
5. Water Management

INITIAL DRAFT Chapter 5.10 Creating More Efficient Permitting Processes

Introduction

Governor Hickenlooper's May 2013 Executive Order reiterated what has been known for years in Colorado – the gap between our water supply and water demand is real and looming. While conservation is a key strategy to narrowing the gap across the state, it cannot solve the problem alone. Water projects will need to be built in the future. The Executive Order directed the CWCB to “streamline the state role in the approval and regulatory processes regarding water projects”.

The purpose of this section is to explore how permitting in Colorado can be more effective and efficient. The section describes the permitting and licensing processes project proponents must currently go through, the challenges that arise during the process, and reforms that could help make the process more efficient and effective for all parties involved. The solutions proposed in this chapter mainly focus on how state processes can be more effective, but also touches on the benefits that result from the cooperation of federal agencies. The state is prohibited from predetermining the outcome of an environmental permit, certification, or mitigation plan.

Summary of the process for each process within water permitting

This section will briefly explain the processes project proponents are required to address in order to complete their project.

NEPA Process

The National Environmental Policy Act (NEPA) is a federal law that establishes the country's national environmental policies. To implement these policies, NEPA requires federal agencies to assess the environmental effects of their proposed actions prior to decision making. Citizen involvement through public disclosure and opportunities for public input is required as the environmental effects are evaluated. Both of these requirements are fundamental to NEPA because they should lead to implementation of NEPA's policies:

“(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the

general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may –

1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.”

NEPA's procedural requirements apply to all federal agencies and all federal agency decisions for actions including:

- Financing, assisting, conducting or approving projects or programs.
- Agency rules, regulations, plans, policies or procedures.
- Legislative proposals.

Basically, NEPA applies when a federal agency has discretion to choose among one or more alternative means of accomplishing a particular goal. For state water projects, the most common federal actions that lead to NEPA environmental review are a U.S. Bureau of Reclamation contract for storage of water in a facility managed by that agency, a U.S. Army Corps of Engineers (“Corps”) Clean Water Act Section 404 permit, or a Federal Energy Regulatory Commission license.

The NEPA process begins when the federal agency determines there is the need to take an action. This determination can be made by the federal agency itself or can be brought to it by someone outside the agency, for example, through a permit application. The federal agency that will need to take the action is the lead agency and is the agency responsible for compliance with NEPA.

Depending on the circumstances, a joint lead agency and/or cooperating agencies can be identified to share in the responsibilities of completing NEPA environmental review. For many state water

projects, an EIS process is required because significant environmental effects may occur if the projects are implemented.

Reference:

Council on Environmental Quality Executive Office of the President, A Citizen's Guide to the NEPA Having Your Voice Heard. 2007. http://ceq.hss.doe.gov/nepa/citizens_guide_Dec07.pdf

Clean Water Act Section 404

Section 404 of the Clean Water Act (CWA) establishes a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands. Activities in waters of the United States regulated under this program include fill for development, water resource projects (such as dams and levees), infrastructure development (such as highways and airports) and mining projects. Section 404 requires a permit before dredged or fill material may be discharged into waters of the United States, unless the activity is exempt from Section 404 regulation (e.g. certain farming and forestry activities).

Under Section 404, no discharge of dredged or fill material may be permitted if:

- A practicable alternative exists that is less damaging to the aquatic environment.
- The nation's water would be significantly degraded.

Various federal agencies have different Section 404 roles and responsibilities. The Corps administers the day-to-day program, including individual and general permit decisions. The Corps also conducts or verifies jurisdictional determinations, develops policy and guidance, and enforces Section 404 provisions. The U.S. Environmental Protection Agency (EPA) develops and interprets policy, guidance and environmental criteria used in evaluating permit applications. EPA also determines scope of geographic jurisdiction and applicability of exemptions, approves and oversees state and tribal assumptions, and reviews and comments on individual permit applications. EPA has the authority to prohibit, deny or restrict the use of any defined area as a disposal site, can elevate specific cases for further evaluation under Section 404(q), and enforces Section 404 provisions. The U.S. Fish and Wildlife Service evaluates impacts on fish and wildlife of all new federal projects and federally permitted projects, including projects subject to the requirements of Section 404. FWS also elevates specific cases or policy issues pursuant to Section 404(q).

