The Legal Case for 1041 Regulatory Authority Beyond Fort Collins City Limits

Preface

This document has been prepared by an ad hoc group of citizens of the City of Fort Collins. We advocate for strong regulatory authority for the City to protect the health, welfare, and safety of the City's people, their cultural and natural resources, and the quality of their environment. Colorado's Areas and Activities of State Interest Act, the AASIA (also known as "1041" from its original 1974 legislative designation, House Bill 74-1041) grants the needed regulatory powers to the City; it applies to classes of areas and development activities that are listed in the AASIA (and in Section 5.1 below), many of which are relevant to Fort Collins.

1041 powers are stronger than home-rule regulatory powers because they allow the City to regulate any party that proposes a development project—including private parties, state agencies, and federal agencies—when the project falls into one of the listed AASIA classes. Regulation is accomplished by requiring application for a permit issued by the City; the permit is granted if the applicant's project description meets all of the City's regulatory standards, and denied if it does not. If a 1041 permit is denied, then an applicant's only recourse is litigation; the City's regulations and regulatory decisions can be overridden by Colorado courts, but by no other actors. 1041 law has been in effect for nearly 50 years and its powers have been used by at least 37 Colorado counties and 62 municipalities. When 1041 matters have been tested in court, judges have consistently ruled in favor of local governments' regulations and regulatory procedures.

To exercise 1041 powers, Fort Collins must declare its intention to regulate one or more of the classes of areas or classes of activities of state interest (1041 law encourages, but does not require, cities to make these declarations). At the same time, it must adopt guidelines (regulatory objectives) that are at least as stringent as those contained in 1041 law itself; stronger guidelines are explicitly authorized. Then, at its discretion, the City may adopt detailed regulations; as a practical matter, however, the guidelines previously adopted do not define a due process, so detailed regulations are needed. Guidelines and regulations must be crafted consistently with the purposes of the AASIA, as stated in its legislative declaration: *to protect the health, welfare, and safety of the people of the state and for the protection of the environment of the state* (CRS § 24-65.1-101).

1 The purpose of this paper, and our position

We assert that 1041 law, when given modern and proper interpretation, authorizes Fort Collins to regulate a development project whose primary constructed elements lie beyond Fort Collins city limits, if:

- The project qualifies as a *matter of state interest* under 1041 law
- The project reasonably can be expected to diminish the health, welfare, or safety of Fort Collins citizens, or damage natural resources or environmental quality within the City.

This authority is in addition to the clearly stated authorities that apply to projects whose primary constructed elements lie within city limits.

2 AASIA interpretation that supports extra-jurisdictional authority

2.1 Legislative declaration: the purpose of 1041 law

When crafting 1041 regulations, it is important to bear in mind the **core legislative intention** of 1041. If locally adopted 1041 regulatory objectives or detailed regulations are not protective of the health, welfare, and safety of the people, or the protection of the environment, or both, then those adoptions deviate from the purposes of 1041.

1041 Legislative Declaration
…the state has responsibility for the health, welfare, and safety of the people of the state and for the protection of the environment of the state.

Relevant language from the legislative declaration, expressing the purposes of 1041 law (CRS § 24-65.1-101):

- *The protection of the utility, value, and future of all lands within the state, including the public domain as well as privately owned land, is a matter of public interest.*
- *It is the intent of the general assembly that land use, land use planning, and quality of development are matters in which the state has responsibility for the health, welfare, and safety of the people of the state and for the protection of the environment of the state.*
- *The general assembly shall describe areas which may be of state interest and activities which may be of state interest and establish criteria for the administration of such areas and activities.*
- *Local governments shall be encouraged to designate areas and activities of state interest and, after such designation, shall administer such areas and activities of state interest and promulgate guidelines for the administration thereof.*

The language of 1041 is convoluted from the outset. The state legislature, in 1041 law, describes classes of areas and classes of activities that "*may be of state interest*." In other words, the listed classes are recognized in 1041 as candidates for *state interest* status. The candidate designation recognizes some level of state interest in the listed classes, but it creates no regulatory authority.

