

SAVE THE COLORADO THE ENVIRONMENTAL GROUP SIERRA CLUB

By email to: commissioners@bouldercounty.org
Elise Jones, Deb Gardner, Matt Jones: Boulder County Commissioners
Board of County Commissioners of Boulder County
Commissioners' Office
Boulder County Courthouse
Third Floor
1325 Pearl Street
Boulder, CO 80302

March 12, 2019

Re: Appeal by Denver Water regarding applicability of Boulder County's 1041
Regulations to the Gross Reservoir Expansion Project

Dear Commissioners:

On behalf of Save the Colorado, The Environmental Group, and Sierra Club, we are writing to support the Boulder County Land Use Director's October 22, 2018 decision that the Gross Dam and Reservoir Expansion Project ("Project") is **not** exempt from the County's Areas and Activities of State Interest Act ("1041" or "AASIA") Review.¹

Denver Water's Gross Project proposes to increase the height and width of the Gross Dam thus greatly expanding the areal extent of Gross Reservoir behind the dam. The Project will result in the permanent flooding of approximately 424 acres in Boulder County. A map showing the inundation area of the proposed expanded reservoir is attached hereto as Exhibit 1. The Project is one of the largest in Boulder County history and will adversely impact many Boulder County public assets, as well as private property.

Save the Colorado is a nonprofit organization striving to protect and restore the Colorado River and its tributaries. Save the Colorado has approximately 20,000 members and supporters, including many who live in Colorado. The Environmental Group of Colorado is a nonprofit organization located in the foothills of Colorado, spanning Jefferson, Gilpin, and Boulder Counties. The Environmental Group works to protect the natural lands and resources of the region from environmental degradation, and is a longtime proponent of environmental preservation and conservation of the public lands and waters that would be affected by the Gross Dam Project. Hundreds of members of The Environmental Group live in close proximity to the existing Gross Dam

¹ We agree with, and incorporate herein by reference, the Land Use Director's October 22, 2018 decision, including but not limited to all factual and legal rationale for denying Denver Water's exemption request.

and would be directly affected by the proposed construction activities, noise, truck traffic, dust, and emissions. Sierra Club and its Colorado Chapter are dedicated to exploring, enjoying, and protecting the planet's wild places; practicing and promoting the responsible use of the ecosystem; educating and enlisting humanity to protect and restore the quality of the natural and human environment, including rivers ecosystems; and using all lawful means to carry out these objectives. Sierra Club has more than 22,000 members in Colorado, including 4,000 in the Boulder County Indian Peaks Group many of whom will be harmed by the Gross Dam Project.

In addition to the reasons stated in Mr. Case's October 22, 2018 decision letter, we believe that the Gross Reservoir Expansion Project is **not** exempt from the County's 1041 regulations for the following reasons.

1. *Denver Water has the burden of proof in this hearing.*

The 1041 regulations contained in the Boulder County Land Use Code ("Code") state, "[a]t the appeal hearing, the appellant will have the burden of proving that the Director erred in the decision to include or exclude the activity or development from these regulations." Code §8-406(E). Further, the exemptions in the 1041 law should be narrowly construed.² Therefore, Denver Water bears the burden of proof in this proceeding. As discussed below, Denver Water's exemption request should be denied because it has fails to meet that burden.

2. *Denver Water's proposed "development" is subject to 1041 regulation.*

Denver Water seeks to expand Gross Reservoir to provide municipal water to the Denver Water Service Area, which includes numerous suburbs.³ The Code specifically requires a 1041 permit for "[e]xpansion of any existing reservoir for a municipal or industrial or domestic treated water use." Code § 8-401(D). The plain language of the State 1041 law also allows governments to designate areas of state interests from a statutorily prescribed list. Included in the areas of state interest are areas containing natural resources, including areas essential to wildlife habitat. See C.R.S. §§ 24-65.1-104(12), 24-65.1-201(1)(c), 24-65.1-202(3).

The 1041 regulations also specifically state, "[r]eview or approval of a project by

² *Droste v. Board of County Comrs of County of Pitkin*, 85 P.3d 585, 590 (Colo. App. 2003)("adopting a broad interpretation of the zoned land exemption under AASIA... would defeat the intent of the General Assembly in the Enabling Act to give broad authority to local governments to plan for and regulate the use of land") *cert denied*, 2004 WL 500832 (Colo. *en banc*).

