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## **VIA HAND DELIVERY AND E-MAIL**

March 18, 2009

The Honorable Anthony Nuñez  
The Honorable John Cordova  
The Honorable Jeff Chostner  
Pueblo County Board of County Commissioners  
215 W. 10<sup>th</sup> Street  
Pueblo, CO 81003

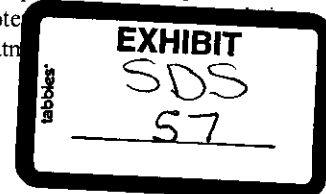
**Re: HB 1041 Permit No. 2008-002  
Mitigation of Project Impacts  
Applicant: Colorado Springs Utilities  
Proposed Southern Delivery System**

Dear Sirs:

On behalf of the Rocky Mountain Environmental Labor Coalition ("RMELC"),<sup>1</sup> undersigned counsel submit these written comments in response to the March 10, 2009, Recommended Terms and Conditions and Mitigation of Project Impacts (hereinafter "Mitigation Plan") and Mitigation Appendix as prepared by Banks and Gesso, LLC, for Colorado Springs Utilities' ("CSU's") Letter of Request for a House Bill 1041 Permit to Construct, Operate and Maintain Southern Delivery System ("SDS") Project Components within Pueblo County and accompanying House Bill 1041 Permit Application ("1041 Permit Application")<sup>2</sup> submitted to

<sup>1</sup> RMELC is a not for profit organization that seeks to ensure a balance between rapid population growth, labor interests and the preservation of the natural environment in the Rocky Mountain region. RMELC provides a voice for workers and unions to engage their neighbors and public officials on pressing environmental issues such as the proposed SDS project. RMELC seeks to unite labor leaders, union members, environmental activists and other concerned local citizens in the Rocky Mountain region to fight for good jobs and a clean environment in furtherance of the laudable goals of the Blue/Green Alliance. Members of RMELC reside, work and recreate in El Paso and Pueblo counties and will be directly affected by decisions of the Commissioners with regard to the SDS project.

<sup>2</sup> CSU has submitted the 1041 Permit Application on behalf of itself and the City of Fountain, the Pueblo West Metropolitan District, and the Security Water and Sanitation Utilities District, collectively referred to herein as the "Applicants." The Applicants' 1041 Permit Application was filed with Pueblo County pursuant to the Pueblo County Regulations for Areas and Activities of State and Local Interest, Title 17, Chapter 17.172 "Regulations for Efficient Utilization of Municipal and Industrial Water Projects" and Title 17, Chapter 17.173 "Regulations for Site Selection and Construction of Major New Domestic Water and Sewage Treatment Systems" and Title 17, Chapter 17.174 "Regulations for Extensions of Existing Domestic Water and Sewage Treatment Systems."



Kim B. Headley, Planning and Development Director, Pueblo County Department of Planning and Development on August 20, 2008. The Pueblo County Board of County Commissioners ("BOCC") has provided for a public hearing on the recommended Mitigation Plan and Mitigation Appendix on March 18, 2009, and according to the March 11, 2009, eNews from the Applicants, public comments will be accepted through the close of the public hearing.

As a threshold matter, RMELC only became aware of the release of the recommended Mitigation Plan and Mitigation Appendix as of the March 11, 2009, eNews from the Applicants and an article in The Pueblo Chieftain. There apparently was no official public notice from Pueblo County giving advance warning as to the release of these conditions, nor did the Pueblo County website indicate that public comments on the mitigation will be accepted, nor set forth a specific deadline for public comments. Such actions do not ensure full participation of the public and instead created confusion as to the hearing parameters and public participation rights.

RMELC and the public had less than one full week to analyze and review the Mitigation Plan and Mitigation Appendix, prepare substantive comments, and receive approval of those comments from the Board of Directors in time for the March 18, 2009, hearing. By e-mail communication dated March 12, 2009, RMELC urged Kim Headley, Pueblo County Planning and Development Director, to provide for an additional hearing date to allow for public comment on the recommended Mitigation Plan and Mitigation Appendix after the public hearing on March 18, 2009. No response was received to RMELC's inquiry. Given the length and complexity of the recommended Mitigation Plan and Mitigation Appendix, additional time is necessary for the public to provide substantive comments on the Mitigation Plan and Mitigation Appendix. In light of such procedural improprieties, additional time is also warranted for the public to review and comment on the recommended Mitigation Plan for the proposed SDS project. RMELC respectfully requests that the BOCC extend the public hearing for at least two (2) weeks to allow the public adequate time to submit written or supplemental comments on the recommended Mitigation Plan and Mitigation Appendix.

**I. The BOCC Should Deny The Applicants' 1041 Permit Application As Inconsistent With The Approval Criteria Set Forth In Chapter 17**

As discussed in detail in RMELC's written comments set forth in RMELC's December 11, 2008, letter to the BOCC addressing the Applicants' 1041 Permit Application and the related public comments presented at the December 11, 2008, hearing by counsel before the BOCC,<sup>3</sup> the Applicants' 1041 Permit Application fails to satisfy many significant approval criteria contained in the Pueblo County Regulations at Chapter 17, Section 17.164.030, nor does the SDS 1041

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<sup>3</sup> RMELC's written comments and public comments are part of the public record in this matter and are incorporated herein by reference as "RMELC's December Public Comments."

Permit Application comply with many of the approval criteria contained in Section 17.172.130. RMELC, therefore, continues to respectfully request that the BOCC deny the Applicants' 1041 Permit Application as inconsistent with Pueblo County's approval criteria set forth in Chapter 17.

As currently configured, the proposed SDS project is likely to cause significant adverse impacts on the environment of Pueblo County including the degradation of water quality, wetlands and aquatic animal life along with potentially causing economic harm to residents of Pueblo County. RMELC continues to assert that the Applicants' 1041 Permit Application is inconsistent with Pueblo County's approval criteria and, therefore, not in the best interests of Pueblo County and its residents.

