

## MEMORANDUM

TO: Colorado Parks and Wildlife Commissioners  
FROM: Karlyn Armstrong, Sr. Water Resource Engineer and Water Project Mitigation Coordinator  
DATE: March 5, 2020  
RE: Overview of Fish and Wildlife Mitigation Plan process

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In the next few months, the Parks and Wildlife Commission (PWC) will be asked to evaluate and provide a recommendation regarding the Monument Reservoir Project Fish and Wildlife Mitigation Plan. This memo will provide a brief explanation of what a Fish and Wildlife Mitigation Plan (FWMP or “plan”) is intended to accomplish, why the PWC will be asked to review it, and what criteria the PWC might use to evaluate it.

CPW staff are currently tracking 26 potential water storage projects across the state, including the Halligan Reservoir Expansion and Wolf Creek Reservoir Project. In addition to obtaining various federal, state, and local permits, certifications, and other authorizations, proponents of these projects must develop a state-level FWMP and seek recommendation of the plan from both the PWC and the Colorado Water Conservation Board (CWCB). CPW staff’s engagement in this process, and review and recommendation of the plan by the PWC, are crucial to the protection of state fish and wildlife resources.

Under Colorado law, fish and wildlife resources impacted by water development projects are a matter of statewide concern, and proponents of water diversion, delivery, or storage projects are expected to mitigate the future impacts of their projects on such resources. (37-60-122.2 C.R.S., attached). To do so, project proponents must develop a FWMP whenever they seek a permit, license, or other approval from the federal government for any water diversion, delivery, or storage facility in the state (with some exceptions as noted in the statute). Prior to the plan being finalized, the FWMP must be submitted to both the PWC and the CWCB.

Project proponents are largely in control of this process and must develop the proposed FWMP. CPW staff recommend that the project proponent begin developing mitigation proposals after the release of the draft environmental impact statement (EIS) since mitigation proposals typically reference the same impacts as the EIS preferred project alternative. Before the plan is submitted, project proponents are encouraged to discuss and develop consensus on the proposed mitigation with CPW and CWCB staff.

Following the project proponent’s submittal of and public release of the proposed FWMP to the PWC, the PWC has 60 days to respond, unless extended in writing by the project proponent. If the project proponent and the PWC reach a mutual agreement regarding the FWMP, the PWC forwards the plan to the CWCB. The CWCB then adopts the plan as the state’s official position on fish and wildlife resource mitigation actions required by the project proponent.

When reviewing a proposed FWMP, the PWC is guided by the criteria set out in its implementing regulations (2 CCR 406-16:1604.B.3, attached). Using these criteria, the PWC can evaluate future impacts from the proposed project, including cumulative and indirect impacts, in order to determine whether the proposed mitigation adequately protects fish and wildlife from project impacts. The PWC's evaluations may be guided by, but are not necessarily limited to, impacts identified in a draft EIS or other federal scoping document. Statute requires that mitigation measures must be "economically reasonable" and "maintain a balance between the development of the state's water resources and the protection of the state's fish and wildlife resources." (37-60-122.2(1)(a), C.R.S). Statute does not set a minimum or maximum expenditure for mitigation costs. However, if the cost of implementing mitigation recommendations exceeds five percent of the project's construction costs, the applicant may apply to the CWCB for grant funding.

In the event that the PWC and the project proponent cannot agree on a proposed FWMP, the plan still moves forward to the CWCB with recommendations from the PWC. If the CWCB agrees with the FWMP as recommended by the PWC, the FWMP becomes the official state position on fish and wildlife resource mitigation. If the CWCB makes modifications to the FWMP as recommended by the PWC, the FWMP is sent to the governor, who has 60 days to affirm or modify mitigation recommendations. The governor's decision becomes the state position regarding the FWMP.

Once the state has adopted its position on the FWMP, the FWMP is distributed to every governmental agency (federal and state) from which the project applicant must obtain a permit, license, or other project approval, as the state's recommended fish and wildlife resource mitigation for the proposed project. These agencies may, but are not required to, incorporate aspects of the state FWMP into the record of decision or as a term or condition of a permit, license, or approval, at which point those conditions become enforceable as permit conditions. The FWMP is not independently enforceable under state law. However, the plan, or components of it, typically become enforceable through a separate agreement such as a memorandum of understanding or intergovernmental agreement between the proponent and CPW. While not required, most proponents see such voluntary agreements as being beneficial to their securing necessary federal, state, or other governmental agency approvals.