Proposed activities are regulated through a permit review process. An individual permit is required for potentially significant impacts. Individual permits are reviewed by the Corps, which evaluates applications under a public interest review, as well as the environmental criteria defined in CWA Section 404(b)(1) Guidelines, and NEPA policies and procedures. For most discharges that have only minimal adverse effects, a general permit is issued. General permits are issued on a nationwide, regional, or state basis for particular categories of activities. Many state water projects require an individual Section 404 permit.

Reference:

U.S. Environmental Protection Agency.

http://water.epa.gov/grants_funding/wetlands/upload/2004_4_30_wetlands_reg_authority_pr.pdf 08 May 2014

401 Water Quality Certification

Under Section 401 of the CWA, if an activity that requires a federal license or permit may cause any discharge into navigable waters, the applicant for the federal license or permit must obtain a 401 certification. The Water Quality Control Division is required by Colorado statute (C.R.S., §25-8-302(1)(f)) to review federal licenses and permits under Section 401 of the Clean Water Act. Colorado Water Quality Control Commission Regulation No. 82 (5 CCR 1002-82) authorizes the division to certify, conditionally certify or deny certification of federal licenses and it sets forth best management practices (BMPs) applicable to all certifications, with one exception, noted below. Regulation No. 82 applies to division certification of CWA 404 permits issued by the U.S. Army Corps of Engineers (Corps), licenses for hydropower projects issued by the Federal Energy Regulatory Commission, and other federal permits involving a discharge including Clean Water Act Section 402 discharge permits issued by EPA. The exception is for 402 discharge permits issued by EPA for facilities on tribal lands and for federally owned facilities on federal lands: for these facilities, EPA issues the 401 certification. Individual certification review is not required for Section 404 general or nationwide permits issued by the Corps. These general or nationwide permits are certified under statute (C.R.S., §25-8-302(1)(f)) without additional conditions.

The division issues a section 401 water quality certification when it determines that there is reasonable assurance that both the construction and the operation of the project will comply with state surface and groundwater water quality standards and requirements. If the division concludes that the project will comply with the water quality standards and requirements only if one or more conditions are placed on the license or permit, the division will issue the certification with the necessary conditions included.

Section 122.2

Colorado State Statute 37-60-122.2 (C.R.S.), known as the Fish and Wildlife Resources Fund and Authorization, declares that fish and wildlife resources are a matter of statewide concern and that impacts on such resources should be reasonably mitigated by applicants proposing water diversion, delivery, or storage projects. Applicants must submit a mitigation proposal to the Colorado Parks and Wildlife Commission for review and approval. If mutual agreement on the plan is reached by the applicant and the commission, the plan is forwarded to the CWCB for board adoption as the official state position on the plan. If the commission rejects an applicant's plan, it is still forwarded to the CWCB. If CWCB does not agree with the Commission, then the Governor decides whether or not to approve the plan. Once there is mutual agreement on the plan by the applicant and the Commission, the plan is forwarded to the CWCB for board adoption as the official state position on the plan. A plan is generally required when an applicant seeks a permit or license from the federal government for the specified types of water projects, with some exceptions as noted in the statute. Grants can be made available to applicants to help implement the mitigation plans. Criteria have been established for such grants for distribution when funds are available. Examples of Section

122.2 plans that are completed or in process include Southern Delivery System (SDS), Windy Gap FIRMING Project, Moffat FIRMING Project, and Chatfield Reservoir Reallocation project.

1041 Local Permits

In 1974, the Colorado General Assembly enacted measures to further define the authority of state and local governments in making planning decisions for matters of statewide interest. These powers are commonly referred to as "1041 powers", based on the number of the bill of the proposed legislation (House Bill 74-1041). These 1041 powers allow local governments to identify, designate, and regulate areas and activities of state interest through a local permitting process. The general intention of these powers is to allow for local governments to maintain their control over particular development projects even where the development project has statewide impacts. The statute concerning areas and activities of state interest can be found in 24-65.1-101 (C.R.S.)