The 1041 Permit Application, even with the addition of the terms and conditions set forth in the Mitigation Plan and Mitigation Appendix, is fundamentally flawed due to myriad material deficiencies as discussed in RMELC's December Public Comments at length, including, *inter alia*, the failure to analyze cumulative and connected impacts, and the failure to consider water conservation, efficiency, reuse alternatives and increased energy use caused by the SDS proposed project. Significantly, as discussed in RMELC's December Public Comments, and reiterated herein, the 1041 Permit Application remains deficient because the 1041 Permit Application lacks critical information on many significant areas of public concern including the following:

- (1) Whether the proposed project will significantly degrade water quality and how excursions in water quality will be handled;
- (2) Whether the proposed project will significantly degrade terrestrial or aquatic animal life including impacts of elevated levels of dissolved selenium;
- (3) Whether the proposed project will exacerbate noxious weed infestation in the Pueblo Reservoir;
- (4) Whether the SDS project will overburden existing wastewater treatment capacities;
- (5) Whether the SDS project will emphasize the most efficient use of water including recycling water to the greatest extent allowable since reuse alternatives have been excluded and rejected;
- (6) The nature and extent of environmental impacts on Pueblo County citizens residing in high risk areas;
- (7) The cumulative impacts of other regional water supply and storage projects; and
- (8) The nature and extent of associated flooding hazards resulting from increased flows due to the proposed project.

In many instances, the Mitigation Plan and Mitigation Appendix fail to address or do not address adequately these deficiencies. Consequently, given the outstanding issues as to the 1041 Permit, the BOCC should outright reject or at a minimum defer a decision on the 1041 Permit

Application as currently configured.

Admittedly, some of the proposed Mitigation Plan requirements attempt to address RMELC's and other stakeholder concerns. For example, the Mitigation Appendix, Condition E-1, proposes a water quality and sediment monitoring program "to assess the effectiveness of the proposed SDS mitigation measures" and "collect data that supports the evaluations related to impacts on water quality and geomorphology" (Mitigation Appendix at page 2). However, that mitigation proposal does not cure the 1041 Permit Application's defect as to lack of information on whether and to what extent the SDS project will significantly degrade water quality. Prior to approval of the 1041 Permit Application and construction of the proposed SDS pipeline, Applicants must be required to analyze adequately whether and to what extent the SDS project will significantly degrade water quality and explain how excursions in water quality will be handled as discussed in RMELC's December Public Comments at pages 6-11.<sup>4</sup> Without this analysis, there is no mechanism to ensure that the proposed monitoring plan contained in the Mitigation Appendix will address adequately the potential water quality and sedimentation issues raised by the SDS project.

Similarly, the Mitigation Appendix, Condition C-16, contains a proposal for noxious weed control requiring the Applicants to "control spread of noxious weeds resulting from project construction" and implement a noxious weed eradication program. However, the Applicants are not being required to first conduct a quantitative analysis (as proposed by the DEIS comments of the Colorado Division of Wildlife) with regard to the potential adverse impacts of noxious weeds, in particular tamarisk, as they relate to the change in water levels to the Pueblo Reservoir as set forth in RMELC's December Public Comments at pages 13-14. This proposed Mitigation Appendix condition may address RMELC's concerns, but without the necessary analysis, the public cannot evaluate the efficacy of the proposal.

Likewise, the Mitigation Plan's section 7 requires CSU to commit to invest an additional \$75,000,000 in its wastewater system, subject to annual appropriation by the Colorado Springs City Council, between 2009 and 2024. But, this proposed requirement does not address the lack of information as to whether the SDS project would overburden existing wastewater treatment capacities in the first place. As stated in RMELC's December Public Comments at page 15, the Applicants should be required to provide an analysis of whether existing wastewater treatment capacities can absorb the new flows through municipal systems, or whether the full realization of SDS might overburden the wastewater capabilities of those systems. This critical information also must be evaluated by the BOCC to determine whether the SDS project would not overburden the existing systems and whether current and projected future demand for the service can be met within existing and proposed capacity in accordance with Pueblo County Code

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<sup>4</sup> Additional discussion as to the adequacy of the monitoring program is set forth herein at pp. 12-13 *infra*.

Section 17.164.030(D). Without this analysis, BOCC and the public cannot be assured that \$75,000,000 earmarked for "efforts to protect against future spills to Fountain Creek, to increase its opportunities for reuse, and to mitigate possible water quality impacts" (Mitigation Plan at page 6), will address sufficiently all of the impacts of the SDS project and truly encourage the increased use of wastewater reuse systems.

Finally, RMELC continues to assert as set forth at pages 3-6 of RMELC's December Public Comments, that pursuant to Pueblo County Code, Sections 17.164.0303(O) and 17.172.130B.(1), the BOCC should defer a final decision on the Applicants' 1041 Permit Application until the Applicants have obtained key federal and state permits and approvals prior to submitting the 1041 Permit Application. Specifically, a complete Clean Water Act section 404(b)(1) guidelines analysis before the United States Army Corps of Engineers is necessary to avoid and minimize impacts to aquatic resources, as well as compensate for any remaining unavoidable impacts of the SDS project alternatives under consideration because the guidelines require a watershed approach that takes into account the context of the entire landscape. Moreover, many of the recommended conditions and impact mitigation practices set forth in the Mitigation Plan are likely to be required as permit conditions necessary to comply with federal wetland regulatory requirements. In essence, the Applicants are seeking credit in the Pueblo County 1041 process for mitigation practices that will be required under federal law. Accordingly, RMELC respectfully requests that the BOCC table approval of the 1041 Permit Application until a detailed section 404(b)(1) analysis is completed and made available to the public for review and comment along with identification of the least environmentally damaging practicable alternative or "LEDPA."