In addition to proposing a FWMP for the water project, project proponents may also choose to develop a Fish and Wildlife Enhancement Plan (FWEP). Whereas FWMPs mitigate project impacts, FWEPs improve the environment beyond its existing condition. Though the creation of FWEPs are encouraged, they are not required by state law. FWEPs may be eligible for grant funding from CWCB.

Attachments:

1. Examples of water projects with completed FWMPs
2. 37-60-122.2 C.R.S.
3. 2 CCR 406-16:1602-1604

## ATTACHMENT 1: Examples of Water Projects with Completed FWMPs

- Southern Delivery System
  - *Project proponent:* Colorado Springs Utilities
  - *Approximate location:* Pueblo and Colorado Springs
  - *Primary infrastructure development:* pipelines, pump stations, and multiple reservoirs
  - *Project yield:* 42,400 acre-feet
- Windy Gap Firming Project
  - *Project proponent:* Northern Colorado Water Conservancy District
  - *Approximate location:* Loveland and Colorado River near Granby
  - *Primary infrastructure development:* construction of Chimney Hollow Reservoir near Loveland
  - *Project yield:* 30,000 acre-feet
- Moffat Collection System Project
  - *Project proponent:* Denver Water
  - *Approximate location:* Boulder and Upper Colorado River system
  - *Primary infrastructure development:* expansion of Gross Reservoir near Boulder
  - *Project yield:* 18,000 acre-feet
- Chatfield Reservoir Reallocation Project
  - *Project Proponent:* Chatfield Reservoir Mitigation Company
  - *Approximate location:* South Denver
  - *Primary infrastructure development:* mitigation of Chatfield State Park facilities
  - *Project yield:* 8,539 acre-feet
- Northern Integrated Supply Project
  - *Project proponent:* Northern Colorado Water Conservancy District
  - *Approximate location:* Fort Collins
  - *Primary infrastructure development:* construction of Glade and Galeton Reservoirs
  - *Project yield:* 40,000 acre-feet
- LEDE Reservoir
  - *Project Proponent:* Town of Gypsum
  - *Approximate location:* Gypsum
  - *Primary infrastructure development:* expansion of LEDE Reservoir
  - *Project yield:* 512 acre-feet

## ATTACHMENT 2: 37-60-122.2, C.R.S.

### 37-60-122.2. Fish and wildlife resources--legislative declaration--fund--authorization

(1)(a) The general assembly hereby recognizes the responsibility of the state for fish and wildlife resources found in and around state waters which are affected by the construction, operation, or maintenance of water diversion, delivery, or storage facilities. The general assembly hereby declares that such fish and wildlife resources are a matter of statewide concern and that impacts on such resources should be mitigated by the project applicants in a reasonable manner. It is the intent of the general assembly that fish and wildlife resources that are affected by the construction, operation, or maintenance of water diversion, delivery, or storage facilities should be mitigated to the extent, and in a manner, that is economically reasonable and maintains a balance between the development of the state's water resources and the protection of the state's fish and wildlife resources.

(b) Except as provided in this paragraph (b), the applicant for any water diversion, delivery, or storage facility which requires an application for a permit, license, or other approval from the United States shall inform the Colorado water conservation board, parks and wildlife commission, and division of parks and wildlife of its application and submit a mitigation proposal pursuant to this section. Exempted from such requirement are the Animas-La Plata project, the Two Forks dam and reservoir project, and the Homestake water project for which definite plan reports and final environmental impact statements have been approved or which are awaiting approval of the same, applicants for site specific dredge and fill permits for operations not requiring construction of a reservoir, and applicants for section 404 federal nationwide permits. If an applicant that is subject to the provisions of this section and the commission agree upon a mitigation plan for the facility, the commission shall forward such agreement to the Colorado water conservation board, and the board shall adopt such agreement at its next meeting as the official state position on the mitigation actions required of the applicant. In all cases the commission shall proceed expeditiously and, no later than sixty days from the applicant's notice, unless extended in writing by the applicant, make its evaluation regarding the probable impact of the proposed facility on fish and wildlife resources and their habitat and to make its recommendation regarding such reasonable mitigation actions as may be needed.