Regulatory authority is established by *designation* of an area or activity of state interest by a local (county or municipal) government, and the authority applies locally. The geographic extent of local 1041 authority is subject to interpretation and is the central theme of this paper.

2.2 Delegation to local governments

The selection of areas and activities for regulation was delegated to local governments because Colorado is culturally and geographically diverse. One-size-fits-all regulation by a centralized agency was considered unworkable.

Local governments shall be encouraged to designate areas and activities of state interest. The legislature, perhaps out of respect for small jurisdictions with limited resources, did not make local designations under 1041 mandatory; rather, those designations are optional for local governments. The legislature's general intention, though, was to have local governments become active partners in the declared state *responsibility for the health, welfare, and safety of the people of the state and for the protection of the environment of the state*. When implementing 1041 in a local jurisdiction, it is sound practice—and perhaps necessary practice—to maintain a focus on these state-legislated principles.

Taken together, the intention of the state legislature was to create a mosaic of environmental protection across the state, implemented by local governments, and that local jurisdictions would administer the matters of state interest in ways that would protect the health, welfare, and safety of the people of neighboring jurisdictions, as well as of their own. The Colorado Court of Appeals stated that allowing one jurisdiction's development goals and projects to degrade conditions in another jurisdiction "would eviscerate a fundamental objective of the Land Use Act."[1]

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2.3 Consideration of "state interest" as described in 1041 law

Conundrum #1. If a class of area or class of activity is listed in 1041 as a candidate for "state interest," the implication is strong that the listed class is intrinsically "of state interest," just temporarily immune from 1041 regulation until action is taken by a local jurisdiction. If it were not intrinsically "of state interest," then how could a mere local jurisdiction endow it with statewide interest with a local ordinance?

Conundrum #2. Assume that there are two adjacent local jurisdictions, A and B. Jurisdiction A designates, say, airport development (see Section 5.2 below) as a matter of state interest, and institutes regulations for airport development within its borders. Neighbor jurisdiction B is a legally constituted subdivision of the State of Colorado and can reasonably be assumed to have a legitimate interest, inherited from the state, in all matters that are of statewide interest. Jurisdiction B may, therefore, have a shared interest in the regulation of airport development, even within its neighbor's borders and beyond its own borders. Its interest is particularly clear if an airport is proposed close to the shared border. A legitimate logical and legal question is this: does designation by one local government, which elevates an area or activity to a matter of statewide interest, endow a second jurisdiction with 1041 regulatory authority over an activity that primarily takes place in the first jurisdiction?

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The answer to this pivotal question may well be "yes." The question is untested, as far as these authors can determine, in practice and in court rulings. For now, the point to keep in mind is that **1041 law and court decisions are silent on this question**. One cannot legitimately assert that cross-jurisdictional authority is forbidden; it is not. On the other hand, as explained in Section 2.4 below, one finds specific authorization absent. The possible inheritance of regulatory authority, from another jurisdiction's elevation of a matter into the realm of statewide interest, may not be the strongest argument for cross-jurisdictional regulatory authority, as explained in the following sections.

[1] Colorado Springs v. Commissioners (of Eagle County), 895 P.2d 1105 (Colo. App. 1994). See also Section 3.3 below.

2.4 Where in 1041 is cross-jurisdictional authority prohibited?

Nowhere. The lack of authorization has been interpreted by some as prohibition, but it is not that.

Cross-jurisdictional authority appears not to be authorized (as opposed to prohibited) in the procedures for designating matters of state interest, as described in CRS § 24-65.1-401:

After public hearing, a local government may designate matters of state interest within its jurisdiction, taking into consideration the intensity of current and foreseeable development pressures.

A designation shall:

- *Specify the boundaries of the proposed area; and*
- *State reasons why the particular area or activity is of state interest, the dangers that would result from uncontrolled development of any such area or uncontrolled conduct of such activity, and the advantages of development of such area or conduct of such activity in a coordinated manner.*

The phrase *within its jurisdiction* seemingly excludes a local government from regulating projects whose primary construction activities occur beyond its borders. That interpretation, however, depends on interpretation of one word, *site*, which appears in the listing of classes of activities of state interest, in the phrases "site selection" and "site selection and construction."