Generally, development may only proceed if consistent with the environmental and developmental goals of the local communities as outlined in their 1041 regulations.

Of particular interest to many local governments are impacts from the construction and operation of large-scale water projects. The Act authorizes local governments to designate as "activities of statewide interest" the site selection and construction of major new domestic water and sewage treatment systems, major extension of existing domestic water and sewage treatment systems, site selection and development of new communities, and efficient utilization of municipal and industrial water projects. Local governments may not pass regulations that are completely prohibitive of the building of municipal water facilities and expansion of existing projects. The Act allows the locality to require a permit with designated conditions prior to construction.

Past and Existing Colorado Efforts to Make the Permitting Process More Effective and Efficient

Over the years, there have been several attempts to coordinate the permitting process. The Colorado Joint Review Process (CJRP) was created by the general assembly in 1983 to improve the environmental permitting process primarily for energy development. The CJRP was never fully completed for any project, and only nine projects started the process (DORA, 2012). It is not clear if this is because the energy industry collapsed, or if the process was not considered helpful. In 1996, the General Assembly allowed the CJRP legislation to expire.

Another attempt to have a coordinated review process was initiated in 2003 when Colorado's General Assembly established the Colorado Coordination Council through HB03-1323. The council was to be administered by the Executive Director of the Department of Natural Resources. It was a voluntary coordination process that sponsors could choose to use. The permitting areas allowed within the process included "extraction, use, conservation, transportation, or management of natural resources" that require permits, approvals or compliance from federal, state, or local governments (DORA, 2012). This process was never utilized, and the statutes supporting the council were allowed to expire in 2013. According to the Colorado Department of Regulatory Affairs (DORA), which reviews statutes set to expire, "Very few outside, or even inside, the Colorado Department of Natural Resources (DNR) were aware of the Council's existence. Indeed, most stakeholders contacted as part of this sunset review had never heard of the council.... Those within

DNR acknowledged that DNR conducted no outreach to inform the community of the Council's existence and, to the best of anyone's recollection, no one at DNR had ever suggested that a project sponsor utilize the Council."

Recently, progress has been made through the use of Memorandums of Understanding (MOUs) between the State and various Federal agencies. While no formal legislation was passed to initiate the development of these MOUs it is important to recognize that these documents assist in creating a structure for the State and these respective agencies to work together with the intention of making a more coordinated permitting process.¹ Additionally, although not formalized and signed progress has been made on a **Collaborative Approach to Water Supply Permit Evaluation (CAWS) MOU**. The process was initiated by the Colorado Department of Natural Resources to educate federal permitting partners about state planning and permitting issues.²

There is the potential for recent legislation to further this progress. For instance if the Hydroelectric Generation Incentives Bill ([House Bill 14-1030](#)) becomes law, it could help streamline the State's role in the permitting process for small hydroelectric projects.³

Despite the lack of an official coordinating statute that state and federal permitting entities operate under, there is a great deal of coordination. Recently, Colorado Parks and Wildlife and the Water Quality Control Division have become cooperating agencies for several projects undergoing the Environmental Impact Statement (EIS) process of the National Environment Protection Act (NEPA). Project proponents indicated during the interview process for this section that this has been a helpful collaborative effort. Furthermore, there has been increased coordination within the Colorado Department of Natural Resources as well.

Review of Current Permitting Efforts

In order to further understand the needs, issues and potential solutions for the permitting process, CWCB staff met with and interviewed a variety of water providers, environmental groups, state and federal partners:

¹ Examples include the FERC MOU concerning collaboration with other federal permitting entities and the State and Forest Service MOU concerning coordination with the Colorado Department of Natural Resources and Forest Service.

