9.4 FRAMEWORK FOR A MORE EFFICIENT PERMITTING PROCESS

GOAL

Colorado's Water Plan advocates for effective and efficient permitting in which State of Colorado agencies work together to complete their work early in the permitting process. This will provide the opportunity for State support without being pre-decisional.

Introduction

Governor Hickenlooper's May 2013 executive order reiterated that the gap between Colorado's water supply and water demand is real and looming. While conservation is a key strategy to narrowing the gap across the state, it alone cannot solve the problem. Scenario planning indicates that at least 80 percent (350,000 acre-feet) of already-planned projects need to be implemented, and many of these still need to go through the permitting process.[55] Ideally, the permitting process ensures the implementation of projects that best meet Colorado's water values—which are to support vibrant and sustainable cities, viable and productive agriculture, a robust tourism industry, efficient and effective infrastructure, and a strong environment. The current permitting process needs review, and the executive order directed the CWCB to "streamline the State role in the approval and regulatory processes regarding water projects."[56]

The objective of this section of Colorado's Water Plan is to explore how permitting in Colorado can be more effective and efficient. Tackling permitting is extremely difficult due to the complexity of the projects, the challenges in understanding and reducing environmental impacts, and the condition of many of the aquatic systems. This section describes the current permitting and licensing processes, challenges that arise during the process, and reforms that could make the process more efficient and effective for all parties involved. The solutions the CWCB proposes focus on how the State can be more effective and eliminate and reduce redundancies. This section also touches on the benefits of cooperation among federal agencies, local governments, and stakeholders. Finally, this section describes an approach that allows the State to support a project without predetermining the outcome of an environmental permit, certification, or mitigation plan.

Summary of Each Process Within Water Permitting

This section briefly explains the state and federal process that project proponents are required to follow in completing a project. Section 2.4 contains a description of entities involved in permitting.

National Environmental Policy Act Process

NEPA is a federal law that establishes and requires a structured planning and decision-making framework for any federal decision that has the potential to significantly impact the human environment. NEPA requires federal agencies to assess the environmental effects of their proposed actions before decision making. Importantly, NEPA provides opportunities for citizen involvement in government decision making through public disclosure, and formal opportunities for public input as the environmental effects of a project are evaluated.[57]

There are three situations in which a water supply project may trigger NEPA's procedural requirements:

- One or more project components will occur on federal lands, such as national forest or BLM lands.
- The project or its components will be funded in part or whole by federal funds.
- The project will require a federal permit or license.

For water projects in Colorado, the most common federal actions that lead to a NEPA environmental review are a BOR contract for storage of water in a facility managed by that agency, a Corps CWA Section 404 permit, a project component that will be built on federal land, or a FERC hydropower license.[587]

The NEPA process is intended to help public officials make decisions that are based on an understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.[59] Regulations instruct federal agencies to use the NEPA planning process "to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment" and to use all practicable means "to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions."[60] It is with public and agency input that these goals are to be achieved.

The NEPA process begins when the federal agency determines that there is a need to take action. The federal agency that needs to take action is the lead agency and is 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 that may have significant environmental impacts, an EIS process is required.[61]

To the fullest extent possible, NEPA regulations direct federal agencies to integrate NEPA requirements with other planning and environmental review procedures required by law or by agency practice, so that all such procedures run concurrently rather than consecutively.[61] Agencies often do not meet this goal and instead run consecutive permitting processes. This, in addition to other factors, often leads to an extended planning process. To successfully achieve the goal of concurrent planning, the NEPA process must start at the earliest possible time within the water supply project planning process and involve all interested parties in a meaningful way. Proponents should assess whether a project proposal is likely to trigger NEPA planning requirements at the start of planning, and immediately engage the relevant federal and state agencies, as well as local governments and other interested parties. Early involvement of all such parties may also avoid extended planning processes by reducing the need for supplemental NEPA documents.

Clean Water Act Section 404

Section 404 of the CWA establishes a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands. Activities this program regulates 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 (for example, certain farming and forestry activities).

In summary, the Code of Federal Regulations (CFR) 40 Part 230 Section 404(b)(1)(Guidelines) states that no discharge of dredged or fill material may be permitted if:

- A practicable alternative that is less damaging to the aquatic environment exists.
- It causes or contributes to violations of any applicable state water quality standard.
- It violates any applicable toxic effluent standard.
- It jeopardizes the continued existence of species listed as endangered or threatened under the ESA.
- The nation's water would be substantially degraded, and unless steps have been taken to minimize potential adverse impacts of the discharge on the aquatic ecosystem.

Like NEPA, Section 404 requires that a program address specific, structured planning steps and information at the initial stages of project planning and development in order to increase efficiencies. Various federal agencies have different Section 404 roles and responsibilities.

The Corps administers the day-to-day permitting program, including individual and general permit decisions. The Corps issues individual permits and evaluates applications under a public interest review, as well as evaluates the environmental criteria defined in the guidelines and NEPA regulations, if they are applicable. For most discharges that have only minimal adverse effects, the Corps issues a general permit. It issues

general permits on a nationwide, regional, or state basis for particular categories of activities. Large-scale water projects require an individual Section 404 permit.[63] The Corps also conducts or verifies jurisdictional determinations, develops policy and guidance, and enforces Section 404 provisions.

The EPA develops and interprets policy, guidance, and environmental criteria used in evaluating permit applications. The EPA also determines the scope of geographic jurisdiction and evaluates the applicability of any exemptions, approves and oversees state and tribal assumptions, and reviews and comments on individual permit applications. The EPA has the authority to prohibit, deny, or restrict the use of any defined area as a disposal site under section 404(c), may elevate specific cases for further evaluation under Section 404(q), and enforces Section 404 provisions.

The USFWS evaluates the impacts of all new federal projects and federally permitted projects on fish and wildlife, including projects subject to the requirements of Section 404. The USFWS also elevates specific cases or policy issues about an individual permit that is required for activities that have potentially significant impacts.

