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City of Fort Collins
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Dear Colorado Parks and Wildlife Commission,

The City of Fort Collins ("Fort Collins") respectfully submits the following material on the revisions to the draft *Fish and Wildlife Mitigation and Enhancement Plan (Draft Final)*, dated August 22, 2017 for Northern Water's proposed Northern Integrated Supply Project ("NISP"). The proposed mitigation plan is referred to as the "Plan," as the "revised" August 22, 2017 or "original" June 9, 2017 versions as necessary. Fort Collins appreciates the public comment opportunity provided by Northern Water ("Northern"), the Colorado Parks and Wildlife Commission ("CPW") and the Colorado Water Conservation Board ("CWCB").

This packet includes the following:

- 1) A response to the revised Plan, as a supplement to Fort Collins' original comment letter dated August 10, 2017 "Fort Collins' Comment Letter," which is attached. This response is devoted to how the revised Plan now addresses (or fails to address) Fort Collins' concerns and key recommendations originally expressed in the August 10 Fort Collins' Comment Letter.
- 2) A reply regarding the comment letter *Re: Fort Collins Comments Suggesting Delay in Approval of NISP Fish and Wildlife Mitigation and Enhancement Plan*, dated August 10, 2017, from Peggy E. Montañó of the law firm of Trout Raley Montañó Sinor Thompson, P.C. on behalf of NISP ("NISP Response Letter").

Fort Collins' Concerns and Key Recommendations Regarding the Plan, as Revised

- 1) Peak Flows: Northern and CPW are to be commended for the revisions to the peak flows component of the Plan. They represent a notable improvement over the original Plan. It appears that full bypass flows are achieved in approximately 70% of years versus 50% under the initial draft of the Plan. Fort Collins' continues to be concerned, however, that the proposed peak flow regime will not achieve CPW's goals for fish spawning habitat as well as other wildlife objectives pertinent to the statute. The peak flow strategy is based on a technical report (Anderson 2017¹) that provides a definition for flushing flows that is not applicable to the Poudre (see Fort Collins' Technical Comments, August 10). As compared to the expanded tier-based approach in the Plan, an annual 3-day bypass would achieve CPW's objectives, alleviate future flood risks to Fort Collins resulting from NISP's diversion of peak flows, and allow efficient and predictable implementation. Fort Collins continues to strongly urge CPW to require an annual three-day bypass of peak flows.
- 2) Conveyance Refinement: The Plan describes the benefits of NISP deliveries via releases to the Poudre River under the conveyance refinement approach. Such releases will provide base flows throughout the year (see page 40 of the Plan), and will benefit the Poudre for a 12-mile reach through Fort Collins. Unfortunately, the Plan clarifies that the proposed base flows will only be provided after full buildout, and "that prior to full buildout conditions, NISP will convey a minimum of 35% of deliveries to NISP participants through the Poudre River intake" (see page 1 of the Plan cover letter). Thus, until sometime, perhaps decades into the future, when full buildout (demand from participants) occurs, the 18 CFS winter delivery and up to 25 cfs summer delivery may be, in fact, significantly less. In the meantime, the impacts of NISP continue to accrue.

Given that the conveyance refinement is, as the Plan cover letter states (at page 1), "one of the keystone commitments of our plan" Fort Collins is disappointed that the benefits to the Poudre River are wholly contingent on the water demands of NISP participants. Fort Collins suggests that CPW and Northern consider water management strategies that would enable full use of the conveyance refinement as soon as possible. For example, prior to buildout, the project participants could commit to utilize the full volume of NISP deliveries planned for the conveyance refinement (about 14,000 acre-feet per year). Doing so may require NISP participants to forego use of their other existing water supplies prior to buildout; however, the participants may be able to lease their foregone supplies to other uses. In sum, Fort Collins strongly urges CPW to require the full 18 cfs winter and up to 25 cfs summer releases from the conveyance refinement as soon as deliveries to NISP participants begin and the volume of water stored in Glade Reservoir exceeds 50% of full capacity.

¹ Fort Collins will be submitting its technical concerns with respect to the Anderson report to the Army Corps of Engineers and the Environmental Protection Agency.