**RMELC, therefore, continues to assert that approval of the SDS 1041 Permit Application as currently configured is premature due to the uncertainty relating to the project's scope and route due to, *inter alia*, the fact that key project permits and approvals have not been obtained and the failure of the SDS 1041 Permit Application to assess and address fully all of the SDS project impacts within Pueblo County. Consequently, the BOCC should reject the SDS 1041 Permit Application at this time.**

**II. The Recommended Mitigation Plan and Mitigation Appendix As Currently Configured Are Inadequate To Ensure Protection Of The Welfare And Environment Of Pueblo County And Meet Title 17 Approval Criteria**

In response to the Applicants' 1041 Permit Application, and at direction of the BOCC, Banks and Gesso, LLC, developed the Mitigation Plan and Mitigation Appendix for review by the BOCC and public. While the Mitigation Plan and Mitigation Appendix contain many significant improvements to the proposed SDS 1041 Permit Application, the Mitigation Plan and Mitigation Appendix as currently configured are insufficient to ensure protection of the welfare

and environment of Pueblo County and meet the Title 17 approval criteria set forth in Title 17, Chapter 17.164 and Title 17, Chapter 17.172 of the Pueblo County Code. At this juncture, if the BOCC decides to approve the 1041 Permit Application (which appears to be a foregone conclusion despite numerous objections to the SDS project), the approval must be contingent upon the Applicants' adoption and implementation of additional necessary conditions with clear and enforceable requirements beyond those set forth in the recommended Mitigation Plan and Mitigation Appendix in order to satisfy the Title 17 requirements.

RMELC addresses the following key provisions of the recommended Mitigation Plan below:

- (1) Limitations and conditions on third-party contracts or agreements for the purchase or lease of additional water rights including a rate of flow limitation of 78 mgd and the assertion of Pueblo County's Regulation 1041 authority over any actions by CSU to enlarge the storage capacity of Pueblo Reservoir (section 5);
- (2) CSU shall pay monetary mitigation in the amount of \$50,000,000 for Fountain Creek impacts (section 6);
- (3) CSU shall commit to expenditures for wastewater system improvements of an additional \$75,000,000 through December 31, 2024 (section 7); and
- (4) Implementation of a water quality and sediment monitoring program for the Arkansas River and Fountain Creek (section 18).

In general, the recommended Mitigation Plan fails to adequately address many of the impacts and concerns raised in RMELC's December Public Comments as well as those raised in the December 3, 2008, Banks and Gesso Report, and the January 20, 2009, Memorandum from Raymond L. Petros to Banks and Gesso ("Petros Memorandum"). In addition, many of the conditions do not require CSU to act beyond what is already required under existing laws, regulations or permit conditions in yet to be obtained federal and state water permits, or as already set forth in the Bureau of Reclamation's Final EIS as part of those required mitigation efforts.

In sum, with regard to proposed mitigation plans, as discussed below in more detail, RMELC urges the BOCC to bolster the mitigation requirements to minimize and mitigate impacts from the proposed SDS project on the Arkansas River Basin and the residents of Pueblo County. To minimize such impacts, the BOCC should condition approval of the SDS project as follows:

- (1) Establish a concrete enforceable annual limit on the amount of water that may be diverted from the Arkansas River;
- (2) Prohibit delivery of water from the SDS pipeline to parties other than the project

- proponents irrespective of whether such third parties are in El Paso or Teller Counties; and
- (3) Require concrete enforceable water conservation measures and goals to reduce residential and commercial water consumption by the project proponents.

In short, the Mitigation Plan must go further to facilitate and require water conservation and reuse measures, protect water quality and strengthen the required monitoring in order to minimize impacts on Pueblo County and its residents.

**A. The Applicants Should Not Be Allowed To Pump More Water Than Is Necessary To Meet Ongoing Present Demands Of Water Users To Be Served By The SDS Project And Must Be Subject To Clear and Enforceable Numeric Pumping Limitations**

As noted in RMELC's December Public Comments, Pueblo County Code Section 17.172.130B.(26) requires that "[t]he Project will not result in excess capacity in existing water or wastewater treatment services or create duplicate services." As such, any provision allowing the SDS project to create excess capacity particularly for the carriage of water to entities that are not SDS project participants through the sale of such water by CSU is at odds with the prohibitions in the Pueblo County Code and inconsistent with the interests of Pueblo County. The proposed Mitigation Plan, however, expressly provides that CSU "does not intend to foreclose the potential of making additional agreements for the long term delivery of water to third parties via the SDS Project." (Mitigation Plan at page 3) Thus, the plain language of the Mitigation Plan contemplates allowing CSU to act as a "water broker" by selling off excess capacity from the SDS project to third parties in El Paso and Teller Counties. CSU's reservation of the right to sell or lease excess capacity to third parties contravenes the Pueblo County Code and is not in the best interests of Pueblo County given the impacts of increased flows associated with such contracts.

The Mitigation Plan attempts to place limits on CSU's ability to sell or lease the excess capacity by requiring all third parties in El Paso County to agree to the five conditions set forth in section 5.2 of the Mitigation Plan though RMELC questions the efficacy and enforceability of such terms and conditions. Oddly, the current language of section 5.2 does not require third party contracts for the delivery of water in Teller County to incorporate the same five conditions as El Paso County, though later the language of section 5.2 indicates that CSU may deliver water from the Pueblo Reservoir to entities located in El Paso County or Teller County within the Arkansas River Basin under the Mitigation Plan. Inadvertent or otherwise, such an omission must be addressed prior to BOCC approval of the Applicant's 1041 permit application.

In addition, section 5.2 of the Mitigation Plan purports to limit the ability of CSU and

other entities to operate the SDS project at a rate of flow in excess of 78 mgd. However, even that limitation is not absolute, since CSU may seek an increase in the rate of flow by applying for and receiving an amended 1041 Permit from Pueblo County. Thus, once the SDS project commences, there is no assurance to the public that eventually flows will not be increased by future BOCCs to levels significantly above the threshold of 78 mgd. Without an absolute limitation on flows relative to actual usage, there are no incentives to encourage CSU or other entities to limit their usage through conservation and reuse since excess capacity is readily available up to 78 mgd and then subsequent 1041 proceedings may raise the flow limit even further.

Finally the Petros Memorandum notes that CSU and the other project proponents could divert an additional 28,000 acre feet per year beyond the 60,000 acre feet contemplated in the Final EIS for the SDS project if the 78 mgd pumping limit at the Juniper Pump Station serves as the only limitation on water diversion. Water is too precious of a resource and valuable of a commodity and the impacts on Pueblo County and its residents are far too pervasive and significant to allow CSU to sell the excess water as a water broker to the highest bidders throughout El Paso and Teller Counties as currently described in the Mitigation Plan and Mitigation Appendix. Absent the setting of an annual limitation, CSU stands to profit greatly through the sale of such water to third parties and Pueblo County and its residents will be left to suffer the consequences.