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 to protect water quality. The WQCD is required by Colorado statute (C.R.S., §25-8-302(1)(f)) to review federal licenses and permits under Section 401 of the CWA . Regulation No. 82 (5 CCR 1002-82) authorizes the division to certify, conditionally certify, or deny certification of federal licenses. It also sets forth best management practices applicable to all certifications, with one exception.[64] Regulation No. 82 applies to division certification of CWA 404 permits issued by the Corps, licenses for hydropower projects issued by the FERC, and other federal permits involving a discharge, including CWA Section 402 discharge permits issued by the EPA.[64] The 401 certification process includes an antidegradation analysis as described in Chapter 7.3.

Exceptions apply to 402 discharge permits the EPA issues for facilities on tribal lands, Section 404 permits the Corps issues on tribal lands, and 402 permits the EPA issues for federally owned facilities on federal

LURLINE UNDERBRINK CURRAN

COLORADO RIVER BASIN

Lurline was the county manager for Grand County and currently serves as the vice chair of the Colorado Basin Roundtable. As the County's lead negotiator for recent transmountain diversion agreements associated with the county's 1041 permitting authority, she demonstrated that cooperation can be accomplished even in the most contentious of circumstances. She is pictured by the bridge at Grand Lake near the headwaters of the Colorado River.

Colorado's Water Plan will provide a template for cooperation and thoughtful decisions as demands increase on the waters originating in Colorado. There are many struggles to overcome between the East and West slopes, but the plan

CONTINUED AT END OF CHAPTER

PROFILE

lands. For these facilities, the EPA issues the 401 certification.[66] Individual certification review is not required for Section 404 general or nationwide permits the Corps issues, except for activities covered by certain nationwide permits on tribal lands. Except for the activities on tribal lands, general or nationwide permits are certified under statute (C.R.S., §25-8-302(1)(f)) without additional conditions.

The WQCD issues a Section 401 water quality certification when it determines 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 WQCD concludes that the project will comply with the water quality standards and requirements, and if one or more conditions are placed on the license or permit, it will issue the certification with the necessary conditions included.

House Bill 15-1249 passed during the 2015 legislative session. It repeals and reenacts statutory fees for clean water and drinking water programs in the WQCD of the CDPHE. One of the many provisions of the bill authorized new fees for the CDPHE certifications related to projects affecting regulated water quality standards in jurisdictional waters of the United States; these are known as 401 certifications. The WQCC establishes 401 certification fees by rule according to a tiered schedule, and these fees will take effect in fiscal year 2016-2017.

Fish and Wildlife Mitigation Plans

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 applicants proposing water diversion, delivery, or storage projects should reasonably mitigate impacts on such resources. Applicants must submit a proposed mitigation plan to the CPW Commission for review and approval. If the applicant and the WQCC reach a mutual agreement, the WQCC forwards the proposed plan to the CWCB for adoption as the official State position. If the WQCC rejects an applicant's plan, it still forwards the plan to the CWCB. If the CWCB disagrees with the WQCC, the governor decides whether to approve the plan.

A mitigation plan is generally required when an applicant seeks a permit or license from the federal government for specified types of water projects, with some exceptions as noted in the statute.[67] The CWCB has grant funds available for applicants to help implement the mitigation plans, and has established criteria for such grants.[68] Examples of completed or in progress Section 122.2 plans include Southern Delivery System, Windy Gap Firming Project, Moffat Collection System Project, and Chatfield Reservoir Reallocation Project.

Claimed Water Regulation

The Colorado WQCC Regulation No. 84 (5 CCR 1002-84) and the WQCD's reclaimed water program are designed to promote the use of reclaimed water in Colorado. The regulation includes requirements and minimal standards for reclaimed water, and for treaters and users of reclaimed water, to employ best management practices in its use. These minimal standards are necessary to protect public health and the environment. Regulation applies to the use of reclaimed water for landscape irrigation, agricultural irrigation, fire protection, industrial, and commercial uses as detailed in table 9.4-1. The treatment and best management practices required before and during use depend on the use of the reclaimed water. Regulation 84 requires treaters and users to obtain and comply with a notice of authorization, which the WQCD issues, and which contains the terms, limits, and conditions deemed necessary to ensure compliance with Regulation 84.

TABLE 9.4-1 RECLAIMED WATER USES AUTHORIZED IN REGULATION 84

APPROVED USES	
Industrial	Evaporative Industrial Processes
	Washwater Applications
	Non-discharging Construction and Road Maintenance
	Non-evaporative Industrial Processes
Landscape Irrigation	Restricted Access
	Unrestricted Access
	Resident-Controlled
Commercial	Zoo Operation
	Commercial Laundries
	Automated Vehicle Washing
	Manual Non-Public Vehicle Washing
Fire Protection	Residential Fire Protection
Agricultural Irrigation	Non-Food Crop Irrigation and Silviculture

Hot air balloons at Chatfield Reservoir. Reallocation of flood storage water received fish and wildlife mitigation plan and 404 permit approvals in 2014.

1041 Local Permits

In 1974, the Colorado General Assembly enacted measures to 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 legislation bill number (House Bill 74-1041). These 1041 powers established under this "Areas and Activities of State Interest Act" 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 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.), The Local Government Land Use Control and Enabling Act (as described in Section 2.3) is another source of authority, along with others, which confers upon local governments the authority to regulate the development of water projects within their jurisdictions to ensure the protection of the environment and to provide for the planned and orderly use of land.[69]

Generally, development may only proceed if it is consistent with the local communities' environmental and developmental goals 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 Areas and Activities of State Interest 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, the major extension of existing domestic water and sewage treatment systems, the site selection and development of new communities, and the efficient utilization of municipal and industrial water projects. Local governments may not pass regulations that are categorically prohibitive of the building of municipal water facilities and expansion of existing projects. However, the Act allows the locality to deny a specific application or require a permit with designated conditions before construction. A permit may be denied for a specific water project that does not meet the standards or criteria of the local regulations.

Past and Existing Colorado Efforts

In the past, there have been several attempts to coordinate the permitting process. The General Assembly created the Colorado Joint Review Process (CJRP) in 1983 to improve the environmental permitting process, primarily as it pertained to energy development. The CJRP was never fully completed for any project.[70] It is not clear whether this is because the energy industry collapsed, or because the process was not considered helpful. Many projects failed to proceed for economic reasons. The CJRP also coordinated the State's combined responses to major projects, such as the review of the proposed Denver International Airport, the Two Forks veto, and Colorado's bid for the Super Conducting Super Collider. In 1996, the General Assembly allowed the CJRP legislation to expire.