2.5 Proper interpretation of *site*

2.5.1 A necessary consideration of historical context

Colorado House Bill 74-1041 (the AASIA) was signed into law in 1974. This was early in the history of environmental protection law, and early in the general public's understanding (and, most likely, in legislators' understanding) of the lateral reach of environmental connectivity. It was, for example, before the nation recognized that coal-fired power plants in one state caused acid rain in other states and that interstate regulatory action was needed. Acid-rain regulations were passed in 1980.

So, in legislators' minds in 1974, the immediate area of construction of a water facility or an airport was the extent of their perception of the project's *site*. The word *site* is used in 1041 statutes without definition. We assert that the word *site* in the AASIA, interpreted with current (nearly 50 years later) general understanding about environmental connectivity, includes places that can reasonably be expected to suffer adverse impacts from the project.

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Under this definition of *site*, a project whose primary scope of construction is outside of Fort Collins city limits, but whose adverse impacts extend into the city limits, is subject to 1041 regulation by the City.

How the *site* of a project plays into regulatory authorization is explained in Section 2.5.2.1 below with detailed reference to 1041 language.

2.5.2 Two examples illustrating lateral reach of environmental connectivity

2.5.2.1 Example 1

Suppose that a dam is proposed in county A to create a water-supply reservoir that would flood (upstream) part of county B. Authorization for 1041 regulation of this activity of state interest under 1041 is in CRS § 24-65.1-203, described as:

> Considering the *site* of a project to end at an administrative boundary, when natural processes do not end at that boundary, defies physical realities of the project.

Site selection and construction of major new domestic water and sewage treatment systems and major extension of existing domestic water and sewage treatment systems.

This description is supported by a definition in CRS § 24-65.1-104:

"Domestic water and sewage treatment system" means a wastewater treatment facility, water distribution system, or water treatment facility, as defined in section 25-9-102(5), (6), and (7), C.R.S., and any system of pipes, structures, and facilities through which wastewater is collected for treatment.

Water distribution system is defined in CRS § 25-9-102(6):

"Water distribution system" means any combination of pipes, tanks, pumps, or other facilities that delivers water from a source or treatment facility to the consumer.

Is the area that would be flooded in county B part of the water distribution system? It is one segment of the part of the system that stores water for later distribution (i.e., one segment of the reservoir)—so yes, it is part of the distribution system. Is it part of the project's *site*? It might be excluded from the *site* by deeming the site to end artificially at the county line. Water impounded by the dam, however, will not heed the county boundary. To deem the county boundary as the limit of the *site*, therefore, defies the physical realities of the project. The *site*, in its physical reality, is partly in county B.

Our assertion is that this situation licenses county B to regulate the *site selection and construction* (per CRS § 24-65.1-203 cited above) of the dam in county A because part of the project *site*, in its physical reality—either in its construction or post-construction operation—is in county B and, therefore, is within county B's jurisdiction.

2.5.2.2 Example 2

The same is true of airport site selection. Noise and hazards from post-construction operation of an airport extend beyond the airport itself. If those adverse impacts extend to jurisdictions beyond the extent of the airport's concrete, then the adversely affected jurisdictions should qualify for 1041 regulatory authority, just as they would with dams. Noise and hazards from aircraft operations are, in fact, some of the most important considerations in airport siting, and they have no respect for administrative boundaries; again, 1041 authority and permitting should be based on the physical realities of the project.

The authority thus alleged parallels the principle of "standing" in torte law, although in torte law standing is established after harm is done. In a regulatory context, the purpose of regulation is prevention of harm, so reasonably anticipated harm establishes regulatory standing.

2.6 Intention for broad regulatory concern

We now show that 1041 language conveys the law's intention for cross-jurisdictional consideration and regulation of reasonably anticipated adverse impacts.