Critically, the most serious potential impacts of the proposed SDS project on the Fountain Creek watershed as noted in the December 3, 2008, Banks and Gesso Report – erosive baseflows that would cause excessive sedimentation of downstream segments of Fountain Creek and the attendant increased risk of flooding Pueblo – are proportionate to the Applicants' pumping rate. The 1041 Permit should not allow the Applicants' to pump more water than is needed by its water users without regard to the significant impacts to residents of Pueblo County. It is not in the best interests of Pueblo County to bear the burden of the contemplated impacts so that CSU can become water brokers profiting at the expense of Pueblo County. The BOCC, therefore, should require as a condition of approval clear and enforceable numeric pumping limitations on an annual and daily basis to minimize the impacts throughout Pueblo County particularly property owners within the Fountain Creek watershed. These limitations should reflect the rate of flow necessary to meet ongoing present demands of the project participants to be served by the SDS project and prohibit CSU from serving as a water broker throughout El Paso and Teller Counties over the next forty years.

Even if such limiting provisions are negotiated, the increased flows from the SDS project still will most likely cause property damage arising from erosion. Therefore, an additional mitigation provision should be negotiated to compensate for the loss of property based on land valuation procedures conducted by an expert appraiser. As previously advocated in RMELC's



December Comments, the BOCC should require the creation of a trust fund with pre-established procedures for compensating property owners within the Fountain Creek watershed for negative impacts to their property including loss and damage to property caused by erosion due to non-native flows into Fountain Creek from CSU facilities. Such a trust fund is necessary to balance the potential unlimited rate of flow increases associated with the SDS project and provide CSU with incentives to limit flows and impacts on property owners within the Fountain Creek watershed.

**B. The Monetary Mitigation Plan May Not Fully Address All Impacts Of The SDS Project on Pueblo County And Its Residents**

One of the key mitigation provisions in the Mitigation Plan is the payment of \$50,000,000 to the Fountain Creek Watershed, Flood Control and Greenway District to mitigate the impacts of the SDS project to Fountain Creek. Throwing money at the problem, however, cannot and will not address the impacts that will result from decreased flows in the Arkansas River, which will shrink the Pueblo Reservoir, and reduce flows in the Arkansas River with negative impacts on water flow and quality, or impacts on Fountain Creek and the Arkansas River below Fountain Creek due to increased flows in Fountain Creek. And what if \$50 million is not enough to address impacts to Pueblo County and its residents? Then, what will be done and who will be held accountable? Unfortunately, the likely answers to these questions are nothing and nobody because the Mitigation Plan does not provide any mechanisms to address such contingencies.

Moreover, BOCC and the public have not been provided sufficient information in the Mitigation Plan or in the 1041 Permit Application to evaluate whether in fact \$50,000,000 is sufficient to adequately mitigate forty years worth of increased flows and sedimentation on the Fountain Creek. The public needs to know what criteria were used to determine this amount and whether this amount is based on sound economic forecasting and environmental impact valuation and analysis, or was it simply a "horse-trade" in a negotiated settlement to complete a deal. Under the current plan CSU, having reserved the right to sell or lease excess capacity, will profit immensely from the SDS project, without having to bear all of the real costs associated with the project – those will be borne in large part by the residents of Pueblo County. In return, CSU should be required to offset the actual costs associated with the SDS project with a mechanism to allow for additional funds to address future or unknown costs as they arise.

For example, will any of the money proposed address such issues as the impact of the reduced flows of the Arkansas River on fishers and anglers downstream of the Pueblo Reservoir, the costs to property owners from flood damage due to increased flows, the costs of multiple dredging projects or the loss of property that occurs as a result of erosion from increased flows? In addition, there is inadequate information in the record as to what, if any, kind of oversight and

public participation will be provided to ensure that the funds allocated to the new District or Nonprofit are spent in a manner consistent with the goal of mitigating impacts of the SDS project on the Arkansas River basin including Fountain Creek. Similarly, there is inadequate information about what, if any, public recourse exists, if \$50,000,000 turns out to be insufficient to fully mitigate the impacts of SDS to Fountain Creek. Certainly, Pueblo County will lack leverage to obtain increased funding, if needed in the future, once the SDS 1041 Permit has been approved and the project has commenced construction.

As such, before this monetary mitigation is accepted, the BOCC should require an independent analysis of the true economic and environmental costs of the impacts of the SDS Project on Fountain Creek, the Arkansas River, the Pueblo Reservoir and Pueblo County residents. If such analysis has been completed by an independent consultant, then the results of that analysis should be released to the public for evaluation and comment and incorporated into the record.

Finally, this mitigation provision lacks sufficient specificity and enforceability as drafted leaving far too many issues undecided or left to the discretion of others outside of the BOCC and Pueblo County. The funds are to be turned over to the new proposed District, which may or may not be created legislatively, or in the alternative, to a Nonprofit Corporation. While Pueblo County will have representation on either the District or the Nonprofit, it will share that representation with Colorado Springs whose interests may not be aligned with the interests of Pueblo County. According to the plain language of the proposal, the District "may" use the funds only for one or more new projects that create a significant and not merely incidental benefit to Fountain Creek – the use of "may" instead of "shall" creates an ambiguity and enforceability concerns. Does this provision contemplate that the District has the discretion to use the funds in a different manner other than for projects that create a significant benefit to Fountain Creek? The District is given broad discretion in choosing the types of projects and defining what is a significant benefit to Fountain Creek. There is no specific recourse for the public set forth if the District chooses a project that is actually incidental to the benefit to Fountain Creek – leaving the public with only the option of an expensive lawsuit challenging the District's decision.

Instead, the funds should be turned over to an entity controlled by Pueblo County, not shared with Colorado Springs, with a specific mandate as to the exact projects to be completed, the conditions under which the projects will be completed and the time frame for the completion of such projects. If Pueblo County is not ready to specifically identify what needs to be done to mitigate the impacts, and how the money must be expended, then approval of the Applicant's 1041 permit application clearly is premature.