Another attempt to coordinate the review process was initiated in 2003 when Colorado's General Assembly established the Colorado Coordination Council through HB03-1323. The executive director of the DNR was designated as the administrator of the council. The coordination process was voluntary; sponsors could choose to use it. The permitting areas allowed within the process included "extraction, use, conservation, transportation, or management of natural resources," which required permits, approvals, or compliance from federal, state, or local governments.[71] This process was never used, and the statutes supporting the council were allowed to expire in 2013. According to DORA, which reviews statutes set to expire, "Very few outside, or even inside, 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."[72]

Recently, the State and various federal agencies have made progress toward coordinating review processes through the use of MOUs. No formal legislation was passed to initiate the development of MOUs. These documents assist in creating a structure under which the State and the respective agencies can work together, with the intention of developing a more coordinated permitting process.[a] Colorado and federal permitting

[a] 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 the Forest Service.

TABLE 9.4-2 STAKEHOLDER INPUT

	Met with the CWCB	Provided Written Comments
Colorado Department of Public Health & Environment (CDPHE)	X	
Colorado Parks & Wildlife (CPW)	X	
Colorado Attorney General's Office (AGs Office)	X	
Division of Water Resources (DWR)	X	
Northern Colorado Water Conservancy District (NCWCD)	X	X
Trout Unlimited (TU)	X	
South Metro Water Supply Authority (SMWSA)	X	X
U.S. Army Corps of Engineers (Corps)	X	
Environmental Protection Agency (EPA)	X	
Bureau of Reclamation (BOR)	X	X
Federal Energy Regulatory Commission (FERC)	X	
Denver Water	X	X
Upper Yampa Water Conservancy District	X	
Northwest Colorado Council of Governments	X	X
Western Resource Advocates (WRA)	X	X
Colorado Springs Utilities	X	X
Water Reuse Association	X	X
Aurora Water		X
City of Thornton		X
Front Range Water Council	X	X
Conservation Colorado		X
Colorado Wastewater Utility Council		X
Colorado Oil and Gas Association		X
Pikes Peak Regional Water Authority		X
Fountain Valley Authority		X
Douglas County		X

agencies made progress on developing a Collaborative Approach to Water Supply Permit Evaluation (CAWS) through a series of facilitated conversations among several parties. As a result, the parties reached an informal agreement under which conservation could be treated either as a demand reducer or as an alternative to the project. The DNR initiated the process to mutually understand state and federal permitting processes and requirements, and to identify areas with potential for improved efficiencies.[b]

Despite the lack of an official coordinating statute for state and federal permitting entities, there is coordination. Recently, CPW and the WQCD have become cooperating agencies for several projects undergoing NEPA's EIS process. Project proponents have indicated that this has been a helpful, collaborative effort.[73] In addition, there is increased coordination within the DNR.

[b] 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, the agencies developed an MOU concerning the use of conserved water. Rather than considering conservation as an alternative, the agencies agreed that conservation would be factored into reducing demands as part of the purpose and need of the project. While this MOU has not yet been finalized, the agencies have begun an important collaborative process 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.

In 2012, President Obama issued Executive Order 13604, "Improving Performance of Federal Permitting and Review of Infrastructure Projects."[73] Specific federal agencies reportedly applied an expedited review process to 50 pilot projects, each with an accelerated schedule, clear project review milestones, and a designated lead coordinating agency. Agencies tracked the project progress on a "Federal Infrastructure Permitting Dashboard," which contained an IT platform on which agencies could develop a cooperative schedule, share project documents, and quickly communicate with one another.[75]

Basin Roundtable and Inter Basin Compact Committee Concepts Concerning Permitting

The IBCC's No-and-Low-Regrets Action Plan and the basin roundtables' BIPs discuss permitting in depth. Of the eight BIPs, six discuss challenges or solutions. Table 9.4-2 at the end of this section quotes these important stakeholder sources. While the individual statements in the table do not reflect the position of the State of Colorado, future discussions should incorporate careful consideration of the challenges and solutions.

Additional Stakeholder Outreach

To further understand the needs, issues, and potential solutions regarding the permitting process, the CWCB staff met with and interviewed a variety of water providers, environmental groups, and state and federal partners. Table 9.4-2 indicates the list of organizations with which the CWCB met or from which it received comments from concerning permitting (not including several individuals who provided comment).

Stakeholders across many industry and government sectors desire improved coordination and increased early involvement, regardless of whether those stakeholders represent environmental or utility interests. In many cases, stakeholders believe that improved coordination and increased early involvement would shorten permitting time while upholding the environmental protections that permitting secures. Multiple stakeholders also express interest in reducing duplication, increasing resources, lowering costs, unifying methods, increasing clarity, examining reuse permitting, improving quality of draft EISs, and encouraging multi-purpose projects.[76]

One common concept these meetings have uncovered is to revive a program akin to the CJRP described above. The establishment of a joint NEPA review process, which would begin before land use authorization applications are submitted for new water projects, may prove to facilitate a more efficient process. The BLM's experience is that applicants who are willing to have pre-application discussion of potential impacts and perform analysis of alternatives before submitting land use authorization applications experience much shorter wait times.

The Northwest Colorado Council of Governments envisioned the process in the greatest detail. This process is summarized below:

Because it is expensive, time consuming, and sometimes "work for the sake of work" for the applicant, regulators, local governments, and other stakeholders to participate in a NEPA process, the State should facilitate a joint review process before and during the NEPA process. This sort of "front loading" minimizes the costs to the applicant and other stakeholders because as early as possible, the applicant and regulators understand what concerns, impacts, and potential for mitigation are relevant in the areas affected by the project; and what will be necessary to satisfy federal, state, and local laws and regulations.

This approach also improves the likelihood that alternatives, reports, and studies that are generated during NEPA will be more focused and responsive to actual, real world concerns, rather than reports and studies that are off the mark. Agreement can be reached on the scope of alternatives, reports, and studies before the applicant/regulators spend money on consultants to prepare pounds of paper that ultimately are not necessary to satisfy NEPA, the regulators, or affected stakeholders.

