

# STATE OF COLORADO

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

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Colorado Department  
of Public Health  
and Environment

April 23, 2010

John Fredell  
Colorado Springs Utilities  
Plaza of the Rockies, Third Floor  
121 S. Tejon MC930  
Colorado Springs, Colorado 80947

Re:      Section 401 Water Quality Certification  
         Colorado 401 Certification No.: 4224  
         U.S. COE 404 Permit No.: SPA-1995-00131-SCO  
         Description: Southern Delivery System  
         Location: Pueblo and El Paso Counties  
         Watercourse: Arkansas River, Fountain Creek and tributaries  
         Designation: Reviewable (MA01, MA02, MA03, FO02a, FO02b)  
                         Use Protected (FO04, LA01a, LA01b)

Dear Mr. Fredell:

The Colorado Department of Public Health and Environment (CDPHE), Water Quality Control Division (Division) has completed its review of the Southern Delivery System (SDS) Clean Water Act (CWA) Section 401 Permit Application. We have also reviewed our preliminary determination with the issuance of the State of Colorado 401 Certification Public Notice (5 CCR 1002-82.5(B)) and have completed an antidegradation review pursuant to Regulation 31, Basic Standards and Methodologies for Surface Water (5 CCR 1002-31).

## Regulation 82 Requirements

Regulation 82, (5 CCR 1002-82) which addresses certifications under Section 401 of the Clean Water Act, directs the Division to consider antidegradation requirements identified in the state's Procedural Regulation, Regulation 21 (5 CCR 1002-21), requirements contained in the Basic Standards and Methodologies for Surface Water, Regulation 31 (5 CCR 1002-31), the Basic Standards for Ground Water, Regulation 41 (5 CCR 1002-41), as well as appropriate classifications and water quality standards, effluent limits, control regulations, Best Management Practices (BMPs), water quality mitigation measures and public comments. The Division is directed to provide either a regular certification, conditional certification, or to deny certification based upon a determination that the federally permitted action either will or will not comply with "all applicable provisions of the Basic

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Standards for Surface Water, the Basic Standards for Ground Water, surface and ground water classifications and water quality standards, effluent limitations and control regulations” (Section 82.5(B)(3)-(5)).

Section 82.5(B)(6) provides that “[c]ertification shall not be denied where the imposition of conditions or denial would result in material injury to water rights as prohibited under section 25-8-104 C.R.S.” The pertinent part of § 25-8-104(1) reads as follows:

No Provision of this article shall be interpreted as to supersede, abrogate, or impair rights to divert water and apply water to beneficial uses in accordance with the provisions of sections 5 and 6 of article XVI of the constitution of the State of Colorado, compacts entered into by the State of Colorado, or the provisions of articles 80 to 93 of title 37, C.R.S., or Colorado Court determinations with respect to the determination and administration of water rights. Nothing in this article shall be construed, enforced, or applied so as to cause or result in material injury to water rights. ...Nothing in this article shall be construed to allow the commission or the division to require minimum stream flows...

#### Project Background

The proposed project involves moving raw municipal water from Pueblo Reservoir to Colorado Springs through the construction of a water intake structure at Pueblo Reservoir dam, 53 miles of underground raw water pipelines, modification of a stream diversion structure on Fountain Creek and a return outfall structure to Fountain Creek from a proposed new reservoir. This project is expected to have impacts to the Arkansas River from below Pueblo Reservoir to approximately the Catlin diversion structure near the confluence with the Apishapa River, as well as Fountain Creek from Colorado Springs to the confluence with the Arkansas River at Pueblo. The Arkansas River portion is identified as segments Middle Arkansas River segments 2 and 3, Lower Arkansas River segments 1a and 1b; and Fountain Creek segments 2a and 2b from Colorado Springs to the confluence with the Arkansas River.

Middle Arkansas River segments 2 and 3 and Fountain Creek segments 2a and 2b are undesignated, meaning an antidegradation review is required. The antidegradation review process requires a determination as to whether the activity is likely to result in significant degradation of the impacted waters, and if so, “whether the degradation is necessary to accommodate important economic or social development in the area in which the waters are located.”

#### Division Comments and Antidegradation Review

The Division has reviewed information submitted concerning the Southern Delivery System (SDS) against the requirements of Regulation 82 and other regulations cited herein. The construction activities described in the SDS project are expected to be only short-term in nature and are therefore not significant.