The minimal "criteria for administration" (regulatory objectives) for major extensions of (or new) water and sewer systems are stated in CRS § 24-65.1-204:

- *New domestic water and sewage treatment systems shall be constructed in areas which will result in the proper utilization of existing treatment plants and the orderly development of domestic water and sewage treatment systems of adjacent communities.*
- *Major extensions of domestic water and sewage treatment systems shall be permitted in those areas in which the anticipated growth and development that may occur as a result of such extension can be accommodated within the financial and environmental capacity of the area to sustain such growth and development.*

Both paragraphs mandate a concern for protecting nearby communities or jurisdictions with the words, "*orderly development of… systems of adjacent communities*," and "*the financial and environmental capacity of the area*."

The second paragraph is particularly relevant, as it establishes responsibility not to exceed the environmental capacity of the *area*, which means not only the host jurisdiction of a project, but also surrounding jurisdictions. *Orderly development* in the first paragraph mandates avoidance of environmental damage, because development that disregards environmental consequences can no longer be regarded as *orderly*.

Therefore, a jurisdiction issuing a permit under 1041 is obligated to protect not only its own systems and environment, but its nearby neighbors' as well.

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What was omitted from 1041 statutes was clarity about the mechanisms for implementing these objectives. Interpretations that invent prohibitions, where there are none, impede realization of the law's objectives. We continue by exploring mechanisms for implementing cross-jurisdictional implementation of 1041 without violating its language.

2.6.1 What if a jurisdiction without 1041 authority hosts a project that adversely impacts a neighbor?

In this case, the impacted neighbor exercises its 1041 regulatory authorities, requires a permit, and applies those parts of its 1041 regulations that relate to the reasonably anticipated adverse impacts. The host jurisdiction might challenge the right of the neighbor to regulate within the host jurisdiction's boundaries. If that challenge is settled in favor of the host, then the neighbor would still have rights for remedies under torte law, but possibly not until injury is sustained. The purpose of the AASIA is to avoid development activities approved in one jurisdiction causing harm in another, so this situation fails to meet the objectives of AASIA.

2.6.2 What if a jurisdiction issues a 1041 permit without adequate concern for impacts on neighbors?

If the host jurisdiction fails to protect the environmental capacity of another jurisdiction in the area, and grants a permit for a project that will damage the environment of a neighbor, then what remedy is available? Under 1041 law, this would be a failure to meet the minimum regulatory objectives presented

in Section 2.6 above. Furthermore, this may not be the only failure of the host jurisdiction in applying 1041 regulations. The host jurisdiction, per CRS § 24-65.1-301 is required to

- *Receive recommendations from state agencies and other local governments relating to matters of state interest.*

At the same time, the neighbor jurisdiction in the area, in anticipation of adverse impacts, is required to

- *Send recommendations to other local governments relating to matters of state interest.*

A host jurisdiction is thus obligated to notify neighboring jurisdictions that a 1041 application has been received and is under review, and to provide copies of the application materials. If a neighbor jurisdiction has sent recommendations to the host jurisdiction stating its anticipation of adverse impacts, and those concerns have been ignored or dismissed by the host jurisdiction when granting a permit, then the neighbor jurisdiction has standing for challenging the permit issued by the host. Under 1041 law, CRS § 24-65.1-502, a challenge to denial of a permit is filed in Colorado District Court. The law is silent on the venue for challenging an improperly granted permit, but the same court would be a logical place to start.

2.6.3 Cross-jurisdictional regulation is a better remedy

An alternative and better remedy is to interpret *site* in 1041 to mean all places that reasonably can be expected to suffer adverse impacts. With that interpretation, a jurisdiction that is not the host has regulatory authority, and the project applicant would be required to obtain permits from both jurisdictions. See the illustrative examples in Section 2.5.2 above. Taking the dam example from Section 2.5.2.1, the upstream county would require a permit, apply its 1041 regulations related to water impoundments or causation of flooding, and would not apply unrelated regulations. If the application met those regulatory standards, then it would issue a permit; if it did not meet those standards, then it would deny the permit.

Importantly, this mechanism would typically function without court intervention.