Another important result of the process is that for each project, the joint review process would define the regulatory framework and where the overlaps between state, local, and federal processes are, so that they could be coordinated rather than duplicative or contradictory. This saves money for the applicant, the regulators, and the public concerned about the project as well as ensuring that permits can be issued more quickly.

Finally, it provides a forum to formulate agreements, like the Windy Gap Firming Project IGA, that result in projects that benefit the project proponent, the environment, and affected interests.

In order to be part of the joint review process, participants would have to agree to certain principals regarding rules of engagement. Those rules would require that the parties work in good faith, explain interests rather than take positions, among others.

The local governments from the areas that would be affected by the project should be responsible for identifying the appropriate local stakeholders and coordinating local input.

Critical input points during the process are during:

1. *Scoping*
2. *Developing alternatives*
3. *Determination of methodologies and data gaps*
4. *Mitigation and enhancement plans*

The Front Range Water Council suggests that Colorado use, or modify, the expedited federal permitting procedures and dashboard developed as a result of Presidential Executive Order 13604 described above.

Permitting Issues and Potential Process Improvements

Several common potential process improvements, as well as comments from water providers, the conservation community, and various state and federal agencies, emerged after the CWCB reviewed the work of the IBCC and the basin roundtables. Based on these discussions, the CWCB identified the following process improvements to explore further:

1. **Improve Coordination**
   - Coordinate review efforts by different state agencies.
   - Coordinate EIS document review across state agencies with the goal of increasing efficiency.
2. **Increase Early Involvement**
   - Examine opportunities for state agencies, local governments, stakeholders, and federal agencies to get involved earlier in the NEPA process.
   - Involve NEPA and CWA Section 404 lead agencies (if applicable) at the very initiation of project planning to ensure a concurrent (vs. sequential) planning process. This will facilitate early identification of required planning steps and information needs.
3. **Coordinate Technical Methods**
   - Reduce duplication of technical methods across state agencies, while respecting the various authorities and obligations within existing law.
4. **Increase State and Other Resources**
   - Shorten the length of time needed to complete the required environmental reviews, while maintaining a robust decision-making process.
   - Evaluate potential future State staff demands and associated resources needed to complete the reviews in a timely manner at the beginning of the permitting process.
5. **Increase Clarity**
   - Increase the understanding of the information required for environmental reviews.
   - Identify required technical elements, assessment methodology, and reporting results of environmental parameters, including hydrology, conservation, scenario planning, water quality status and designated uses, modeling applicability, and risk tolerance.
   - Understand the role of conservation in purpose and need development.
   - Develop a State certification and mitigation handbook for project proponents and stakeholders.
6. **Improve the Quality of Draft EIS Documents**
   - Enhance efficient completion of State certification, federal permitting, and mitigation plan processes.
   - Emphasize issue identification earlier in the EIS process by involving all parties with a decision-making role, and by collecting baseline environmental data.

7. **Encourage Multi-Purpose Projects**
   - ✦ Facilitate projects with multiple objectives, such as municipal, industrial, hydropower, environmental, recreational, and agricultural objectives, by increasing sources and availability of funding for these types of projects.
   - ✦ Explore with project proponents and other beneficiaries opportunities to streamline permitting processes, equitably allocate mitigation responsibilities, and provide State support for these types of multi-purpose projects.

Many of these process improvements will be addressed by conducting a series of lean events with state and federal partners and consulting with stakeholders. Lean events (also called Kaizen events) are short term improvement projects with a specific goal or set of processes to improve.[77] These events are attended by the owners and operators of a process with the intent of making efficiency improvements to that process. The events will accomplish the following:

- ❖ Gather operators, managers, and owners of a process in one location;
- ❖ Map the existing process;
- ❖ Improve on the existing process; and
- ❖ Solicit buy-in to the process improvements from all involved parties.

Framework for State of Colorado Support for a Water Project

The State of Colorado could develop a more effective and efficient pathway for a water project to receive State support (Figure 9.4-1, page 9-41) while continuing to uphold state and regulatory review responsibilities. The State will identify milestones and decision points at the beginning of the process to make the regulatory process more efficient and effective.

Figure 9.4-1 (page 9-41) explores a framework for how the State could be involved in the Federal 404 permitting process.

1. Pre-permit work has been shown to resolve many of the issues prior to a project proponent's permit application submittal.
2. The CDPHE and DNR cooperating agency involvement will focus on impacts, analysis, mitigation, and enhancements for water quality and fish and wildlife.
3. In order for the CDPHE and DNR to evaluate the project in a contingent manner, the Draft EIS must a) identify the preferred alternative, and b) detail mitigation and enhancements for water quality and fish and wildlife.
4. The process clarifies the time at which the State's fish and wildlife mitigation plan would happen.
5. Based on the information in the Draft EIS, the Wildlife Mitigation Plan, and public comments, the CDPHE and DNR would provide their recommendations to the Governor's Office. The definition of state support is below.
6. If 401 certification occurs before the ROD, it will automatically be a conditional certification. The first condition would be that if the underlying assumptions of the FEIS change or if the preferred alternative changes as part of the ROD, the 401 certification must be completed again after the ROD.

Pre-Permitting Work (Initial Studies and Stakeholder Involvement)

If a project proponent is seeking State technical or financial support for initial planning, baseline environmental studies, alternatives analysis, feasibility studies, or initial stakeholder involvement, priority will be given to projects that:

- ❖ Meet the goals and measurable outcomes identified in the BIPs;
- ❖ Identify a project proponent;
- ❖ Meet an identified need; and
- ❖ Can be built within the next 15 years, assuming a more efficient and effective permitting process as suggested below.

State Support for Projects Aligned with Colorado's Water Values

Importantly, Colorado's Water Plan does not require proponents of water projects to take any action. A project proponent can, however, voluntarily qualify for State support in the form of state engagement, facilitation, or funding by ensuring the project aligns with

Colorado's water values (Chapter 1). The State will use the following criteria to determine alignment with these values.

- Does the project proponent demonstrate a commitment to collaboration? Does the project proponent:
  - address more than one type of need;
  - involve multiple participants where appropriate;
  - consult with a broad set of local stakeholders and local governments before or early in the regulatory process (examples of stakeholders include relevant basin roundtables, water users, conservation groups, and community groups); or
  - provide meaningful opportunities for input?

