



Office of the County Attorney

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The Secretary
Federal Energy Regulatory Commission
Mail Code: PJ 12.5
888 First Street, N.E.
Washington, DC 20426
filed via FERC eFiling only

RE: *Comments on Supplemental Environmental Assessment of Denver Water's Application for License Amendment for Gross Reservoir Hydroelectric Project (Project No. 2035-099)*

Dear Commissioners;

Boulder County is an intervenor in this action and offers the following comments on the Supplemental Environmental Assessment (EA) issued by the FERC's staff on February 6, 2018, related to the Gross Reservoir Hydroelectric Project (FERC Project No. 2035-099).

As detailed below, Boulder County continues to object to the FERC issuing Denver Water's requested license amendment. The FERC staff has failed to address significant issues related to the project; as a result, approval by the FERC is premature and would result in negative and unnecessary impacts on the residents and natural resources of Boulder County.

The EA analyzes only those potential environmental effects of Denver Water's proposal to expand Gross Dam and Reservoir which were not addressed in the 2014 Final EIS prepared by the Army Corps of Engineers (Corps). The FERC's staff reviewed the EA, made a finding of no significant impact, and recommended approval by the Commission, as mitigated by environmental measures discussed in the EA. This approach is flawed because of the resulting narrow scope of the EA, the lack of specificity related to adoption of mitigation measures for project impacts, and the FERC staff's wholesale and unquestioning adoption of the Army Corps of Engineer's Final Environmental Impact Statement (FEIS), which FEIS was completed on April 25, 2014, and for which a Record of Decision was issued on July 6, 2017. The FERC should determine that both the FEIS and the EA fail to meet the standards of the National Environmental Policy Act (NEPA) and therefore reject staff's unreasonable approach.

The FERC staff's process also violates applicable federal law. Although the FERC was a cooperating agency in the Corps' FEIS, it is not permitted to adopt the FEIS without first recirculating it unless it has conducted an independent review of the statement and concluded that the FEIS meets NEPA standards and that its comments and suggestions have been satisfied. 40 C.F.R. § 1506.3. The FERC has not conducted an independent review of the FEIS, nor does it appear that its comments and suggestions related to the FEIS have been satisfied. The EA states that its authors did not even consider comments submitted to the FERC that were related to issues considered in the FEIS. (EA at pp. 6, 26). Part of the FERC's independent review must include consideration of comments made to the FERC that are related to issues considered by the Corps in the developing the FEIS. This is because the

FERC must make its own independent judgement as to the adequacy of the FEIS prior to issuance of any amendment to Denver Water's license or its decision will be subject to reversal on appeal.

Boulder County raised numerous issues in its Motion to Intervene that were not addressed by the Corps in the FEIS or by the FERC in the EA or elsewhere. Of great concern to Boulder County and its residents are the staleness of the data in the FEIS and the failure to consider the impacts of climate change upon the Moffat Collection System project and streams that will be dewatered as a result of the project. The FERC cannot make its final determination on NEPA compliance until it has examined the best data available on these issues.

Since Denver Water initiated its effort to construct the project, Boulder County has become increasingly concerned that Denver Water's preferred alternative does not meet the purpose and need Denver Water established for the project. Denver Water's desire for the project is predicated on a Purpose and Need Statement for the Moffat Collection System Project that was released by Denver Water in April of 2004 and based on analysis done in 2002. At that time, Denver Water stated that it would have an annual 34,000 acre-foot water supply shortfall in the "near-term timeframe" (which Denver Water put as being 2030). See Purpose and Need Statement for the Moffat Collection System Project at p. 10. Denver Water decided that it would seek to meet 16,000 acre-feet of this shortfall through water conservation and 18,000 acre-feet through firm yield of a project selected in the NEPA process. *Id.* at p. 12. Whether Denver Water can meet the purpose and need it set for itself is a threshold issue under NEPA (42 U.S.C. § 4332(2)(c); 40 C.F.R. § 1502.13; *Protect Our Communities Foundation v. Jewell*, 825 F.3d 571, 579 (9th Cir. 2016)) and it is still a very relevant issue for the FERC to decide.

Denver Water projected that a shortfall would first be experienced in 2016; we are now two years beyond that date and, despite the fact that the Denver metropolitan area has been one of the fastest growing metropolitan areas in the country over that time, no shortfall occurred. In fact, Denver's water usage has gone down over this period. If more people are being served by Denver Water and water usage has gone down, it means that people are conserving water at higher rates than Denver Water predicted. That is very good news but there is nothing in the FEIS or EA that discusses Denver Water's changes in policy, or its customers' changes in usage, over the past 16 years.

A Denver Water Gross Reservoir Fact Sheet from 2015 says that it has reduced overall water use from pre-2002 drought usage by 22 percent. Twenty-two percent of Denver Water's water supply portfolio of approximately 345,000 acre-feet is 75,900 acre-feet -- more than twice as much as Denver Water expected its shortfall to be in 2035 and more than four times as much as Denver Water set out to save through conservation. Before the largest construction project in the history of Boulder County is imposed upon us, the FERC should require Denver Water to provide more detailed data regarding its water savings over this period of time and how that compares to what it predicted. The Corps and the FERC should look at nonstructural strategies for providing Denver Water the water security it seeks so that the FERC can make a more informed decision about whether Denver Water actually needs new storage space in Gross Reservoir.