3 Court rulings supporting cross-jurisdictional authority

3.1 Colorado Land Use Commission v. Larimer County Board of Commissioners (1979)

On appeal, this case went to the Colorado Supreme Court. In its opinion, the court wrote:

The purpose of the article of the Colorado Land Use Act dealing with areas and activities of state interest, sections 24-65.1-101 et seq., C.R.S. 1973 (1978 Supp.), is to allow both state and local government to supervise land use which may have an impact on the people of Colorado beyond the immediate scope of the project.

The referenced law is the AASIA. The supervision of land use referred to by the court is the 1041 designation of matters of state interest by local governments; the receipt and evaluation of project applications; and issuance or denial of project permits.

What is most important in the court's words is its interpretation of the AASIA's purpose: *regulation of land use that may have an impact…beyond the immediate scope of the project*. With that understanding of AASIA, what should happen if the jurisdiction of *immediate scope* (i.e., the project's host jurisdiction) fails to protect its neighbors from the project's adverse impacts? A justifiable remedy would be for the affected neighbor(s) to apply their own 1041 regulations, thereby meeting the purposes

of AASIA. If one jurisdiction fails to satisfy the purpose of AASIA, then another jurisdiction may elect to do so, particularly if the second jurisdiction can thereby avert injury.

3.2 Denver v. Eagle and Grand Counties (1989)

Denver Water Board and Northern Water sued Eagle and Grand Counties, both of which had 1041 regulations in place for water systems. The water utilities claimed that their right to develop and utilize their water rights made them immune to 1041 regulation by the counties. The Supreme Court of Colorado found that the broad applicability of 1041 regulations was valid, and that the water districts were subject to the counties' 1041 regulations.

3.3 Colorado Springs v. Eagle County (1994)

The cities of Colorado Springs and Aurora held water rights in Eagle County, which they proposed to exercise by building a dam in the upper parts of the Eagle River basin. Their 1041 permit was denied by Eagle County. One of the arguments that the two cities presented to the courts in their appeal of Eagle County's permit denial was that Eagle County's decision had the effect of regulating growth and development in the two cities. This was the court's response to that argument:

Interpreting the statute to mean that the Board [of Commissioners of Eagle County] *cannot apply its regulatory criteria here because the Board cannot presume to control growth, development, and use of existing facilities in the cities would eviscerate a fundamental objective of the Land Use Act*.

In this case, Eagle County was regulating dam-building and pipeline installation activities within its own boundaries, and those regulations had effects in other Colorado jurisdictions. First, the court found that Eagle County had 1041 rights to regulate projects that delivered water elsewhere, i.e. to regulate a project that was only partly within its boundaries. Examined oppositely, the Colorado Court of Appeals found that the growth ambitions and rights of other jurisdictions did not supersede Eagle County's right to protect its environment under 1041 law and that the regulated activity was validly one of state interest. In other words, 1041 protections spanned across jurisdictions, and the court declared that span to be an essential attribute of the law, without which 1041 would be *eviscerated*.

4 We are not alone

Other Colorado local governments have adopted, or are planning to adopt, 1041 regulations to prevent damages within their boundaries that propagate from projects outside their boundaries. The central purpose of 1041 law is regulation that prevents exactly this sort of damage propagation (see Section 3.3 above).

4.1 Castle Rock

This is a real-world example of the approach suggested in Section 2.6.3 above.

The City of Castle Rock declared a Watershed Protection District under auspices of the federal Safe Drinking Water Act. This gave Castle Rock jurisdiction over activities in the District that could degrade quality of the city's drinking-water sources. Castle Rock then designated 1041 *activities of state interest* to eligible activities in the District. There is no legislated connection between federal watershed protection districts and 1041 designations. Castle Rock's claim to 1041 authority, in places that are in the District but outside the city limits, therefore rests on its partial jurisdiction over drinking-water-related activities in the District.

This is imaginative and novel application of 1041. In effect, Castle Rock is using 1041 authorities to protect itself from harms that can reasonably be expected to propagate from projects in Douglas County into the city (in this case, into its domestic water supply), which the county has not sufficiently regulated. These designations create dual regulatory authorities in parts of Douglas County. There is no prohibition of dual authorities in 1041 statutes.