**C. Expenditures For Wastewater System Improvements May Be Inadequate To Address The Impacts Of The SDS Project**

The Mitigation Plan also touts the provision requiring CSU to commit to invest an additional \$75,000,000 in its wastewater system to “continue its efforts to protect against future spills to Fountain Creek, to increase its opportunities for reuse, and to mitigate possible water quality impacts to Fountain Creek.” As a threshold matter, neither the Mitigation Plan nor the 1041 Permit Application provide sufficient analysis as to what efforts CSU has made and will make in the future to protect against future spills, increase reuse or mitigate water quality impacts. Thus, as with the monetary mitigation plan, the public is unable to evaluate whether these additional resources are sufficient to address the issues of spills, reuse and water quality impacts or whether such funds will be dedicated to projects that actually serve the goals articulated in the Mitigation Plan.

Moreover, the limitation set forth in the Mitigation Plan stating that the \$75,000,000 is “for projects not currently required by other regulatory permits, agency enforcement or court orders, consent agreements, or governmental regulations existing as of January 30, 2009” is disingenuous at best in light of the fact that CSU apparently has been issued compliance orders and entered in to Compliance Orders on Consent in response to a Notice of Violation issued by the Colorado Department of Public Health and the Environment (“CDPHE”) on October 7, 2005, for water quality violations resulting from wastewater system deficiencies and violation of permit conditions and water quality standards, BOR has not issued the ROD for the proposed SDS project, the Army Corps of Engineers has not issued any wetlands permits for the proposed project under section 404 of the Clean Water Act and the United States Environmental Protection Agency (“EPA”) has not weighed in as to the nature and extent of wetlands mitigation required to comply with the Clean Water Act § 404(b)(1) guidelines.

Once again, CSU and the other project applicants appear to be seeking credit under the Mitigation Plan for expenditures that are likely to be required under federal and state law. Accordingly, the Mitigation Plan should delete the January 30, 2009, date and clearly state that the funds be expended on “projects not required by other regulatory permits, enforcement, regulations now and in the future.” Finally, RMELC notes that the annual appropriations are subject to approval by the Colorado Springs City Council, removing any input of Pueblo County to ensure that these funds are allocated in a manner consistent with Pueblo County’s goals to address future spills, reuse and water quality issues downstream. Again, the Monitoring Plan proposes terms and conditions that are vague and create enforceability concerns.

**D. The Proposed Monitoring Plan Is Not Adequate To Address All Concerns As To Water Quality Impacts**

Another key provision of the Mitigation Plan is the Monitoring Plan set forth at Condition E-1 of the Mitigation Appendix entitled "Water Quality and Sediment Monitoring Program" (Pages 2-5 of the Mitigation Appendix). While there are positive aspects to this Monitoring Plan, many sections should be bolstered to ensure that the Monitoring Plan provides accurate and relevant information relating to water quality and sediment impacts resulting from the SDS project. For example, within E-1 of the Mitigation Appendix, the Applicants are required to "monitor both the inlet and outlet to Lower Williams Creek Reservoir for methyl mercury on a quarterly basis following the start of reservoir operations for a period of one year, then annually for four years thereafter." (Mitigation Appendix at page 2). While RMELC approves of monitoring for methyl mercury, the Monitoring Plan as a whole does not address fully all of the issues relating to potential methylmercury contamination.

Fundamentally, RMELC notes that this proposed Monitoring Plan would be unnecessary if the chosen SDS alternative did not rely on a return flow storage reservoir. To use colloquial terms, the Applicants are proposing to build a pond in which it would hold treated sewage to later pump down Fountain Creek. The pond would act like a stove pot, containing all the necessary ingredients to cook up a brew of methylmercury. It would be practically impossible for the Applicants to undo creation of the reservoir or mitigate the formation and release of methylmercury once it began. RMELC has contended from the outset that a return flow reservoir is unnecessary and that the SDS project would be more environmentally sound if it did not contain a return flow reservoir. If the BOCC decides to approve the 1041 Permit Application with the return flow reservoir as part of the SDS project, then the consequences of methylmercury generation in this reservoir must be rigorously examined. Finally, the United States Army Corps of Engineers has yet to approve the preferred alternative with the return flow reservoir and may require instead an alternative that does not include a return flow storage reservoir.

To that end, it is imperative that Pueblo County know the extent of mercury released from the Lower Williams Creek Reservoir at the earliest possible stage. In addition to water quality monitoring, at the outset, the Applicants should be required to determine mercury levels of soils within the area that would be flooded to create the Lower Williams Creek Reservoir prior to construction of the Lower Williams Creek Reservoir. Once water begins to submerge these soils, any mercury within the soil will become the source of mercury that bacteria will convert to methylmercury as explained in RMELC's December Public Comments at pages 7-9. In addition, given that mercury contamination from mining represents a risk to human health and the environment, Pueblo County should also require an analysis of any historical use of mercury in gold mining activities that may have taken place in the vicinity of the proposed SDS project

reservoirs. These historic mining locations, if within the proposed reservoir areas, could be hot spots of present-day mercury contamination that is beyond current assumptions for the amount of mercury these reservoirs may liberate into surface waters.

In addition, development of the monitoring plan protocol should be open to the public. The monitoring plan designates CSU to monitor the specific water quality constituents through samples at 13 monitoring locations. There is no independent objective data collection required by a neutral third party to ensure the integrity of the monitoring data – CSU controls all data collection and maintains the database. Moreover, the data collected will be assembled and entered into an electronic database accessible only to CSU and to Pueblo County, only upon request. There is no provision allowing the public to have regular and convenient access to the data, thereby limiting the public's ability to monitor how the project is proceeding in terms of water quality issues, presumably to limit the public's ability to challenge the data and raise concerns when water quality standards or other permit conditions are being violated. As a public entity, CSU may have to release that data pursuant to a Colorado Open Records Act, ("CORA") C.R.S. § 24-72-201 *et seq.*, request; however, the CORA process is slow and cumbersome, subject to assertion of myriad governmental and investigatory privileges and provides only for a lawsuit when documents are not released in a timely fashion. Accountability and transparency are essential elements to any monitoring plan conducted by a governmental entity; as such, provisions must be added to the monitoring protocol such as the development of an independent third party monitoring program, an independent, public audit of the data collected, and regular public access to the data on a publicly available website without requiring a formal request under CORA.