- 3) Water Quality: No changes regarding water quality were made in the revised Plan. Please see Fort Collins' comments below in response to the NISP Response Letter. Without a quantitative analysis of the water quality impacts of NISP, CPW and Fort Collins cannot judge the impacts to fish and wildlife nor judge whether the proposed Plan adequately mitigates those impacts.
- 4) Mitigation, Restoration, Channel Improvements, and Conveyance: The majority of Fort Collins' concerns described over restoration and channel improvements were not addressed in the revised Plan. The addition of the bullet "improve floodplain connectivity" on page 102 is welcome but without a more detailed description, the commitment is unclear and non-binding. Given the revised Plan has not changed Northern's commitment to work on 2.4 miles of river (in a location where it is not apparent that improved floodplain connectivity is needed or possible), this additional bullet is not meaningful. Thus, Fort Collins' original comments regarding the type and scale of restoration stands.

No change was made to the financial commitment for these sections of the revised Plan. As Fort Collins' noted in its original comments, the mitigation plan for NISP could be improved at a reasonable cost by providing adequate funding for at scale mitigation. The Plan's proposed budget of \$2.8 million for stream channel and habitat improvements is unlikely to achieve its objectives for the simple reason that it will not "buy" enough in the way of restoration improvements. As noted in Fort Collins' original comments, this amount should be increased to at least \$12 million to have a positive mitigation impact commensurate with negative environmental effects. The same is true of the enhancements budget of \$5 million (page 104), which should be increased to \$10 million. In the context of the overall cost of the project as well as mitigation costs, these increases are reasonable and practicable.

- 5) Adaptive Management and Long-Term Monitoring: The revised Plan notes that the adaptive management program will be financed at \$50,000 a year and that the Plan will operate for 20 years beyond "the consistent delivery of full or nearly full NISP yield to a majority of the NISP participants for a period of 5 years" (page 104). This represents an improvement over the original Plan and extends the length of the adaptive management program. Fort Collins would like to understand the timeframe expected for full buildout, and to see the financial commitment carried over into the cost schedule (Table 13, page 121) which has not changed from the original version. As noted in Fort Collins' original comments, the Plan could be improved by enhancing the budget for adaptive management from \$50,000 per year to \$100,000 a year.

All other Fort Collins comments regarding adaptive management remain unchanged.

- 6) Uncertainties Regarding Agreements: Please see comments below in the response to the NISP Response Letter.
- 7) Mitigation and Enhancement Costs: Fort Collins continues to recommend funding improvements for mitigation, enhancement, and monitoring (see comments, items 4 and 5).

- 8) Big Game Habitat: Fort Collins looks forward to working with Northern, CPW and others on the conservation of the State Land Board parcel to the west of the proposed Glade Reservoir.

Reply Regarding the NISP Response Letter

The NISP Letter discusses C.R.S. §37-60-122.2 (the “Statute”) and objects primarily to two comments from the August 10 Fort Collins Comment Letter. Regarding the theme of Water Quality, Fort Collins stated:

Fort Collins recommends withholding approval of the Plan until the final EIS and final water quality impacts analysis are made publicly available so that the Commission can ascertain whether mitigation measures will adequately prevent water quality impacts to fish and wildlife (page 3).

Regarding the theme of Uncertainties Regarding Agreements, Fort Collins stated:

CPW should withhold approval of the Plan until crucial agreements are completed (for example bypass agreements with ditch companies for the conveyance refinement) (page 5).

The evaluations, recommendations, and ultimate approval of a fish and wildlife mitigation plan can be made in a manner consistent with the Statute while addressing Fort Collins’ concerns.

The NISP Response Letter asserts that CPW “cannot” delay its evaluation and recommendation on the Plan (page 2). However, this is only part of the picture. CPW has 60 days from the applicant’s notice to make its evaluation and to send its recommendation to the CWCB, “unless extended in writing by the applicant.”² The CWCB similarly has 60 days to act “unless extended in writing by the applicant.”³ Northern Water thus holds the key to providing CPW, the CWCB, Fort Collins, and the public with adequate time for a thorough and complete evaluation of the Plan, which will be the basis of the recommendations and the State’s official position. Northern’s assertion is thus self-fulfilling; CPW cannot take more time to evaluate the plan and to craft a recommendation only because Northern Water is opposed.