- Does the project proponent address an identified water gap? Is the project:
  - included in a BIP;
  - identified as meeting a defined need in a basin needs assessment;
  - identified as meeting a defined need identified in the SWSI; or
  - identified as part of the no-and low-regrets scenario planning process?

- Does the project proponent demonstrate sustainability? Does the project proponent:
  - adopt an integrated plan or plans geared toward implementing the conservation best practices at the high customer participation levels, as defined in the SWSI;
  - avoid adverse effects to environmental and recreational interests or adopt environmental, watershed health, and recreational mitigation in the planning phase of the project, prior to consideration in the permitting phase of alternatives that minimize or avoid adverse effects (project proponents should consider use of existing tools if available, such as stream management plans that follow state guidance, instream flow water rights, water leasing, restoration, infrastructure upgrades, and consumptive use efficiencies);
  - avoid impacts to, mitigate, or enhance water quality, such as exceeding water quality standards or impairment of classified uses;
  - mitigate or avoid economic and social impacts on agricultural and rural communities;
  - maximize the use of water resources (through reuse, firming the yield of existing supplies, water sharing arrangements, improving or modernizing aging infrastructure, or aquifer storage and recharge projects);
  - partner with the local government(s) being served by the water project to incorporate best water use practices into land use planning efforts (these practices are included in water and land use trainings offered by CWCB and DOLA as described in Section 6.3.3); or
  - demonstrate that the project will not unreasonably increase the risk of non-compliance with any interstate compact or the curtailment of existing water rights (projects depending on water from the Colorado River system can demonstrate this commitment by agreeing to participate in the collaborative contingency planning efforts discussed in Chapter 8 and Section 9.1)?

- Does the project proponent establish the fiscal and technical feasibility of the project? Does the project proponent demonstrate:
  - over-all cost-effectiveness;
  - local investment or contribution;
  - financial capability to repay debt (bonds, loans, or other debt instruments);
  - an intent to leverage any state grant or loan with private, local, or federal funding;
  - technical and legal availability of water supplies for the project; or
  - readiness to proceed upon receipt of necessary funding and permits (i.e. completed preliminary planning and design work, obtained necessary water rights, secured necessary financial commitments)?

State Resource Prioritization

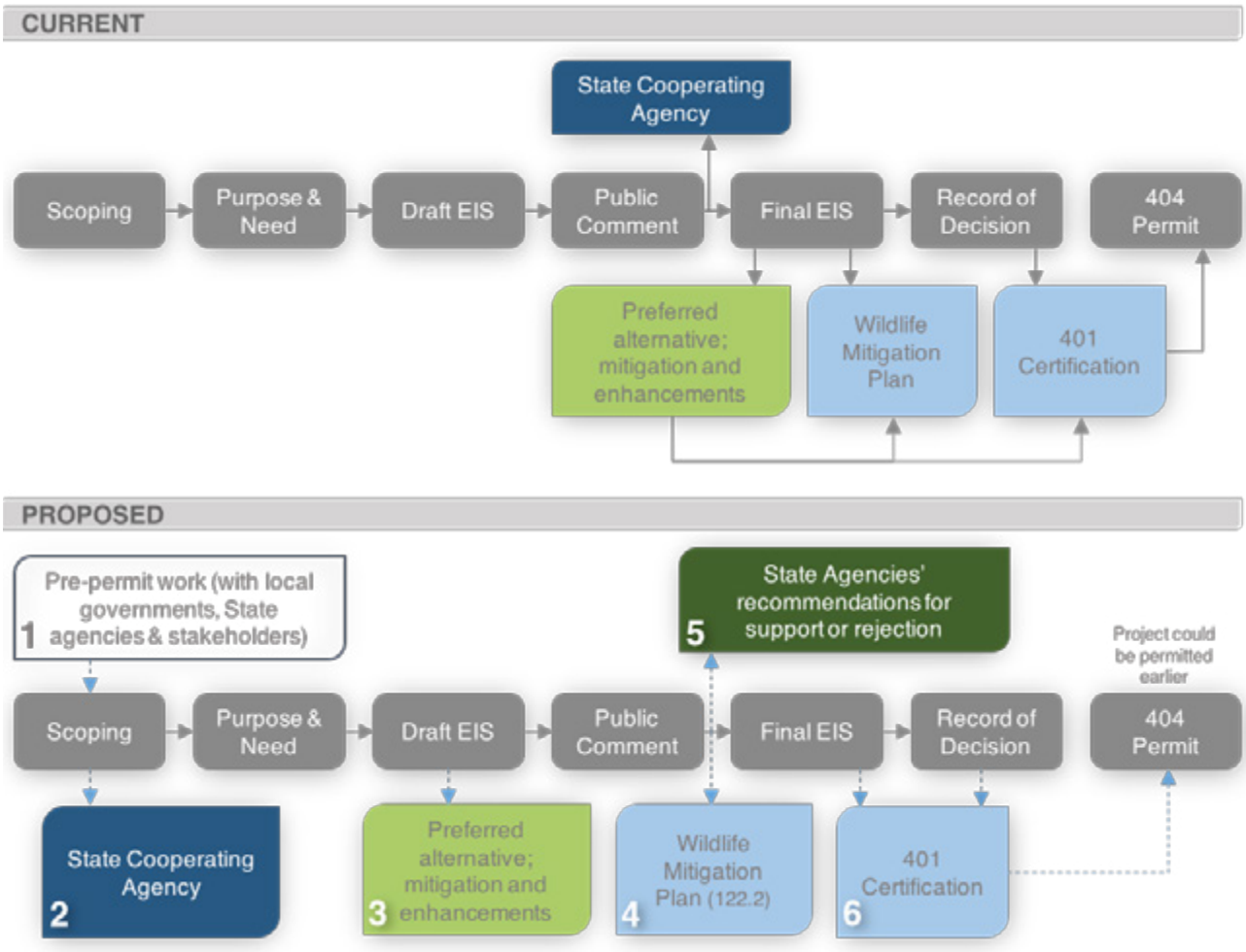
With the above criteria satisfied, the State will commit to front-loading State efforts at the beginning of the permitting process as available resources allow. This approach enables the State to coordinate with local governments and stakeholders and engage as a cooperating agency through the federal permitting process. Cooperation would need to occur at critical decision points, including scoping, methodological review, alternatives analysis, and development of mitigation and enhancement opportunities. In addition, this process could use a coordinated dashboard approach to define goals, timelines, and necessary permits. Existing regulations suggest that a coordinated approach is allowable under existing state law. For instance, regulation number 82.5(C)(2) states, "Where possible, the 401 certification process should be coordinated or consolidated with the scoping and review processes of other agencies which have a role in a proposed project in an effort to minimize costs and delays for such projects."[78]