4.2 San Luis Valley

News reports indicate that counties, and potentially cities, in the San Luis Valley are developing intergovernmental agreements for cooperative application of 1041 regulations to prevent export of groundwater from the valley's aquifers. The underlying philosophy is that harm to one jurisdiction is harm to all. There is no authorization in 1041 statutes for this sort of collaboration, but there is also no prohibition.

5 Reference

5.1 List of 1041 areas of state interest, CRS § 24-65.1-201

- Mineral resource areas
- Natural hazard areas
- Areas containing, or having a significant impact upon, historical, natural, or archaeological resources of statewide importance
- Areas around key facilities in which development may have a material effect upon the key facility or the surrounding community.

5.2 List of 1041 activities of state interest, CRS § 24-65.1-203

- Site selection and development of solid waste disposal sites except those sites specified in section 25-11-203(1), C.R.S., sites designated pursuant to part 3 of article 11 of title 25, C.R.S., and hazardous waste disposal sites, as defined in section 25-15-200.3, C.R.S.;
- Site selection of airports;
- Site selection of rapid or mass transit terminals, stations, and fixed guideways;
- Site selection of arterial highways and interchanges and collector highways;
- Site selection and construction of major facilities of a public utility;
- Site selection and development of new communities;
- Efficient utilization of municipal and industrial water projects;
- Conduct of nuclear detonations; and
- The use of geothermal resources for the commercial production of electricity.

5.3 Definitions related to areas and activities of state interest

- General definitions CRS § 24-65.1-102
- Definitions relating to natural hazards CRS § 24-65.1-103
- Definitions relating to other areas and activities CRS § 24-65.1-104

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The 1041 Papers

1. What Colorado Problem was Solved by the 1041 Law?

It was 1974. The U.S. Congress had passed an unprecedented flurry of environmental-protection laws during the previous decade:

- The Wilderness Act — 1964
- National Environmental Policy Act (NEPA) — 1970
- Clean Water Act — 1972
- Clean Air Act — 1955 and 1970

Of particular importance was the Clean Air Act of 1970, because it deputized the States to develop and implement plans for compliance with national clean-air standards, with national oversight.

Colorado had a problem. The problem was Colorado's significant size and diversity, and the widespread desire of its citizens for State-level protection of its spectacular and varied natural resources, for the security of their continued health, recreational opportunities, and culture. A single State agency would be large and cumbersome, and it would be nearly impossible to write regulations that would fit well across Colorado's extremes of geography, ecology, and culture. City and county officials across the state were rightly concerned that their unique conditions and needs would be excluded from a monolithic statewide system.

House Bill 74-1041 was the solution. With the 1041 law, the legislature recognized:

- There are activities that can alter environmental conditions across multiple, sometimes dozens, of county and municipal jurisdictional boundaries: these are *activities of state interest*. The law enumerated these activities.
- There are areas that host ecological, recreational, and economic resources that are beneficial to the entire state: these are *areas of state interest*. The law enumerated these areas.
- Management of the activities of state interest and protection of the areas of state interest warranted a minimal set of environmental standards. The law established minimum standards.
- Local governments were encouraged—in effect, deputized—to recognize and administer matters of state interest within their jurisdictions. This was an echo of the 1970 Clean Air Act, which deputized the states to administer compliance with national clean-air standards.
- Local governments were invited to develop protective standards that met or exceeded the minimal state standards, through a defined public process.
- Local governments were authorized to require permits for resource-disturbing projects in areas or activities of state interest, and to deny permits for projects that did not fully meet local standards.