Finally, RMELC asserts that improvements are needed in the monitoring plan to require the use of the best scientific protocols for water quality assessments. The most sensitive and comprehensive means of determining the ecological quality of aquatic systems is the use of bioassessment protocols, in particular benthic macro invertebrate protocols that measure the health of a river or stream segment by quantifying taxa richness (the number of different species or taxa that are found in an assemblage, community or sample) and related variables.<sup>5</sup>

Condition E-1 of the Mitigation Appendix requires the Applicants to monitor specific water quality constituents such as dissolved selenium, E. coli, ammonia, and salinity as measured by specific conductance. RMELC asserts that it is imperative that Condition E-1 of the Mitigation Appendix also require the Applicants to employ benthic macro invertebrate protocols on a regular basis to monitor in the broadest way possible the SDS project's impact on ecological quality of surface waters downstream of the project.

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<sup>5</sup> US EPA (2002), "Biological Assessments and Criteria: Crucial Components of Water Quality Programs." <http://www.epa.gov/waterscience/biocriteria/technical/brochure.pdf>.

**E. The Applicants Should Be Required To Prepare Land Within Newly Flooded Reservoirs To Minimize The Potential Release Of Mercury And Other Contaminants**

As discussed at length in RMELC's December Public Comments at pages 7-9, the creation of newly flooded reservoirs as proposed by the SDS project may lead to the release of methylmercury and other contaminants into Pueblo County. The Mitigation Plan fails to address this issue, but it is critical to lessen the potential for methylmercury contamination and subsequent ingestion of methylmercury by biota and human receptors. For purposes of mitigation, before allowing raw water to enter the proposed upper Williams Creek Reservoir, and before allowing return flows to enter the proposed lower Williams Creek Reservoir, the BOCC should establish clear and enforceable conditions that require the Applicants to prepare the land designated for use as a reservoir by removing all vegetation that might become submerged and decay to minimize low dissolved oxygen levels and the mobilization of toxic heavy metals from sediments in these newly formed reservoirs in order to assure that the discharge of water into the Fountain Creek watershed meets applicable water quality standards for mercury and other pollutants.

The environmental conditions proposed including the monitoring plan in the Mitigation Plan fail to address the need for the removal of the vegetation prior to commencement of construction of the reservoirs. The Mitigation Plan must be amended to provide for the removal of vegetation to address RMELC's concerns as to methylmercury contamination and the release of other contaminants into the flows. Monitoring mercury levels in discharges to Fountain Creek cannot and will not address or minimize mercury releases; any data generated will be after the fact. As such, removal of vegetation from reservoir sites is the only reasonable and practicable approach.

**F. The Mitigation Plan's Conservation And Reuse Provisions Are Wholly Inadequate**

RMELC asserts that the Mitigation Plan should include concrete enforceable water conservation measures and goals to reduce residential and commercial water consumption by the project proponents thereby minimizing diversion of water from the Arkansas River and limiting impacts on Pueblo County and its residents rather than the vague and unenforceable commitment to water conservation currently set forth in the Mitigation Plan:

24. Conservation and Reuse. In recent years, Applicant has demonstrated a commitment to water conservation programs and local reuse. Continued commitment and local reuse will reduce the Applicant's diversions from the Arkansas River and Pueblo Reservoir and reduce flows on Fountain Creek, thereby reducing the impacts of the SDS Project in Pueblo County. Applicant has

specifically committed itself to continue such conservation and reuse despite the availability of additional water from the SDS Project.

(Mitigation Plan at page 13). This condition as drafted is vague, weak and unenforceable; it would not assure compliance with Pueblo County Code Section 17.172.130B.(25) that requires that the Project "shall emphasize the most efficient use of water, including the recycling, reuse and conservation of water." There are no specific and enforceable provisions contained in the Mitigation Plan requiring increased levels of reuse and conservation of water on the part of Colorado Springs. As such, the provision is meaningless, window-dressing. This section must be strengthened to include provisions that will require increased levels of reuse and conservation of water to lessen the impacts of the SDS project on Pueblo County. The best mitigation plan places limits on usage coupled with incentives to increase reuse and conservation. The Mitigation Plan as proposed does neither.

For example, in RMELC's December Public Comments at page 24, RMELC noted that Colorado Spring's Landscape Code and Policy does not require water-efficient landscaping for single-family residences - the majority of the expected new development in Colorado Springs to occur as a result of the SDS project. RMELC also noted that Colorado Springs's Code watering restrictions are voluntary and as such fall far short of requiring water-efficient landscaping for all expected development or imposing mandatory watering restrictions. Given the lack of statutory or regulatory requirements for Colorado Springs, the Mitigation Plan must require the implementation of specific and mandatory water-efficient landscaping restrictions on new development as a condition of approval of the Applicants' 1041 Permit Application in the form of clear and enforceable conditions as required under Pueblo Code 17.172.130B.(25) to minimize the proposed SDS project's impacts on Pueblo County and its residents.

In addition, RMELC asserts that water demand-side management incentives also must be included as a condition of approval of the Applicants' 1041 Permit Application to minimize the proposed SDS project's impacts on Pueblo County and its residents. These water demand-side management incentives should include subsidies for consumers and industries to purchase new water-efficient appliances and accessories, and for commercial enterprises and industries to complete water consumption audits. Requiring these subsidies for water demand-side management is a proven cost-effective means for communities to conserve water and therefore should be incorporated as a clear and enforceable conditions as required under Pueblo Code 17.172.130B.(25) to minimize the proposed SDS project's impacts on Pueblo County and its residents.<sup>6</sup>

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<sup>6</sup> Kenney, D. (2007), "Residential Water Demand Management in Aurora: Learning from the Drought Crisis" Colorado Water, [http://sciencepolicy.colorado.edu/admin/publication\\_files/resource-2512-2007.12.pdf](http://sciencepolicy.colorado.edu/admin/publication_files/resource-2512-2007.12.pdf).