Federal recognition of the need to increase permitting efficiency also signals the potential for improvement of a process that is widely viewed as broken by stakeholders form multiple sectors.[79]

Preliminary Technical Review for State Processes

Figure 9.4-1 (below) summarizes the current state processes for involvement in the federal 404 permitting process. The DNR's wildlife mitigation process is guided by C.R.S. 37-60-122.2. In 1987, the Colorado General Assembly passed HB 1158, which created a process by which agencies within the DNR come to consensus regarding the impacts of water resource development projects on fish and wildlife, and the mitigation of such impacts. Among other things, the statute establishes a process that involves a project's proponent, the Parks and Wildlife Commission, and the CWCB. The process results in the State's official position on the

FIGURE 9.4-1 STAKEHOLDER INPUT



A bald eagle and mallard duck on Harriman Reservoir in Littleton with wetlands in the background.

mitigation of impacts on fish and wildlife associated with the development of water resources for Colorado's citizens.

Historically, the project proponent's presentation of a draft mitigation plan to the WQCC initiates this process, after which CPW staff members have 60 days to review the proposed plan and provide further input to the WQCC. At the end of a 60-day period, the WQCC and the project proponent must agree upon a plan; alternatively, the WQCC forwards different versions of the plan to the CWCB for separate deliberation and decision. If the WQCC and proponent agree, the CWCB simply endorses that agreement, and that becomes the official State position. If the CWCB disagrees with a plan and modifies it in any way, that plan goes to the governor for affirmation or modification, resulting in the official State position. Irrespective of the route that a plan has taken, the official State position is then transmitted to each local, state, and federal governmental entity. The statutory process is constructed to encourage agreement between the project proponent and CPW—greatly reducing the amount of time for the process to occur and resulting in an expedited state regulatory process.

The CDPHE's involvement as a cooperating agency in the federal 404 permitting process has typically occurred toward the end of the permitting process, after a draft EIS is issued. Additionally, the CDPHE has typically waited until the project's ROD has been completed before embarking on its official 401 certification review process.

As discussed above, with resources prioritized for earlier state agency involvement in the federal permitting process, state agencies could implement improvements. The State has an obligation to not be pre-decisional in 401 certification and wildlife mitigation plan processes. Earlier state agency involvement in the EIS

process would allow for early identification and resolution of State concerns which should result in a higher quality draft EIS. Figure 9.4.-1 (page 9-41) highlights the steps that could help accomplish this early state agency involvement, including early involvement of the CDPHE. Additionally, much of the State's review work could be done prior to, during, and immediately after the draft EIS process.

More specifically, the CDPHE could begin its involvement shortly after the project proponent has established the project objective, or as the project proponent develops evaluation criteria for the EIS alternatives analysis. The CDPHE's input on the evaluation criteria is critical, as the State's methodologies for assessing water quality should be used in the EIS process. In addition, with early involvement, the draft EIS could include the CDPHE's input on mitigation and enhancements.

Once the federal permitting authority has completed the draft EIS, the CDPHE and CPW's review of comments from stakeholders and local government would give the State a good indication of support for or opposition to the project, as well as any outstanding issues related to it.

As a result of early involvement in the project's development or scoping, the CDPHE would be able to evaluate whether the preferred alternative adequately addresses water quality impacts, and whether it includes sufficient mitigation and enhancements for water quality. Likewise, through early communication and collaborative efforts with the project's proponents, CPW staff can have already initiated work on the framework of a mitigation plan for the project. At the appropriate time (following the publication of the draft EIS and after the 122.2 process has been completed), each agency would provide its project recommendations to the Governor's Office. The CDPHE's recommendation would most likely be in letter form, and would specify whether the CDPHE could certify the preferred alternative identified in the draft EIS. The CDPHE would provide this recommendation after the draft EIS public comment period.

Because the specific project that ultimately receives a 404 permit must be certified with a 401 certification, and because the 404 permit cannot be issued before completion of the EIS, 401 certification needs to occur after the final EIS. In all cases, the CDPHE will retain full authority to issue a 401 certification and conduct an independent antidegradation analysis. However, if state processes are coordinated during the draft EIS, the 401 certification could be completed after the EIS is issued, provided that all required processes for public notice and review per WQCC Regulations #21 and #82 are followed (unless the preferred alternative changes or underlying assumptions of the draft EIS change). If the 401 certification is completed before the ROD, it is automatically a conditional certification. The conditions are that, if the underlying assumptions of the EIS change, or if the preferred alternative changes as part of the ROD, the 401 certification process will have to be conducted again after the ROD.

Potential Fish and Wildlife Mitigation Process Changes

The legislation that created the 122.2 process for the mitigation of fish and wildlife impacts associated with water project development is somewhat constraining in that the project proponent and CPW staff do not initiate official communications with one another until after the release of a draft EIS. Furthermore, 122.2 has some rigid timelines that make it difficult for project proponents and CPW staff to jointly develop a quality, comprehensive mitigation plan. It is also difficult to engage stakeholders early in the process, and currently, there is little written guidance (beyond the words in the statute) for either the project proponents or the stakeholders. Therefore, the DNR and the Parks and Wildlife Commission should develop a written policy, administrative directive, or formal rules regarding the implementation of the provisions of 122.2. This written policy should encourage and provide an avenue for early communication and collaboration between

project sponsors and CPW staff regarding impacts and mitigation strategies. The policy should provide an avenue for early stakeholder engagement regarding the mitigation of impacts.