² Collaborative Approach to Water Supply Permit Evaluation (CAWS) MOU: Beginning in 2010, the Colorado Department of Natural Resources, U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers met to educate federal permitting partners about state planning and permitting issues. Out of that process, an MOU was developed concerning the utilization of conservation. Rather than conservation being considered as an alternative, it was agreed to that it would be factored into reducing demands as part of the purpose and need of the project. While this MOU has not yet been finalized, an important collaborative process was begun to help each agency understand opportunities and constraints that may inform the MOU and streamline processes in the future. Additional efforts will take place to revise and/or finalize the MOU as appropriate.

³ The Hydroelectric Generation Incentives Bill ([House Bill 14-1030](#)) passed through the Colorado State Legislature with large margins. At the time of writing this section, the bill has not yet been signed into law by the Governor. The purpose of the bill is to build off of the federal "Hydropower Regulatory Efficiency Act of 2013" and streamline the State's role in the permitting process of small hydroelectric projects. It is not yet clear how effective this process will be, but one difference between this and past efforts is the narrow focus of the bill and the coordinating power given to one agency.

- Colorado Department of Public Health & Environment (CDPHE)
- Colorado Parks & Wildlife (CPW)
- Colorado Attorney General's Office (AGs Office)
- Colorado Division of Water Resources (DWR)
- Northern Colorado Water Conservancy District (NCWCD)
- Trout Unlimited (TU)
- South Metro Water Supply Authority (SMWSA)
- U.S. Army Corps of Engineers (USACE)
- U.S. Environmental Protection Agency (EPA)
- U.S. Bureau of Reclamation (BOR)
- Federal Energy Regulatory Commission (FERC)
- Denver Water
- Upper Yampa Water Conservancy District
- Northwest Colorado Council of Governments
- Western Resource Advocates
- Colorado Springs Utilities

CWCB staff will continue to meet with state and federal permitting and licensing partners throughout the development of Colorado's Water Plan. Staff has contacted or is in the process of scheduling interviews with the following organizations:

- Ute Water Conservancy District
- Centennial Water & Sanitation District
- U.S. Fish & Wildlife Service
- Bureau of Land Management
- U.S. Forest Service
- National Resource Conservation Service (NRCS)
- Colorado Department of Agriculture
- Colorado Counties Incorporated
- Colorado Municipal League

Permitting Issues and Potential Process Improvements

After meeting with various state and federal agencies and interviewing water providers and the conservation community, similar issues were brought up across interests. Based on these discussions the following process improvements should be explored further:

1. **Increase state and other resources** – the length of time to complete the required environmental reviews should be shortened while maintaining a robust decision-making process. At the beginning of permitting process the State should evaluate potential future staff demands and associated resources to complete the reviews in a timely manner.
2. **Increase clarity** - increase understanding of information required for environmental reviews. Identify required technical elements, assessment methodology and results of reporting of environmental parameters, including hydrology, water quality status and

designated uses, modeling applicability, and risk tolerance. Understand the role of conservation in purpose and need documentation. Develop a State certification and mitigation handbook for project proponents and stakeholders.

3. **Improve the quality of Draft EIS documents** – this would allow for State certification and mitigation plan process to be completed more efficiently. Emphasize issue identification earlier in the EIS process.
4. **Encourage multi-purpose projects** – incentivize projects with multiple objectives such as municipal, industrial, hydropower, environmental, recreation and agricultural purposes. The State should work with project proponents and other beneficiaries to explore opportunities to streamline permitting processes and to equitably allocate mitigation responsibilities.
5. **Improve coordination across state agencies** – minimize redundant review efforts by different State agencies. Coordinate EIS document review across State agencies with the goal of increasing efficiency.

Potential State of Colorado Support of a Project Moving Forward

The State of Colorado should develop a pathway for a water project to receive a State endorsement. This could be achieved by identifying milestones upfront and what decisions could be made at each milestone. This section will be finalized based on the Basin Roundtable Implementation Plans.

Next Steps:

- Development of certification and mitigation handbook
- Finalize CAWS MOU
- Further technical and stakeholder exploration for how to make the permitting process effective and efficient based off the potential process improvements described above.