Operation of the SDS project represents a potential long-term water quality impact to Fountain Creek and the Arkansas River. The Division has reviewed information from the SDS Final Environmental

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Impact Statement (FEIS) including, the Record of Decision (ROD) and associated reference material, the Clean Water Act §404 and §401 applications, Pueblo County 1041 Terms and Conditions and Mitigation for Project Impacts (Permit), the SDS Fish and Wildlife Mitigation Plan with the Colorado Division of Wildlife (DOW), public comments and additional information from the applicant. Based on the information and operating conditions and mitigation contained in these documents and the special conditions of this 401 Water Quality Certification agreed to by the applicants, the Division has determined that no significant degradation of water quality will occur on the Arkansas River and Fountain Creek as a result of the SDS project and that applicable water quality standards will be met.

Compliance with flow management plans of the Arkansas River, flow monitoring and geomorphic mitigation of Fountain Creek, aquatic life sampling, water quality monitoring, the development of an adaptive management plan and the many other conditions placed on the project by regulatory agencies including the Division, serve as a means of ensuring that operating the SDS project will not adversely affect the classified water quality uses. Regulatory agencies identified with project conditions mitigating potential water quality impacts include: the United States Bureau of Reclamation and its Environmental Impact Statement Record of Decision and Operating Contract; Pueblo County 1041 Permit; SDS Fish and Wildlife Mitigation Plan; and the United States Army Corps of Engineers §404 Permit of which this §401 Water Quality Certification is part of. Therefore, the Division finds these activities meet the antidegradation criteria of sections 31.8(1)(b) and 31.8(3) of the Basic Standards and Methodologies for Surface Water, Regulation No. 31 (5 CCR 1002-31), and will not result in significant degradation of the receiving waters.

#### Response to Public Comment

Regulation 82 also requires the Division to review public comments and take them into consideration in the development of a water quality certification. The Division received public comments from multiple stakeholders which prompted the Division to request additional information from the applicant. The public comments and participation by these stakeholders led the Division to accept additional stakeholder comments in response to new and additional information supplied by the applicant. Public comment and participation was considered by the Division in the development of this water quality certification.

Comments received in response to the Division's Public Notice of the project raised concerns with the potential water quality impacts to the Arkansas River from reduced stream flows below the Pueblo Reservoir dam to the confluence of Fountain Creek. The Division has reviewed the Final Environmental Impact Statement (FEIS) and reference documentation relating to water quality. The Record of Decision (ROD) issued for the project by the Bureau of Reclamation (BOR) identifies project conditions to which the applicant has agreed and which are intended to minimize potential impacts of reduced stream flow on water quality and meet the State's antidegradation requirements. The Division finds that the evaluation by the Bureau of Reclamation addresses these concerns and conditions contained in the ROD are in agreement with the Division's antidegradation requirements contained in Regulation 31.8 (5 CCR 1002-31.8) Basic Standards and Methodologies for Surface Water, Antidegradation.

Comments received in response to a request by the Division to the project proponents for additional information raised additional water quality issues related to the water quality and future flows in the

Fountain Creek basin. The comments stated that “the proposed SDS project will have negative impacts on water quality in the Arkansas River Basin due to the future return flows, and wastewater and storm water discharges.” This statement is based on the Division’s preliminary antidegradation review. The Division has since reviewed the §404 and §401 applications, the SDS operations plan in the FEIS and reference documentation relating to water quality of the Fountain Creek basin. The Division has determined that the Pueblo County 1041 Permit, the SDS Fish and Wildlife Mitigation Plan and the BOR ROD, which identify project conditions which the applicant has agreed to, will minimize potential impacts of the water quality and future flows in the Fountain Creek basin. These impacts which may result from the SDS project are not considered significant and meet the state’s antidegradation requirements contained in Regulation 31.8 (5 CCR 1002-31.8). In addition, water quality standards can be maintained from point sources through the Colorado Discharge Permit System (CDPS). Wastewater effluent and stormwater return flows will be regulated and water quality effluent limits will be enforced.

The projected increases in *E. coli* and selenium in the Arkansas River below Pueblo Reservoir do not preclude a Division determination that the project will comply with “all applicable provisions of the Basic Standards for Surface Waters, the Basic Standards for Ground Water, surface and ground water classifications and water quality standards effluent limitations and control regulations.” The expected increases of *E. coli* and selenium in the Arkansas River below Pueblo Reservoir will be caused by the diversion of water itself. The only way to prevent an increase in pollutant concentration would be to impose a condition reducing or precluding that diversion, thereby impairing the applicant’s water right. The provisions of Section 25-8-104(I) C.R.S., quoted above, as well as Regulation 82, make clear that the surface water classifications and standards may not lawfully be interpreted or applied so as to impair the right to divert water to beneficial use, and therefore such regulations are not “applicable” to the downstream water quality changes for the purposes of this certification review under §25-8-302(f), C.R.S. Furthermore, the Division may not impose conditions upon a certification that would impair water rights as described in Regulation 82.5(B)(6). The Division finds that through the conditions outlined in the BOR ROD with the application and compliance with the Upper Arkansas Voluntary Flow Management Program and the Pueblo Flow Management Program that water quality impacts from the SDS project will be minimized to the extent practicable in this portion of the Arkansas River.