The BOCC should condition approval of the Applicants' 1041 Permit Application on a major investment in water demand-side management incentives comparable to the investment required for CSU's wastewater system as set forth in the Mitigation Plan. At a time when water resources are becoming scarce, and drought conditions are the rule in the Front Range, instead of the exception, it would be irresponsible for the BOCC to not mandate conservation and re-use measures as part of the Mitigation Plan in order to ensure efficient use of this valuable resource and to minimize the proposed SDS project's impacts on Pueblo County and its residents.

**G. The Applicants Should Be Required To Implement, By A Date Certain, Land Use Requirements To Minimize Stormwater Runoff**

Section 23 of the Mitigation Plan entitled Stormwater Management provides that "[t]he Applicant shall maintain stormwater controls and other regulations intended to ensure that Fountain Creek peak flows resulting from new development served by the SDS project within the Fountain Creek basin are no greater than existing conditions." (Mitigation Plan at pages 12-13). A parallel section is set forth in the Mitigation Appendix at E-2 providing that "at all times water is delivered through the Southern Delivery System, the Applicant, including all participants, shall maintain stormwater controls and other regulations intended to ensure that Fountain Creek peak flows and runoff volumes received from development served by the SDS project are no greater than existing conditions, or at levels as appropriate to prevent damage to presently existing downstream facilities." The Mitigation Plan for stormwater management is flawed and unenforceable due to acceptance of existing conditions in the Fountain Creek watershed that already negatively impact the Fountain Creek flows and water quality, and reliance on assumptions rather than mandates regarding specific types of controls and regulations required to manage stormwater. As such, the Mitigation Plan fails to address the stormwater management concerns set forth in the December 3, 2008, Banks Report.

It is undisputed that the Applicants' proposed SDS project would promote increased population growth in Colorado Springs, Fountain, Security and Pueblo West. New construction to accommodate the added population will result in more impervious surfaces that are highly likely to increase the quantity and degrade the quality of stormwater runoff entering the Fountain Creek watershed.

According to the December 3, 2008, Banks Report at pages 6-7:

Storm water runoff from new development made possible by SDS was not modeled because the assumption was made that new regulations would be in place and that runoff controls and detention would be implemented and would be successful. **These assumptions cannot be relied on to mitigate impacts to Fountain Creek....**



The Applicant states that in the design year (2046) the median annual base flow will increase to approximately 220 cfs from 150 cfs now, a 47 percent increase in base flow. The proposed maximum flow increase of about 400 cfs represent an increase in baseflows of approximately 267 percent. This does not include all related flows, including possible increased runoff from new development or upset conditions (spills, pipe damage, etc.). ...

**However, Staff believes the Applicant has discounted runoff from new impervious surfaces made possible by SDS (such as development of Banning Lewis Ranch) and has discounted increased flood risk at the Pueblo levees caused by sediment build up in the creek bed. ...**

Colorado Springs is reported to have a \$300 million backlog of drainage projects. Fortunately, the Colorado Springs Stormwater Enterprise remains in place, however **Pueblo County can not assume that it always will be, nor can the County enforce the implementation of new drainage regulations such as low impact development standards (low impact with respect to storm water runoff).** ... (Emphasis supplied).

The December 3, 2008, Banks Reports at pages 51-52, further provides:

The Applicant 1041 and DEIS analysis minimize potential concerns about emerging contaminants and the cumulative effects of pollutants introduced through urban runoff. Critically, to address any question about the effect of tens of thousands of new municipal taps in El Paso County, the Applicant assumes that El Paso County jurisdictions are held to current and future best practices.

Pursuant to Pueblo Code 17.172.130(15), County staff is seeking reliable assurances under this Criterion that on-going efforts to address water quality in Fountain Creek will provide the anticipated benefits and ability to confront future needs.

RMLEC continues to assert that these assurances should take the form of clear and enforceable conditions that require the Applicants to minimize the quantity and maximize the quality of stormwater runoff that would ultimately flow downstream to the Fountain Creek watershed and Pueblo County through incorporation of best management practices described in EPA and CDPHE stormwater program regulations and guidance.

**H. The Applicants Should Be Required To Adhere To Specified Conservation Techniques During Construction Of The Project**

The Mitigation Plan at C-19 entitled Sustainable Construction Practices, (Mitigation Plan at pages 18-19) provides that the “applicant shall, where practicable, use sustained construction practices” including developing a material handling plan with recycling and reuse, use minimum 10-percent bio diesel in construction equipment and purchase local goods and services to the maximum extent possible. While the Mitigation Plan sets forth improved construction practices, the conditions appear voluntary in nature and provide no recourse for failure to comply. The practices must be articulated in a clear and enforceable manner, with incentives to encourage compliance. The conditions are developed do not meet the requirements as articulated in the December 3, 2008, Banks Report.

The December 3, 2008, Banks Report at pages 47-48 notes:

According to the Applicant, a number of conservation techniques may be used if deemed “necessary and appropriate during the construction of the project.” Construction mitigation measures include standard erosion control, revegetation, and weed management. Plant species of special concern will be avoided if and when located in a survey. Excess cut material will be disposed of in a permitted disposal site if the material cannot be given to an off-site user. **While the construction phase offers limited opportunities for meaningful conservation, none of the suggested techniques is particularly costly relative to standard industry practice, and most suggested techniques in fact restate standard construction practices. The Applicant does not discuss procurement of locally manufactured materials, idle controls on vehicles, or other possible “green” construction techniques. Given the modest attempt to address conservation in the construction process, it is unclear why the Applicant would reserve discretion to opt out of the enumerated construction phase conservation techniques, as appears to be indicated by the 1041 application.** (Emphasis supplied.).

Assurances that conservation techniques will be implemented as necessary and appropriate are wholly inadequate and unenforceable. Strict adherence to a comprehensive set of conservation techniques during construction of the project should be established via clear and enforceable conditions of approval for the Applicants' proposed SDS project to ensure compliance with, *inter alia*, Pueblo County Code Section 17.172.130 B.(25).