State Support

The State could provide project support prior to the Final EIS if:

1. The State implements improvements to its involvement in the permitting process as described above;
2. The draft EIS includes a clear alternative with mitigation and enhancement;
3. The State Fish and Wildlife Mitigation Plan is complete; and
4. Analyses associated with water quality indicate that with the suggested alternative, a conditional 401 certification would likely be issued.

Any level of support will be based on a specific alternative, and if the alternative changes, support would need to be reevaluated. Each state agency would provide its recommendations to the Governor's Office, which could communicate to the appropriate federal agency that the State supports or does not support a particular water project. Such support will not require additional justification beyond already accepted state processes – the State Fish and Wildlife Mitigation Plan, 401 certification, and an integrated water resource plan. However, to the extent the project addresses the criteria described above, they will be included in communications to the Governor's Office. The State support described herein encourages early stakeholder engagement so that comments and concerns are addressed at the front-end of the process.

Quicker Regulatory Process

State support also encourages federal agencies to allocate the appropriate resources needed to complete the final EIS and ROD in a timely manner. The federal prioritization of resources is not intended to circumvent the protections or transparent processes associated with federal permitting processes.

ACTIONS

One of the main goals of Colorado's Water Plan is to find ways to support the implementation of the BIPs. The above permitting process enhancements support the statutory and regulatory requirements of each permitting agency without predetermining outcomes. While a particular agency permitting decision could be "yes" or "no," a more efficient means to reach that decision benefits all project participants, stakeholders, the State's planning process, and helps to remove uncertainty.

The actions below help determine efficiencies, where possible, and increase coordination. These actions will also provide an incentive that encourages multi-purpose projects with many partners, especially for projects that meet Colorado's water values, such as enhanced conservation and efficiencies. In addition to Colorado's Water Plan, the state and federal permitting partners will develop a handbook detailing the status quo and an updated joint review process. The following actions are needed to support these efforts:

1. The CWCB will host a series of lean events with relevant permitting agencies and stakeholders to examine current processes and determine how to make them more efficient and effective. Specifically, the lean events will examine how to eliminate redundant review efforts, reduce duplication of technical methods, and increase clarity on the required technical elements, as well as coordinate assessment methodology.
2. In partnership with local, state, and federal agencies, the DNR will coordinate the development of a permitting, certification, and mitigation handbook to reflect the updated permitting process.
3. State agencies with permitting authority will actively participate as cooperating agencies from the outset of the regulatory process, and will encourage parallel processes.

4. Where more than one agency has jurisdiction over a particular issue, the agencies will work together to identify a lead state agency, and a memorandum of understanding will be agreed to by both agencies to assist in the coordination.
5. The State of Colorado will explore options for adding CDPHE and DNR staff and other resources to support a more efficient and effective permitting process.
6. State and federal partners will work together to encourage cooperation through the CAWS MOU process, which factors in conservation as a demand-reducer.
7. State agencies with permitting authority will work with local governments and stakeholders to determine how Colorado will express support for or rejection of a project at the appropriate time during the review process in order to encourage the completion of the federal permit process in a timely manner.
8. In order to encourage stakeholder work prior to a project proponent applying for a federal permit, CWCB will serve as or fund an impartial facilitator between stakeholders as part of pre-application work when requested by a project proponent.
9. The State will coordinate with federal partners to determine if there are opportunities to improve the federal permitting process that stem out of the BIPs or efficiencies identified by the lean process.

TABLE 9.4-3 SUMMARY OF THE IBCC NO-AND-LOW-REGRETS ACTION PLAN AND THE BIP COMMENTS ON PERMITTING[80]

IBCC & Basin Roundtables	Challenges	Solutions
IBCC No-and- Low-Regrets Action Plan	"Needs assessment work conducted as part of the SWSI determined that every basin in Colorado will have a gap in water supply by 2050… Expedited permitting processes for IPPs that are in line with the values of the CWP will ensure that important projects move forward in a timely manner."	As part of the No-and-Low-Regrets Action Plan, the IBCC considered several potential actions in relation to permitting: "Streamline state permitting processes for IPPs that meet values of the CWP: The Executive Order directs the CWP to help expedite permitting at the state level. The State should develop an approach to permitting IPPs that efficiently moves projects through the process and toward an outcome, whether positive or not, while ensuring sufficient protection of nonconsumptive and other values. Public engagement and community outreach regarding water supply needs may need to increase in affected communities to facilitate an efficient permitting process." "Continue state coordination with the federal permitting entities: The State should continue to meet with federal agencies and look for opportunities, including entering into MOUs, to make NEPA and permitting processes more efficient, especially for projects that meet the values of the CWP and are needed across multiple scenarios. Efficiency would not dictate whether the outcome of the positive is positive or not." "Support local permitting authorities to identify, as requested, multi-purpose components up front in a project planning to incorporate county and local concerns." "Upon request of a project proponent, encourage legislative resolutions in support of IPPs that meet the values of the CWP: the CWCB and the IBCC should work with the Legislature to develop and pass resolutions in support of specific IPPs that meet the goals and values of the CWP and have demonstrated broad stakeholder support. However, legislative resolutions supporting specific IPPs should not occur until the project 1) aligns with the goals of the CWP, 2) has broad stakeholder support, and 3) has substantively completed the state permitting process. These resolutions can be simple statements of support or more complex efforts to help specific projects through the permitting process, but they should not seek to override or supplant local decision-making or the protection of nonconsumptive or other values." "Publicly advocate for IPPs that meet the values of the CWP and have stakeholder support: the CWCB, members of the IBCC and the basin roundtables, and the Governor should actively and publicly advocate for IPPs that meet the values of the CWP and have demonstrated broad stakeholder support. However, public advocacy for specific IPPs should not occur until the project 1) aligns with the goals of the CWP, 2) has broad stakeholder support, and 3) has substantively completed the state permitting process. This advocacy should seek to convince decision-makers at all levels and the general public that permitting and implementing these IPPs is critical to meeting Colorado's water supply needs while maintaining our agricultural heritage, healthy environment, and recreational economies." "Water providers that meet a certain threshold of conservation savings or best practices implementation could be offered state support and/or the facilitation of certain permitting approvals."
Arkansas BIP	"Significant challenges exist to achieving the storage goals of the Arkansas Basin, including government permitting, regulation, competing stakeholder interests, and reluctance of storage site owners to take on further responsibility."	No permitting solutions mentioned.