³ For a map of the Denver Water Service Area, see: <https://www.denverwater.org/sites/default/files/2017-05/Service%20Area%20Map%20-%20Municipalities.pdf>

a federal or state agency does not obviate, and will not substitute for, the need to obtain a [1041] permit for that project under these regulations.” Code § 8-206(B). The fact that the Project may also be subject to review by the Federal Energy Regulatory Commission (“FERC”), the Army Corps of Engineers (“ACoE”), or other federal or state agencies does not exempt it from 1041 review and approval. Therefore, Denver Water must obtain a 1041 permit for the Project unless it can meet its burden of proving an exemption.

Colorado’s 1041 enacting legislation defines the term “development” to mean “any construction or **activity** which changes the basic character or the use of the land on which the construction or activity occurs.” C.R.S. §24-65.1-102(1)(emphasis added). By including the word “activity” it is clear that the Colorado legislature intended 1041 law to apply not just to “construction”, but also to “activit[ies] which change the basic character or use of the land...” In this case, the “development” involves constructing both an enlarged dam and an enlarged reservoir. Further, the “activity” is the operation of an enlarged dam and reservoir to provide municipal water to the Denver Water Service Area. The expansion of the Gross Dam will forever change the basic character of land in Boulder County by permanently flooding and submerging acres of land. Exhibit 1 hereto. The basic character of 424 acres of land will be permanently changed from dry land to subaquatic. Further, the use of these same 424 acres of land will be permanently lost as a result of the permanent flooding of the land. Thus, both the construction of an enlarged dam and reservoir, and the activity of operating the expanded dam/reservoir complex, is subject to Boulder County’s 1041 permitting process.

3. *Denver Water has not met its burden of proving a 1041 exemption.*

Denver Water asserts the Project is exempt from 1041 regulation because of the “zoned land exemption” in Section 107 of the Colorado 1041 law. This provision states,

“[t]his article shall not apply to any development in an area of state interest or any activity of state interest which meets any one of the following conditions as of May 17, 1974:(c) The development or activity is to be on land:
(II) Which has been zoned by the appropriate local government for the use contemplated by such development or activity;

C.R.S. §24-65.1-107(1)(c)(II).

The Colorado Court of Appeals previously found that this exemption should be narrowly construed. *Droste*, 585 P.3d 589.

Denver Water claims that the “property” upon which the expanded dam and

reservoir are located “was zoned for such uses by right prior to March 17, 1974.”⁴ Denver Water cites Section 3.4 of the Flood Regulatory Area (allegedly in effect on March 17, 197) claiming that “dams” were a permitted use. The County has correctly countered the factual basis for this argument by finding that the “area of the dam and reservoir was not considered part of the County’s Flood Regulatory zoning in 1974.”⁵ However, even if it was, the cited provision does not authorize a “reservoir” on all lands impacted by the expanded Project. Further, Denver Water’s argument that “[t]he use contemplated for the Project **was not prohibited** in the underlying Forestry Zoning District” does **not** mean that that dams and reservoirs were allowed as “uses by right.”

Denver Water has failed to present factual evidence supporting its claim that all lands impacted by the expanded dam and reservoir Project were zoned for such “uses by right” prior to March 17, 1974. The Director’s October 22, 2018 letter correctly disputes both the legal basis of Denver Water’s argument, as well as Denver Water’s failure to produce evidence supporting the argument. Denver Water has failed to meet its burden of proof on this issue.

Further, Denver Water’s October 12, 2018 exemption request inaccurately claims “the size of the dam following construction fulfills the contemplated use at the time of original design and construction.” In support of this claim, Denver Water submits original design documents for the Gross Dam and Reservoir from February 1946. However, when the February 1946 design document is compared to Denver Water’s 2016 FERC Hydropower License Application, it becomes clear that the size of the proposed Project exceeds the original design. More specifically, the following Table compares the 1946 design dam height and reservoir capacity, the existing dam height and reservoir capacity as constructed, and the proposed Project dam height and reservoir capacity:

	1946 Design⁶	Existing³	2016 FERC application⁷
Height of dam	430’	340’	471’
Capacity of Reservoir (af)	113,078	41,811	118,811

As shown above, Denver Water’s Project will significantly exceed the existing dam height and reservoir capacity as well as the contemplated height and capacity at the time of the 1946 design. Further, Denver Water presents no evidence that it “relied on a zoning classification...to their detriment, nor do they assert that they took

⁴ Denver Water’s October 12, 2018 letter, p. 2.