The Division also received comments as to the imposition and strict enforcement of conditions into the 401 water quality certification to protect water quality over the life of the project. The intent of the water quality certification is to minimize water quality impacts associated with the SDS project with the affirmation of project water quality conditions imposed by the FEIS Record of Decision, Pueblo County 1041 Permit, SDS Fish and Wildlife Mitigation Plan with the DOW and the Division’s conditional certification. All project water quality conditions are incorporated in this certification that is part of the §404 Permit. These conditions are enforceable through the §401 Water Quality Certification No. 4224, United States Army Corps of Engineers §404 Permit No. SPA-2005-00131-SCO, United States Bureau of Reclamation, Record of Decision for the Southern Delivery System Final Environmental Impact Statement No.: GP-2009-01, Pueblo County 1041 Permit Terms and Conditions and Mitigation of Project Impacts, and SDS Fish and Wildlife Mitigation Plan.

Certification Statement

Based on the foregoing analysis and evaluation, consideration of the short term impacts of construction activities, as well as BMPs and conditions imposed by other agencies including the development of adaptive management practices in response to monitoring and assessed conditions, the Division concludes that the project will comply with all applicable provisions to the Basic Standards for Surface Waters, the Basic Standards for Ground Water, surface and ground water classifications and water quality standards, effluent limitations and control regulations. Therefore, this letter shall serve as official notification that the Division is issuing a "Conditional Certification" in accordance with 5 CCR 1002-82.5(A)(3). Conditions for this certification include:

- By reference, the Division incorporates all conditions to protect water quality placed on the SDS project by other applicable regulatory agencies. Regulatory agencies identified with project conditions impacting water quality include the United States Bureau of Reclamation, Record of Decision for the Southern Delivery System Final Environmental Impact Statement No.: GP-2009-01 (March 20, 2009), Pueblo County 1041 Permit Terms and Conditions and Mitigation of Project Impacts (March 18, 2009), SDS Fish and Wildlife Mitigation Plan (February 11, 2010) and the United States Army Corps of Engineers §404 Permit No. SPA-2005-00131-SCO (March 12, 2010).
- By reference the Division incorporates the conditions of the Intergovernmental Agreements (IGA) dated March 1, 2004 and March 27, 2004 which relate to the Arkansas River Flow Maintenance Plan (FMP) and the Arkansas River Low Flow Program memorandum of understanding dated April 17, 2009. By compliance with these plans, the SDS project will minimize water quality impacts due to the reduced Arkansas River flows from the reservoir to the confluence with Fountain Creek.
- The SDS project will install groundwater monitoring wells up-gradient and down-gradient of the Upper and Lower Williams Creek Reservoirs. A minimum of five (5) down gradient and three (3) up-gradient monitoring wells will be constructed at each reservoir and developed to characterize the groundwater in the Williams Creek drainage. The information gathered from these wells will be used to evaluate if elevated selenium concentrations are occurring as the result of the construction and operation of the reservoirs. The exact location of the wells will be determined by a registered geologist.

The monitoring of these wells will begin three years prior to the operation of the reservoirs. Samples will be collected quarterly. Analytical results will be assessed to determine if statistically significant changes have occurred over the baseline data and over the up-gradient concentrations.

If significant water quality changes over greater than a two year period are identified by the down-gradient monitoring wells, the SDS project is required to implement an effective adaptive management program to mitigate adverse water quality effects associated with the construction and operation of the Williams Creek Reservoirs. The adaptive management plan may include an expanded monitoring program to confirm the source and magnitude prior to the development of a corrective mitigation action.

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- All collected raw data and annual reports developed as a requirement of other agency conditions will be submitted to the Division at the same time they are submitted to the requiring regulatory agency. Data and reports will be submitted directly to the Environmental Data Unit in an electronic data format agreed to by the Division.

This §401 Water Quality Certification issued by the Division pursuant to 5 CCR 1002-82.3(C) shall apply to both the construction and operation of the project for which a federal license or permit is required, and shall apply to the water quality impacts associated with the SDS project. This certification does not constitute a relinquishment of the Division's authority as defined in the Colorado Water Quality Control Act, nor does it fulfill or waive any other local, state, or federal regulations.

If you have any questions or need additional information, please contact John Hranac of my staff at (303) 692-3586.

Sincerely,



Steven H. Gunderson  
Director, Water Quality Control Division  
Colorado Department of Public Health and Environment

Enclosure: Regulation 82.6 Certification Requirements

cc: Martha Rudolph, CDPHE Executive Director  
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