Colorado BIP	"Regulatory restrictions, high costs and variable geologic conditions have prevented proceeding with these conditional storage rights." "Water providers must recognize the change in permitting that has occurred and that has resulted in the lengthy and costly regulatory requirements for reservoirs. Rather than undertake this risk with no assurances of approval, water providers should consider other alternatives."	"This BIP recommends that State, Federal and Local regulatory jurisdictions work collaboratively to improve the permitting process." "Improvements to the permitting process to support new water supply projects are imperative in securing safe drinking water in the future." "Secure 401 certification for specific places prior to a ROD by the Corps, through a coordinated permitting process that includes all permitting agencies, including local government." Measurable Outcome: "Reduced average permitting time for reservoir project to under 10 years." "Improve inefficiencies in reservoir permitting process between federal agencies and promote revisions and BMPs to improve process timeline and cost." "Further research needs to be conducted that will evaluate the reservoir permitting process and provide recommendations on improvements."
Gunnison BIP	Several of the project sheets list permitting as a constraint and challenge. In these cases, the text typically reads: "Issues limiting project implementation may include: Regulations – permitting requirements may limit construction activities and potentially increase cost and timing."	"Due to the numerous benefits to future water resource projects, the Gunnison Basin Roundtable recommends the reinstatement of a process similar to the CJRP or Colorado Coordination Council." In Strategies to address regulations, the following bullet points are included to streamline permitting or develop collaborative solutions: • Collaborate with the CWCB to identify technical support mechanisms for Federal permitting activities • Identify methods to proactively address potential regulatory pitfalls that generate excessive time delays and added costs • Identify methods to streamline regulatory processes between multiple agencies with proactive, time-dependent deadlines • Collaborate with the CWCB to identify financial support mechanisms for Federal permitting activities "Better management tools will optimize projects to meet multiple needs, minimize cost, and protect public health and safety. An example of this is the Extreme Precipitation Analysis Tool (EPAT). Reservoir storage restrictions currently cost the state some 74,000 acre-feet in lost storage opportunities. An updated EPAT would provide cost savings by minimizing necessary dam spillway sizes and would streamline the permitting process."
North Platte BIP	Regulations can be a constraint to securing acceptance of a project. Since a large amount of the land in the North Platte Basin is under federal ownership, permitting issues can impact project feasibility, cost, and schedule.... Regulatory bureaucracy and environmental impact requirements may significantly delay project timelines, increase costs and ultimately limit the ability of a project sponsor to implement a proposed project, regardless of the relative size of project scope. Regulatory streamlining and cooperative strategies may help address regulatory constraints."	In Strategies to address regulations, the following bullet points are included to streamline permitting or develop collaborative solutions: • Collaborate with the CWCB to identify technical support mechanisms for Federal permitting activities. • Identify methods to proactively address potential regulatory pitfalls that generate excessive time delays and added costs. • Identify methods to streamline regulatory processes between multiple agencies with proactive, time-dependent deadlines. • Collaborate with the CWCB to identify financial support mechanisms for Federal permitting activities.
Rio Grande BIP	No permitting challenges mentioned.	No permitting solutions mentioned.

South Platte and Metro BIP	"In order to be developed, water supply, infrastructure, and treatment projects must go through a myriad of federal, state and local permitting processes which are both time and resource intensive. Improving the efficiency of current federal and state permitting requirements has the potential to save the public money while providing the same assurance of quality and due diligence. The Executive Order cites this issue and calls for the identification of potential areas of improvement in CWP. The intent is not to reduce existing environmental protections but to obtain permitting decisions in a more timely and cost effective manner with a more predictable process for federal and state engagement."	"The State of Colorado could support a more efficient EIS process for water supply projects.... Greater efficiency, cooperation, predictability, and consistency in the permitting process could be achieved by establishing guidelines for what the lead federal agency and all state and federal agencies involved in the process require for approval. Efficiency and predictability of the permitting process could be further enhanced by the State compiling agreed upon ranges, tools, and methodologies for assessing contentious topics such as hydrology modeling, system risk, conservation as a demand reducer, and others." "To increase the efficiency, consistency, and predictability of the EIS process, the State could work cooperatively with Federal agencies to develop a Programmatic EIS. Colorado's Water Plan could be used as the platform for a Programmatic EIS. Under a Programmatic EIS, no specific projects are approved, but it would create an analysis from which future specific approvals can rely." "Starting in 2010, the Corps, the DNR including the CWCB, and the US EPA embarked upon a process called CAWS. The major outcome of CAWS was an informal agreement among the three parties that conservation should be used as a demand reducer in analyzing the purpose and need for a project rather than during the alternatives analysis portion of the NEPA process. Though this informal agreement was not publicly documented, an important policy tool going forward could be the use of conservation as a demand reducer in the purpose and need segment of the EIS process. By doing this, water providers will have greater incentive to implement proactive conservation strategies to demonstrate decreased demand and strain on existing resources." "Scoping for 404 or NEPA permitting must follow federally required processes. Delays often result when new areas of analysis are identified late in the permitting process after scoping has occurred. By ensuring that regulating agency concerns are addressed in their entirety during the scoping process, applicants can more accurately plan for the costs associated with the analysis and avoid delays." "The State of Colorado could encourage the Corps and EPA Region 8 to revise their 1990 MOA on sequencing. Their current MOA says that the Corps must determine the Least Environmentally Damaging Practicable Alternative (LEDPA) first and then look at compensatory mitigation to authorize the LEDPA. A revision would enable public works projects to use compensatory mitigation in the identification of the LEDPA. This revision could be limited to public works projects." "The State of Colorado's requirement for 401 certification and an approved Wildlife Mitigation Process could be improved to provide project proponents greater certainty in project planning. Earlier starts for these approval processes could effectively utilize information from the Federal Process to save project proponents and the citizens of Colorado time and money while allowing for greater certainty of project implementation."
Southwest BIP	Permitting is mentioned as a constraint associated with Southwest Basin measurable outcomes.	No permitting solutions mentioned.
Yampa/ White/Green BIP	No permitting challenges mentioned.	"Develop methods to assist with streamlining permitting in a cost-effective manner." "Success in permitting and constructing in-basin storage projects."