(c) The commission's evaluation and proposed mitigation recommendation shall be transmitted to the Colorado water conservation board. The board within sixty days, unless extended in writing by the applicant, shall either affirm the mitigation recommendation of the commission as the official state position or shall make modifications or additions thereto supported by a memorandum that sets out the basis for any changes made. Whenever modifications or additions are made by the board in the commission's mitigation recommendation, the governor, within sixty days, shall affirm or modify the mitigation recommendation which shall then be the official state position with respect to mitigation. The official state position, established pursuant to this subsection (1) shall be communicated to each federal, state, or other governmental agency from which the applicant must obtain a permit, license, or other approval.

(2)(a) Moneys transferred to the fish and wildlife resources fund pursuant to the provisions of section 37-60-121(6) are hereby continuously appropriated to the Colorado water conservation board for the purpose of making grants pursuant to this subsection (2) and for offsetting the direct and indirect

costs of the board for administering the grants. The interest earned from the investment of the moneys in the fund shall be credited to the fund.

(b) To the extent that the cost of implementing the mitigation recommendation made pursuant to subsection (1) of this section exceeds five percent of the costs of a water diversion, delivery, or storage facility, the board shall, upon the application of the applicant, make a mitigation grant to the applicant. The amount of the grant shall be sufficient to pay for the mitigation recommendation as determined by this section to the extent required above the applicant's five percent share. Any additional enhancement shall be at the discretion and within the means of the board. Under no circumstance shall the total amount of the grant exceed five percent of the construction costs of the project, or be disbursed in installments that exceed seventy percent of the amount of the grant during any fiscal year. Any mitigation cost in excess of ten percent of the construction costs of a project shall be borne by the applicant.

(c) An applicant may apply for an enhancement grant by submitting to the commission and the board an enhancement proposal for enhancing fish and wildlife resources over and above the levels existing without such facilities. The commission shall submit its recommendations on the proposal to the board for its consideration. The board, with the concurrence of the commission, may award a grant for fish and wildlife enhancement. Any such enhancement grant will be shared equally by the Colorado water conservation board's fish and wildlife resources fund and the division of parks and wildlife's wildlife cash funds and other funds available to the division.

(d) For the purpose of this subsection (2), construction costs means the best estimate of the physical construction costs as fixed by the Colorado water conservation board as of the date of the grant application. Costs should be limited to design, engineering and physical construction and will not include the costs of planning, financing, and environmental documentation, mitigation costs, legal expenses, site acquisition or water rights.

(e) Species recovery grants from the fish and wildlife resources fund may be made for the purpose of responding to needs of declining native species and to those species protected under the federal "Endangered Species Act of 1973", 16 U.S.C. sec. 1531, et seq., as amended, in a manner that will carry out the state water policy.

(f) Deleted by Laws 2001, Ch. 206, § 28, eff. May 30, 2001.

(3) Decisions relating to the official state mitigation position made pursuant to paragraph (c) of subsection (1) of this section shall not be subject to judicial review.

(4) The board shall distribute mitigation and enhancement grants reasonably and equitably among water basins toward the end that those projects sponsored by beneficiaries east of the continental divide receive fifty percent of the money granted and those projects sponsored by beneficiaries west of the continental divide receive fifty percent of the money granted under this section.

(5) The general assembly hereby recognizes the role instream flows and river restoration projects play in mitigating the effects of the construction, operation, and maintenance of water diversion, delivery, and storage facilities. Therefore, the Colorado water conservation board and the operators of existing water diversion, delivery, or storage facilities projects are hereby authorized to apply directly to the board for moneys for projects to carry out the purposes of this section. The board is authorized to grant such moneys if it finds that such projects will further the purposes of this section.