Fort Collins does not, of course, intend for CPW to act contrary to the Statute and its regulations. Nor does Fort Collins intend that CPW’s evaluation of and ultimate recommendation regarding the Plan be indefinitely delayed, as suggested in the NISP Response Letter (page 2). Rather, Fort Collins hopes that CPW and Northern Water will work together to provide adequate time for CPW’s evaluation of the Plan, and to postpone the deadline for CPW’s recommendation until certain key facts are known and certain key uncertainties are addressed. Likewise, consistent with the Statute, Fort Collins hopes that the State of Colorado’s ultimate approval of the Plan be postponed until adequate information is provided to CPW, the CWCB, Fort Collins, and the public, so that the State of Colorado’s official position is fully informed and based on an acceptable level of uncertainty.

² C.R.S. §37-60-122.2(1)(b); Regulation No. 1604(B)(2).

³ C.R.S. §37-60-122.2(1)(c)

Adequate time for a thorough evaluation and recommendation could be provided through an extension granted by Northern Water, as noted above. Fort Collins' concerns could also be addressed by making the approval of the Plan contingent upon the completion and public review of certain analyses or other milestones so that they can be reviewed and incorporated into the State's official position, or by CPW entering into an agreement with Northern Water containing terms and conditions addressing these issues.⁴ Such actions would be consistent with the Statute and appropriate.

The State's official position should be based on facts and an acceptable level of uncertainty; it is not "backwards" to seek to ensure that they are known before a decision is made.

The NISP Response Letter asserts that Fort Collins gets the Statute "backwards" (page 3). However, Fort Collins does not agree with reading the Statute as to have the State of Colorado take an official position on fish and wildlife mitigation without fully knowing the impacts to fish and wildlife being mitigated and under a level of uncertainty that Fort Collins views as unacceptable.

The NISP Response Letter mischaracterizes Fort Collins' comments in stating that Fort Collins claims that CPW should not act "until after the Colorado Department of Public Health and Environment ("CDPHE") completes its water quality certification in accordance with section 401 of the Clean Water Act" (page 3). As noted above, Fort Collins has only requested a delay until "final water quality impacts analysis are made publicly available," which could come sooner than the CDPHE water quality certification, such as with the release of the NISP final EIS.

The NISP Response Letter claims that waiting until the final EIS and final water quality impacts analysis are made publicly available would "deprive[] the agencies overseeing those reviews the benefit of factoring the proposed mitigation measures and the state's official position into their analyses" (NISP Letter page 3). However, Fort Collins is not aware of any legal authority that would prevent Northern Water from communicating its intended mitigation actions to these permitting agencies, which would only be augmented by the official State position. Fort Collins does not intend to deprive permitting agencies of reviewing a mitigation plan, but rather, Fort Collins intends that those agencies receive a mitigation plan that addresses the actual impacts.

The NISP Response Letter asserts that third-party agreements with ditch and reservoir companies are not relevant to fish and wildlife issues (page 5). However, some of these agreements would concern the "installation of facilities that allow fish passage and measure bypassed flow," which clearly impacts fish and wildlife (Plan at page 2). Fort Collins appreciates the challenge faced by Northern Water and recognizes that it may be premature to complete certain mitigation agreements at this stage in the project. Nevertheless, it cannot be reasonably contested that if these agreements are not completed, then mitigation as defined in the Plan will not occur. Fort Collins cannot accept the high level of uncertainty associated with agreements with third-party entities concerning such critical components

⁴ See C.R.S. §37-60-122.2(1)(b)-(c); Regulation No. 1604(B)(5); Memorandum, *RE: Mitigation of fish and wildlife impacts under § 37-60-122.2, C.R.S.*, dated December 9, 2010, from Tim Monahan, First Assistant Attorney General, to Tom Remington, Director of Colorado Division of Wildlife.



of the Plan. Fort Collins' concerns could be addressed if Northern Water were to document that third-party entities are willing to consider such agreements and that the activities requiring third-party agreements are reasonably likely to actually occur.

The NISP Response Letter also asserts that the issues covered by adaptive management will be refined over time, and thus, need not be fully addressed now (page 6). However, as discussed in the Fort Collins Comment Letter, while Fort Collins welcomes the adaptive management concept, key aspects such as performance standards and "triggers" are unknown (pages 4-5). Absent greater certainty, it cannot be determined what the adaptive management program would and would not accomplish and mitigate.

Fort Collins intends to continue working on these issues.

Fort Collins again expresses its support for communities, including participants in NISP, in their quest to acquire reliable water supplies without significantly adversely affecting other communities and the environment. However, as discussed in the Fort Collins Letter and in these supplemental comments, Fort Collins has various concerns with the Plan. Fort Collins looks forward to working with CPW, the CWCB, and Northern Water to address these issues.