Further evidence that an expanded Gross Dam and Reservoir are not needed can be seen from Denver Water's description of other actions it has taken since it first proposed an

expansion of Gross Dam and Reservoir. Denver Water has recently begun filling its Dunes and Tanabe Reservoirs, former gravel pits in Adams County, as part of its Downstream Reservoir Water Storage Program. All told, Denver Water will be completing a total of 9 reservoirs, with a volume of over 32,000 acre feet of storage capacity, which will allow for more efficient use of its existing transmountain diversions. On its website, Denver Water states that it “started evaluating this concept as an alternative when it began the permitting process for the Gross Reservoir expansion project.”

(<https://denverwatertap.org/2018/03/12/downstream-reservoirs>) The new reservoirs are to provide Denver Water with the ability to adapt to future demands to ensure a reliable water supply. *Id.* Once again, Denver Water should be complimented on finding ways to make more efficient, and economical, use of the water rights it already owns and imports from the West Slope. However, if a new analysis were to be done to update the scoping that Denver Water did when it initiated its effort to expand Gross Dam and Reservoir, the FERC may find that the purpose and need that Denver Water defined in 2002 is no longer supportable. NEPA requires that the FERC undertake this analysis before rendering its decision on a permit amendment to authorize the expansion of Gross Dam and Reservoir.

Because it has taken this project so long to get from the planning stages to Denver Water’s application for amendment of its FERC license, the projected cost of this project has ballooned from a 2006 estimate of \$148,666,00.00 to a 2015 estimate of between \$380,000,000.00 and \$450,000,000.00. There is nothing in the EA that gives a current estimate of the project cost. The cost the project is a material factor to consider in determining the reasonableness of selecting the preferred alternative because, without knowing the cost, it is not possible to adequately compare one proposal to another. *Alliance to Save the Mattaponi v. U.S. Army Corps of Engineers*, 606 F.Supp.2d 121, 130 (D. Colo. 2009) (An agency performing an EIS must take a new look at alternatives if there is evidence of reduced need and higher cost for a proposed reservoir project). Here, we have both a reduced need and a higher cost. In the EA, it states that “the no-action alternative would likely require Denver Water to use a combination of nonstructural strategies to meet the need for additional water supply in the future.” The EA doesn’t say that Denver Water’s future supply needs couldn’t be met with nonstructural strategies, such as conservation. Because a comprehensive program of nonstructural strategies was never considered, it is impossible to know what conservation and other measures could be achieved for a price of the cost of the project. Boulder County and other affected interests have the right to have all alternatives considered fairly, which means that we need more current data upon which a decision can be made.

In addition, over the past 16 years the understanding of climate change has improved, as have estimates about climate change’s impacts upon water supply in the Upper Colorado River. In its Motion to Intervene and in its comments to the Corps, Boulder County has set forth a list of scholarly articles that have been written over the past decade which show a broad consensus that climate change will likely cause a future decrease in streamflows in the Upper Colorado River Basin (where the vast majority of the water that will fill the enlarged Gross Reservoir originate). If there is less water in the tributaries of the Upper Colorado River, there will be less water available for Denver Water to divert into Gross Reservoir. If there is less water available for Denver Water to divert into Gross Reservoir, Denver Water will be able to fill the reservoir less frequently. If the reservoir is filled less frequently, the reliability and firm yield of that water will be decreased. Because Denver Water has defined the purpose and need for the project to be the development of 18,000 acre-feet of firm yield,

which is exactly the amount of firm yield that an enlarged Gross Reservoir could hold based upon historical averages, if there is *any* diminution in stream flows due to lower average annual flows, the preferred alternative from the FEIS fails the most basic NEPA requirement and must be rejected by the FERC.

Federal case law on NEPA compliance requires that climate change and its impact upon a project be considered in a meaningful way by agencies evaluating environmental impacts of federal actions. *Aqualliance v. U.S. Bureau of Reclamation*, 2018 WL 903746 at pp. 36, 38 (E.D. Cal. February 15, 2018) (finding that the failure to analyze climate change in a meaningful and logical way is arbitrary and capricious) *citing Wild Fish Conservancy v. Irving*, 221 F.Supp.3d 1224 (E. D. Wash. 2016). To date, there has not been a meaningful consideration of climate change by either the Corps or the FERC.

Given the scientific consensus that streamflows in the Upper Colorado River will diminish over time due to climate change, using the historic period of 1947-1991 is not reasonable. *See Id.* at pp. 36-39 (it is arbitrary and capricious for a federal agency to use a historic period of hydrology for estimating future runoff when runoff models predict that historic patterns of runoff will likely be altered by climate change). Instead, more emphasis must be given to the more recent era and predictions about how future streamflows will diminish due to climate change must be considered and incorporated. Boulder County encourages the FERC to review the state of current scientific knowledge about the impact of climate change upon the predicted future availability of water for diversion from the tributaries of the Upper Colorado River and take a “hard look,” as required by NEPA, at whether the preferred action can meet the purpose and need that Denver Water has set out for itself.