**I. The Applicants Should Be Required To Maximize The Use Of Renewable Energy Sources And Recycling Of Wastes During The Project's Operation**

The Mitigation Plan at C-18, entitled Sustainable Design (Mitigation Plan at page 18) provides that the "Applicant shall, where practical, design SDS facilities to be sustainable or green." While the Mitigation Plan sets forth improved design practices, as with the construction practices, the conditions appear voluntary in nature and provide no recourse for failure to comply. The practices must be articulated in a clear and enforceable manner, with incentives to encourage compliance. The conditions as proposed do not meet the requirements as articulated in the December 3, 2008, Banks Report. Pueblo County Code Section 17.172.130B.(25) requires that "[t]he planning, design and operation of the Project shall reflect principals of resource conservation, energy efficiency and recycling or reuse." The December 3, 2008, Banks Report at page 48 notes:

In terms of energy efficiency, the 1041 application does not provide any information concerning the opportunity for solar powered monitoring or other field equipment. Construction of the North Outlet Works has been mentioned as an opportunity to build new hydroelectric generation capacity in the proximity of the Juniper Pump Station, but plans at this time involve purchase of electric power for pipeline and pumping equipment from traditional electric line sources. Reverse osmosis in Fountain, as another example, is likely to generate solid waste in the form of recovered sediments, but provision for its reuse or efficient disposal are not considered in the 1041 document. **The Southern Delivery System project** does include plans to conserve resources regulated under other law, such as archaeological sites, but the project **does not clearly demonstrate how it is otherwise specifically designed or operated to implement principles of resource conservation, energy efficiency, recycling or reuse.** (Emphasis supplied.)

RMELC continues to assert that measures to maximize the use of renewable energy sources and recycle the Applicants' wastes, such as solid waste from Fountain's reverse osmosis facility, should be subject to clear and enforceable conditions for the Applicants' proposed SDS project to ensure compliance with, *inter alia*, Pueblo County Code Section 17.172.130 B.(25) and minimize impacts on Pueblo County and its residents.

**J. The Mitigation Plan Fails To Adequately Address Property Owner Concerns. The Applicants Should Be Required To Establish A Trust Fund To Compensate Pueblo County Property Owners And Residents Who Work, Reside or Recreate In Close Proximity To The SDS Route For Nuisances And Other Claims Resulting From The Construction And Operation Of The SDS Pipeline**

The Mitigation Plan at section 15, (Mitigation Plan at pages 9-10) entitled Acquisition of Property Interests provides that “[p]rivate property owners shall be treated fairly by the Applicant and the SDS Project shall not create undue financial burdens on existing or future residents of Pueblo County. The Applicant shall commit to using the power of eminent domain only as a last resort.” While the Mitigation Plan attempts to address the concerns of property owners, the provisions are not clear and enforceable and only provide promises of fair treatment without recourse if the treatment is not fair. The reality is that CSU is required to exercise eminent domain only as a last resort. If a property owner will not voluntarily relinquish his or her property for the SDS project, eminent domain will have to be used and the process rarely leaves the property owner feeling satisfied. The Mitigation Provisions simply codify standard operating procedures set forth in the City of Colorado Springs Procedures Manual and Disposition of Real Property Interests. In exchange for receiving approval of the 1041 Permit Application, CSU should be required to offer the property owners additional and enforceable assurances that they will receive “fair” treatment. For example, property owners will be forced to sell their properties at a time when economic conditions are poor resulting in lower valuations. Under normal circumstances, these property owners would most likely hold on to their properties to sell when the market returns and property values increase. Thus, compensation could be based on the high point of 2008, instead on current valuations.

In addition, there are additional impacts to Pueblo County residents which must be addressed as part of this mitigation. Axiomatically, construction and operation of the SDS project with the contemplated 66 inch pipeline and related facilities through Pueblo County will impose hardships and inconvenience on Pueblo County property owners and residents beyond the direct impacts felt by property owners who will be required to grant an easement or sell their property to CSU along the SDS route under the threat of eminent domain. Noise and dust from construction of the SDS pipeline will negatively impact Pueblo County residents' right to enjoy their property and Pueblo County resources.<sup>7</sup>

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<sup>7</sup> RMELC notes for the record that Pueblo County property owners already have expressed frustration and consternation based on their dealings with CSU representatives regarding offers made to obtain an easement or purchase their property.

[http://chieftain.com/articles/2008/12/10/news/special\\_report/doc493b6ca662de5608704381.txt](http://chieftain.com/articles/2008/12/10/news/special_report/doc493b6ca662de5608704381.txt)

RMELC, therefore, continues to respectfully request that the BOCC require as a clear and enforceable condition the establishment of a trust fund with sufficient resources to compensate affected Pueblo County property owners and residents who work, reside or recreate in close proximity to the proposed SDS route for nuisances resulting from the construction and operation of the proposed SDS project in accordance with Pueblo County Code Section 17.172.130B.(21) in order to minimize negative impacts to Pueblo County residents.

### III. Conclusion

RMELC, therefore, continues to respectfully request that the BOCC *deny* the 1041 Permit Application for the proposed SDS project as inconsistent with the Chapter 17 approval criteria. The BOCC should require the Applicants to address water reuse, water conservation and land use planning strategies as well as address the additional outstanding issues raised above and in RMELC's December Public Comments prior to the issuance of the 1041 Permit for the SDS project as presently proposed. Alternatively, the 1041 Permit for the SDS project should not be issued until the Applicants have executed contracts with the BOR, received all necessary Clean Water Act Section 404 permits from the Corps, and negotiated easements and purchased property rights from affected landowners in Pueblo County. Finally, if BOCC decides to issue the 1041 Permit for the SDS project at this time, RMELC requests that the BOCC strengthen the mitigation plan efforts to require the Applicants to adopt and implement the clear and enforceable conditions as set forth above and as discussed in the December 3, 2008, Banks Report, as part of its approval of the 1041 Permit for the proposed SDS project.

Very truly yours,

/s/

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