is proposing to add the recommended EPA language regarding low flows to the 303(d) Listing Methodology. The division supports their recommendation to add the modifier “exclusively” before the word ‘pollution’ to clarify that a segment impaired by both pollutants and pollution should go on the 303(d) List. The division agrees with Conservation Colorado’s recommendation to add the Clean Water Act definition of a pollutant to the Category 4c section of the 303(d) Listing Methodology. Lastly, the Division is proposing that all impaired waters in Category 4a, 4b and 4c are included in a table following the 303(d) List in Regulation #93 so that there is similar transparency and documentation as there is for Category 5 waters (impaired due to a pollutant, requiring a TMDL).

The division is interested in continuing the Category 4c discussion to develop guidance on the determination and restoration of 4c listings. Several questions came up during the 2016 Listing Methodology workgroup meetings as to what types of impairments would be appropriate for Category 4c, in addition to questions about the post-designation outcome. A future workgroup, either through the 303(d) Listing Methodology efforts or otherwise, could address these issues as well as adding clarity to the determination that the impairment is due solely to pollution.

In conclusion, the division is hopeful that Category 4c can serve as a tool to direct restoration planning and division resources in a more meaningful way. Instead of requiring a TMDL, which is a tool appropriate for pollutant reductions, for segments that are impaired for pollution, the division envisions 4c pollution reduction plans with recommended management strategies to address impairments due to pollution. Many states, such as Maine and New Mexico utilize

such management strategies, as described in Conservation Colorado's Appendix A, Examples of Ten Western States' Listing Methodology for Category 4c.

D. Proposed changes: The division is proposing the following language for the 303(d) Listing Methodology (Section II.F pgs. 8&9)

In cases where the use impairment is determined to be caused exclusively by pollution, that does not result in pollutant(s) levels in excess of state water quality standards, the impaired waterbody shall may be placed into Category 4c. As defined by the Clean Water Act, pollution is "the man made or man induced alteration of the chemical, physical, biological and radiological integrity of the waters" whereas pollutants are "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." (section 502(19) and (6)). Segments classified as Category 4c are still considered impaired, however a TMDL would not be is not required. for Category 4c waterbodies. In some cases, the pollution is caused by the presence of a pollutant and a 303(d) listing (Category 5) is appropriate. In other cases, the pollution does not result from a pollutant, and a Category 4c is appropriate within for the impaired waterbody. Examples of circumstances where an impaired waterbody segment may be placed into Category 4c include segments impaired solely due to lack of adequate flow or to stream channelization. While low flows may be a human-induced condition (i.e., a reduced volume of water) fitting the definition of pollution, lack of flow sometimes leads to the increase of the concentration of a pollutant (e.g., sediment) in a water, such that a TMDL, which may consider variations in flow, is required. Segments located below dams or stream diversions with impaired biological communities (indicated by a failing multimetric index (MMI score) not caused by the presence of a pollutant(s), may be considered candidates for Category 4c.

NOTE: So the new language would read:

In cases where use impairment is determined to be caused exclusively by pollution, that does not result in pollutant(s) levels in excess of state water quality standards, the impaired waterbody may be placed into Category 4c. As defined by the Clean Water Act, pollution is "the man made or man induced alteration of the chemical, physical, biological and radiological integrity of the waters" whereas pollutants are "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." (section 502(19) and (6)). Segments classified as Category 4c are impaired, however a TMDL is not required. Examples of circumstances where an impaired waterbody segment may be placed into Category 4c include segments impaired solely due to lack of adequate flow or to stream channelization. While low flows may be a human-induced condition (i.e., a reduced volume of water) fitting the definition of pollution, lack of flow sometimes leads to the increase of the concentration of a pollutant (e.g., sediment) in a water, such that a TMDL, which may consider variations in flow, is required. Segments located below

dams or stream diversions with impaired biological communities (indicated by a failing multimetric index (MMI score) not caused by the presence of a pollutant(s), may be considered candidates for Category 4c.