Boulder County has intervened in Denver Water’s application for a FERC license amendment to allow for the expansion of Gross Dam and Reservoir because, if constructed, the expansion of Gross Dam and Reservoir will be the largest construction project in Boulder County’s history and the county wants assurances that the project will only be constructed if it is the least environmentally damaging proposal that meets the stated purpose and need and if its impacts are mitigated to the extent reasonably possible. Based upon the FEIS and the EA that have been developed for the project, Boulder County does not believe Denver Water has shown that the project’s purpose and need have not been met and the FERC must deny Denver Water’s application to amend its permit.

During the 16 years since the scoping for the FEIS began, much has changed in terms of the projected cost of the project, Denver Water’s water savings due to conservation, and our understanding of climate change and its impact upon runoff for the Upper Colorado River. The projected cost of the project has doubled or tripled, Denver Water’s customers have saved more water than anticipated, and the water Denver Water seeks to store in Gross Reservoir is less dependable due to climate change. Yet, despite these changes in circumstances, Denver Water’s proposal and the data upon which the Corps and the FERC analyze the project have not been changed accordingly. To satisfy NEPA, the FERC must rectify these deficiencies by conducting its own analysis of the Corps’ FEIS and requiring that new data be compiled to address changes in circumstances in the 16 years since the scoping for the project was initiated.

In addition to the issues raised above, the FERC staff’s recommendation results in an unacceptable level of uncertainty regarding Denver Water’s mitigation requirements.

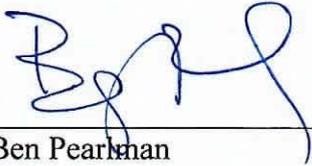
Specifically, the FERC staff recommends that the Commission approve Denver Water's license amendment application with the requirement that Denver Water finalize and implement mitigation plans "in consultation with applicable resource agencies." The recommendation further states that these mitigation plans should "be filed for Commission approval prior to any ground-disturbing or construction work." In any eventual approval, the FERC should require mitigation of environmental impacts, and should require greater certainty about what is required of Denver Water. Otherwise, Denver Water may proceed without putting appropriate mitigation measure in place or conflicts may arise among interested parties over what is required.

One of the issues that has not been resolved, and for which there is no mitigation plan, is how to dispose of 645 acres worth of trees to be removed (estimated to be 200,000 trees greater than 4" in diameter). The EA speaks of tree removal in very general, and conditional, terms. It says that "[t]ree removal would minimize problems with floating debris, decaying vegetation, and potential water quality concerns. Denver Water would submit a final tree removal plan to FERC after coordination with the Forest Service, Colorado State Forest Service, Boulder and Jefferson Counties, and the local community at least 90 days prior to any tree-clearing activities around Gross Reservoir. Tree removal would likely require a combination of the following standard tree-clearing operations . . ." EA at p. 12. The section on tree removal and disposal ends by stating that "Denver Water would explore opportunities to use some of the material to reduce the residue volume." Elsewhere, the EA says that "[a] final [tree removal] plan would be filed with the Commission for approval prior to land clearing activities." EA at p. 17.

Boulder County's Comprehensive Plan lists a portion of the area that would be inundated by the expanded Gross Reservoir as the Winiger Ridge Environmental Conservation Area. As demonstrated from other cases, tree removal associated with a federally permitted project can cause irreparable harm that warrants analysis under NEPA. *Atchalafalaya Basinkeeper et al. v. U.S. Army Corps of Engineers*, Civil Action 18-23-SDD-EWD, slip opinion at p. 12 (M.D. Louisiana, February 28, 2018). Because Denver Water plans to remove trees from a designated environmental conservation area and because such removal could cause irreparable harm, Denver Water should not be able to receive a license amendment from the FERC unless and until the FERC has reviewed and approved of the tree removal plan.

Further, Denver Water's plans for disposing of 50,000 tons of wood will have significant bearing on the project's carbon footprint and overall environmental impact. By what method will the trees be removed? Over which roads will those trees be hauled? Where will the trees be taken? What will become of the carbon in all of that wood? Boulder County has been asking these questions of Denver Water for at least the past 7 years and has received no answers. Accordingly, the FERC should require that the plan for tree removal and other mitigation plans recommended in the EA be finalized and approved by the FERC before any license amendment is issued. Requiring Denver Water to "consult" with Boulder County before it submits its tree removal plan doesn't mean that Denver Water has to incorporate any of Boulder County's recommendations in the plan or that the FERC has to approve of the tree removal plan; Boulder County's past discussions with Denver Water about tree removal and other issues related to impact have not been productive. At a minimum, the FERC must require that no work is done on the project until Denver Water's various mitigation plans, not just the tree removal plan, are approved by the FERC, not just that they are submitted to the FERC.

Thank you for your consideration of these issues of great importance to Boulder County and its citizens.



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