## ATTACHMENT 3: 2 CCR 406-16:1602-1604

### 2 CCR 406-16:1602. PURPOSE AND SCOPE

These rules govern administrative proceedings pursuant to the Commission's obligations under House Bill 1158 as described by Section 37-60-122.2 CRS and Section 5 of Chapter 266, Session Laws of Colorado 1987. This Act, dated July 13, 1987, directs the Wildlife Commission (Commission) and the Water Conservation Board (Board) or the Governor to determine an official State position on a wildlife mitigation plan submitted by an applicant proposing to construct, operate or maintain a water project requiring federal approval. It also establishes State grants to assist in paying for wildlife mitigation and/or enhancement measures. These rules are written to be compatible with the Board's "Rules and Regulations for the Implementation of Colorado's Fish and Wildlife Mitigation and Enhancement Grant Program."

These rules apply to all actions required by and taken pursuant to Section 37-60-122.2 CRS, (1984 and 1987 Supp.) and Section 5 of Chapter 266, Session Laws of Colorado 1987.

These rules apply to all applicants who file an application for, or receive a permit for, a proposed water project on or after July 13, 1987.

These rules do not apply to the Animas-La Plata Project, the Two Forks Dam and Reservoir Project, the Homestake Water Project or to any project which is eligible for a nationwide permit pursuant to Section 404 of the Federal Clean Water Act or to any project, except reservoirs, which requires an individual permit pursuant to Section 404 of the Federal Clean Water Act unless the applicant elects to submit a wildlife mitigation or enhancement plan.

These rules do not apply to actions concerning or carrying out other statutory responsibility of the Commission.

### 2CCR 406-16:1603. DEFINITIONS

A. Applicant means any person or entity proposing to construct a water diversion, delivery or storage facility in the state of Colorado requiring an application for a permit, license, or other approval from the United States.

B. Approval means any form of approval which is required from the United States prior to the construction of a project.

C. Board means the Colorado Water Conservation Board.

D. Commission means the Colorado Parks and Wildlife Commission.

E. Construction Costs means the best estimate of the physical construction costs of the project as fixed by the Board as of the date of the grant application. Costs are limited to design, engineering and physical construction and will not include the costs of planning, financing, and environmental documentation, mitigation costs, legal expenses, site acquisition or water rights.

F. Construction Fund means the Board's construction fund as established by Section 37-60-121, CRS.

G. Division means the Colorado Division of Parks and Wildlife and, when necessary, it may be construed as referring to the Commission.

H. Enhancement means the improvement of the total value of fish and wildlife resources affected by the project beyond that required by mitigation and beyond that which would occur without the project.

I. Enhancement Grant means a sum of money or other remuneration awarded to the applicant by the Board, to pay for the State's contribution to the implementation of an enhancement plan.

J. Enhancement Plan means a document describing the measures to be completed by the applicant which will enhance fish and wildlife resources beyond that which would occur without the project. It includes a cost estimate for the implementation of the plan and a schedule for completion.

K. Fish and Wildlife Resources Account means the account established in the Board's Construction Fund to provide funding for mitigation and enhancement grants.

L. License means any license which is required from the United States prior to the construction of a project.

M. Mitigation means any action or measures taken to address undesirable project impacts on fish and wildlife resources which may be accomplished in several ways, including reducing, minimizing, rectifying, compensating, or avoiding impacts.

N. Mitigation Grant means a sum of money or other remuneration awarded to the applicant by the Board to pay for the State's contribution to the implementation of a mitigation plan.

O. Mitigation Plan means a document describing the measures to be completed by the applicant which will mitigate losses to fish and wildlife resources resulting from the project. It includes a cost estimate for the implementation of the plan and a time schedule for completion.

P. Notice means the date the Division receives documents required of an applicant for a mitigation plan.

Q. Permit means any permit, other than a nationwide 404 permit, which is required from the United States prior to the construction of a project.

R. Project means a water diversion, delivery, or storage facility or facilities, and any combination thereof, together with all associated and appurtenant project works.

S. Water diversion, delivery or storage facility means any structure or structures built for the purpose of diverting or transporting water from a stream, lake or reservoir, on or off channel, to any type of a supply system, or any structure built for the purpose of storing water for subsequent application to beneficial use.

## **2 CCR 406-16:1604. PROCEDURES FOR ARRIVING AT AN OFFICIAL STATE POSITION ON MITIGATION**

### **A. Requirement of Applicants**

1. An applicant proposing to construct a water project requiring an application for a federal permit, license, or other approval as described in #1602 shall advise the Division and the Board, in writing, within five working days of submission of an application for federal permit, license or other approval, and provide each agency with a copy of the application and all materials cited in, referenced in, or submitted with the application.