⁵ County’s January 18, 2019 letter, p. 1.

⁶ Exhibits to Denver Water’s October 12, 2018 exemption request.

⁷ Denver Water’s November 2016 Final FERC Application, Volume II, p. E-11, attached hereto as Exhibit 2.

substantial actions” to construct the enlarged dam and reservoir prior to, or after, May 17, 1974. *Droste*, 585 P.3d at 589.

It cannot be disputed that Boulder County lands will be flooded and permanently inundated beyond the existing system, as well as beyond the capacity originally contemplated in the 1946 design. Denver Water has failed to meet its burden of proving that all additional lands upon which the expanded dam and reservoir will be located were zoned for these respective uses as of May 17, 1974. Denver Water has also failed to prove that it is legally entitled to the claimed exemption. As such, Denver Water’s exemption request must be denied.

4. *Exempting the Project would be contrary to the Boulder County Plan and policy.*

One of the purposes of the Boulder County’s 1041 regulations is to ensure consistency with the Boulder County Comprehensive Plan (“Plan”). Code § 8-202(B)(18). Exempting the Project from the 1041 process would prevent the County from determining whether it is in conformance with the Plan.⁸

The Plan contains the following policy regarding construction of “potentially hazardous developments” within unincorporated areas of the County:

CW 1.13.01 It shall be county policy to cooperate with the municipalities of the county with respect to the evaluation, elimination, and reduction of potentially hazardous developments located within the unincorporated areas of the county.⁹

The term “potentially hazardous developments” includes “reservoirs.”¹⁰ The County has adopted criteria for eliminating or reducing potentially hazardous developments, such as reservoirs, and includes:

- a) The thoroughness of the applicant’s site selection process and the soundness of the conclusions reached, including the analysis of alternative sites with consideration of the potential hazardous impacts of the proposed use.
- b) An assessment of the technological and economic factors affecting the proposed development and the consideration given by the applicant to the implementation of other practical and economically feasible alternatives that can provide the same functions, while minimizing potential hazards for the public.

⁸ The Plan can be found at the following link: <https://assets.bouldercounty.org/wp-content/uploads/2018/10/bccp-boulder-county-comprehensive-plan.pdf>

⁹ Plan at p. 107.

¹⁰ *Id.* at CW 1.13.

- c) The official position of a municipal government if the potentially hazardous development is proposed within, adjacent to, or would directly affect lands within its future service/comprehensive planning area as mutually adopted by the municipality and county; and
- d) All applicable rules, regulations, and policies in effect at the time the proposal is submitted.¹¹

Exempting the Project would side step the requirements of the Plan, Boulder County policy, and sound land use decision-making.

- 5. *Exempting the Project would adversely impact Boulder County lands and assets without mitigation.*

The Boulder County Comprehensive Plan contains a series of maps identifying areas of important values, including plant and wildlife areas, archeological areas, and important view-sheds.¹² These maps can be found at the following links:

- Archeological: <https://assets.bouldercounty.org/wp-content/uploads/2017/03/bccp-map-archaeologic-sensitive-areas.pdf>
- Critical Wildlife Habitat: <https://assets.bouldercounty.org/wp-content/uploads/2017/03/bccp-map-critical-wildlife-migration-corridors.pdf>
- Environmental Conservation Area: <https://assets.bouldercounty.org/wp-content/uploads/2017/03/bccp-map-environmental-conservation-areas.pdf>
- Biodiversity Area: <https://assets.bouldercounty.org/wp-content/uploads/2017/03/bccp-map-high-biodiversity-areas.pdf>
- Natural Areas: <https://assets.bouldercounty.org/wp-content/uploads/2017/03/bccp-map-natural-landmarks-natural-areas.pdf>
- County Open Space: <https://assets.bouldercounty.org/wp-content/uploads/2017/07/bccp-map-open-space-and-public-lands-20170315.pdf>
- Imperiled Plant Species: <https://assets.bouldercounty.org/wp-content/uploads/2017/03/bccp-map-rare-plant-areas-significant-natural-areas.pdf>

¹¹ *Id.* at pp. 107-108, CW 1.13.03

¹² Boulder County’s Threatened and Endangered Species and Geologic Hazard maps have been incorporated by reference into its 1041 regulations and identify adopted areas of state interest. Code at §8-207(C)(1). Boulder County’s “Imperiled Plant Species” map includes rare plant species areas and significant natural communities near the dam/reservoir site and downstream. The Geologic Hazard Areas map includes areas of “major” risk around Gross Reservoir and downstream.