2. When the applicant has prepared a wildlife mitigation plan which is ready for Commission evaluation, the applicant shall give notice to the Commission by submitting 15 copies of the plan to the Division, five of which are to be submitted to the appropriate Division Regional office and ten to the Denver headquarters office; and 15 copies to the Board. The following information shall be prepared within the time sequence and framework of established federal environmental impact review requirements. The mitigation plan shall include:

a. A description of the project.

b. An estimate of construction costs.

c. An assessment of the fish and wildlife resources impacted by the project, measures to mitigate the losses to fish and wildlife resources, a time schedule, and the costs and benefits of the plan.

1) A wildlife impact assessment identifies, predicts the direction and magnitude of, and evaluates and communicates the significance of a project as it affects wildlife. The assessment is dependent upon baseline data that provides an overview of the wildlife resources and related conditions as they currently exist in the area. It also provides a basis for analyzing and determining the extent and scope of project impacts, or its alternatives, to wildlife. The assessment is an integral part of the environmental impact assessment process and is not intended to be separate from or beyond the scope of that process.

2) Decisions regarding such things as study design, period of study, and responsibility for data collection and costs should be approached on a case by case basis and agreed to through interagency review at the initiation of the environmental assessment process.

3) The wildlife impact assessment and recommendations for mitigating losses will be based upon a systematic evaluation of fish and wildlife resources and habitats using the best available scientific information and professional judgment. The plan will contain an estimated cost and assignment of development, operation and maintenance of the mitigation measures and a monitoring plan.

4) Where possible, impacts to wildlife and habitat will be separated into the following categories: direct and indirect; on-site and off-site; public lands and private lands; and cumulative impacts. In the disclosure of predicted impacts, each category may have separate mitigation measures associated with it, which when assembled make up a mitigation plan.

5) Normally, mitigation should occur concurrently with or prior to project development, be proportional to impacts, and last for the entire period in which impacts to wildlife resources persist as federal, state and local laws and regulations provide.

#### B. Commission Action

1. Upon receipt of all the information required in #1604.A.2. the Division will respond, within ten working days, to the applicant with a written acknowledgment that the necessary documents have been received. The date of receipt by the Division is the official date of notice to the Division and the 60 calendar day review period will be initiated culminating in a Commission recommendation for a State position.

2. Within 60 calendar days after an applicant gives notice by submitting a mitigation plan to the Division, unless extended in writing by the applicant, the Commission will make its evaluation of the project's impact on fish and wildlife resources and submit its recommendation to the Board.



3. The Commission will make its evaluation regarding the probable impact of the proposed project on fish and wildlife resources and their habitat based on the information submitted pursuant to #1604.A.2. The Commission may consider the following criteria in making their recommendation that the mitigation plan is economically reasonable and reflects a balance between protecting the fish and wildlife resources and the need to develop the state's water resources:

- a. The value and significance of the affected wildlife resource.
- b. The potential impacts of the project and its alternatives to wildlife.
- c. The availability of best existing technology to implement and monitor the success of the mitigation plan.
- d. The degree to which the identified impacts are mitigated and the permanence of desired effects of the mitigation measures.
- e. The cost of the planned mitigation in comparison to the benefits to the affected wildlife resource.
- f. The net benefits of the project and its mitigation plan to the state's wildlife resources.
- g. The consistency of wildlife mitigation with other environmental and conservation goals.
- h. The legal ramifications of state water law on implementing the proposed mitigation measures.

4. If the Commission and the applicant agree upon a mitigation plan, the Commission shall recommend that the Board adopt the plan at its next meeting as the official state position on the mitigation action required of the applicant.

5. When the Commission and the applicant do not agree upon a mitigation plan, the Commission shall transmit to the Board 15 copies of its report which shall include (1) its evaluation of the project's impact on fish and wildlife, (2) its mitigation recommendations, including an estimate of the costs and benefits of its plan, and (3) its analysis of the applicant's mitigation plan. Documentation will include the significance of the fish and wildlife resources impacted by the project and a comparison of the impacts to the fish and wildlife resources resulting from both plans.