- View Protection Corridors: <https://assets.bouldercounty.org/wp-content/uploads/2017/07/bccp-map-view-protection-corridors-20170315.pdf>

The Project has the potential to adversely affect numerous Boulder County assets, including but are not limited to: the Forsyth Waterfall; South Draw, Winiger Ridge Elk Herd, and Boulder Mountain Park Eldorado Mountain critical wildlife habitats and/or corridors; archeological and travel routes surrounding Gross Reservoir; Winiger Ridge and Hawkin Gulch Upper Eldorado Canyon Environmental Conservation Areas; Winiger Gulch and Boulder Foothills High Biodiversity Areas; Winiger Ridge Natural Landmark; County Open Space and Conservation Easement(s); areas with individual plants or combinations of plants that are imperiled; and view protection corridors. The Project's potential impact to these Boulder County assets underscores the need to require 1041 and/or land use review of the Project.

6. *Exempting the Project would undermine the County's broad land use authority.*

The Local Government Land Use Control Enabling Act ("Enabling Act") also specifically authorizes local government to regulate land use to protect a variety of important values. See C.R.S. § 29–20–104(1)(b). The grant of authority in the Enabling Act is separate from and independent of the grant of authority in the State 1041 law. *Droste*, 85 P.3d 589. Generally, the Enabling Law confers "broad authority to local governments to plan for and regulate the use of land within their respective jurisdictions." C.R.S. § 29-20-102(1). More specifically, Colorado law states:

Each local government within its respective jurisdiction has the authority to plan for and regulate the use of land by: (a) Regulating development and activities in hazardous areas; (b) Protecting lands from activities which would cause immediate or foreseeable material danger to significant wildlife habitat and would endanger a wildlife species; (c) Preserving areas of historical and archaeological importance; (d) Regulating, with respect to the establishment of, roads on public lands administered by the federal government; this authority includes authority to prohibit, set conditions for, or require a permit for the establishment of any road authorized under the general right-of-way granted to the public by 43 U.S.C. 932 (R.S. 2477) but does not include authority to prohibit, set conditions for, or require a permit for the establishment of any road authorized for mining claim purposes by 30 U.S.C. 21 et seq., or under any specific permit or lease granted by the federal government; (e) Regulating the location of activities and developments which may result in significant changes in population density; (f) Providing for phased development of services and facilities; (g) Regulating the use of land on the basis of the impact thereof on the community or surrounding areas; and (h) Otherwise planning for and regulating

the use of land so as to provide planned and orderly use of land and protection of the environment in a manner consistent with constitutional rights.

C.R.S. § 29-20-104(1).

The Enabling Act provides an independent basis for land use regulation by Boulder County. *Droste*, 85 P.3d 589. Further, the “zoned land exemption” under the State 1041 law does not invalidate Boulder County’s independent authority to regulate the Project under the Enabling Act. *Droste*, 85 P.3d at 589.

The Project would be one of the largest construction projects ever in Boulder County. If there was ever a project over which the County should assert its broad land use planning authority, it is this one. The County should not shirk its land use planning authority at a time when it is needed most.

Thank you for the opportunity to submit comments supporting the Director’s October 22, 2018 determination that Denver Water’s Gross Dam/Reservoir Project is subject to 1041 review and Boulder County land use regulation. Please include this letter in the administrative record for the Board’s decision on this matter.

Sincerely,

Gary Wockner, Director
Save The Colorado

Celena Collins, Board President
The Environmental Group

Jim Alexee, Director, Rocky Mountain Chapter
Sierra Club

John Barth, Attorney
Representing Save The Colorado, The Environmental Group, Sierra Club

cc:

David Hughes, Ben Pearlman, Conrad Lattes: Boulder County Attorney’s Office
Dale Case: Boulder County Land Use Director