In deference to the staffing and financial limitations of small local jurisdictions, the legislature did not *require* local governments to adopt 1041 powers, but the overall intent of the law was for willing local governments to be the State's agents for environmental protection. **The 1041 law balanced State and local authority, and it has been effective in protecting local environments for nearly 50 years, wherever 1041 powers have been adopted.**

The 1041 Papers

2. Colorado Grants Environmental Regulatory Authorities to Local Governments

First, the legislature declares responsibilities of the State of Colorado (Colorado Revised Statutes § 24-65.1-101(1)(a,c)):

> *The protection of the utility, value, and future of all lands within the state, including the public domain as well as privately owned land, is a matter of public interest.*
>
> *It is the intent of the general assembly that land use, land use planning, and quality of development are matters in which the state has responsibility for the health, welfare, and safety of the people of the state and for the protection of the environment of the state.*

These sections clarify the **intent of 1041 statute**: to allow development while **protecting the health, welfare, and safety of Colorado's people and Colorado's environment**. To discriminate between developments that are of purely local concern or interest and developments of state-wide interest (CRS § 24-65.1-101(2)(a)),

> *The general assembly shall describe areas which may be of state interest and activities which may be of state interest*[1] *and establish criteria for the administration of such areas and activities.*

Second, **the legislature recruits local governments** for implementing 1041's objectives (CRS § 24-65.1-101(2)(b):

> *Local governments shall be encouraged to designate areas and activities of state interest and, after such designation, shall administer such areas and activities of state interest and promulgate guidelines for the administration thereof.*

Local governments are expected to participate in statewide efforts to protect the quality of the environment and the health, welfare, and safety of the people. Inaction of local governments is permissible—local governments can "opt out" of 1041 through inaction—but participation is clearly preferred (*"shall be encouraged"*) by the State legislature. The statute commits that *state agencies shall assist local governments* in their 1041 efforts. So, for example, if a local government needs to identify areas of significant wildlife habitat, it may call on the Colorado Division of Parks and Wildlife for assistance.

Definitions are provided (CRS § 24-65.1-102): *Development* means any construction or activity which changes the basic character or the use of the land on which the construction or activity occurs; *Local government* means a municipality or county. This section establishes **broad regulatory reach of 1041**:

> *"Person" means any individual, limited liability company, partnership, corporation, association, company, or other public or corporate body, including the federal government, and includes any political subdivision, agency, instrumentality, or corporation of the state.*

Local governments can regulate development activities proposed by anyone, including state and federal agencies, special districts (e.g., water districts), and utilities. Furthermore, they can adopt more stringent standards than those specified explicitly in the 1041 law; among other things, this allows for application of criteria specific to Areas of state interest to Activities of state interest and vice versa (CRS § 24-65.1-402(3)):

> *No provision in this article shall be construed as prohibiting a local government from adopting guidelines or regulations containing requirements which are more stringent than the requirements of the criteria listed in sections 24-65.1-202 and 24-65.1-204.*

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[1] Areas and Activities of state interest that may be protected by local 1041 regulations are described later in the 1041 law.

The 1041 Papers

3. Regulation of Activities of State Interest Under 1041

1041 law allows local governments to regulate the following Activities of State Interest (CRS § 24-65.1-203); each of these activities of state interest can significantly affect nearby communities.

- Site selection and construction of major new domestic water and sewage treatment systems and major extension of existing domestic water and sewage treatment systems
- Site selection and development of solid waste disposal sites [with certain exceptions]
- Site selection of airports,
- Site selection of rapid or mass transit terminals, stations, and fixed guideways
- Site selection of arterial highways and interchanges and collector highways
- Site selection and construction of major facilities of a public utility
- Site selection and development of new communities
- Efficient utilization of municipal and industrial water projects
- Conduct of nuclear detonations
- The use of geothermal resources for the commercial production of electricity.

Water systems

Regulatory guidance for new water systems:

> *New domestic water and sewage treatment systems shall be constructed in areas which will result in the proper utilization of existing treatment plants and the orderly development of domestic water and sewage treatment systems of adjacent communities.* CRS § 24-65.1-204(1)(a)

Orderly development is mandated, and "orderly" may be construed to include regard for environmental consequences in adjacent communities. Criteria for extensions of water-systems:

> *Major extensions of domestic water and sewage treatment systems shall be permitted in those areas in which the anticipated growth and development that may occur as a result of such extension can be accommodated within the financial and environmental capacity* ***of the area*** *to sustain such growth and development.* CRS § 24-65.1-204(1)(b)

By implication, these activities shall not be permitted in areas where they cannot be accommodated within the environmental capacity *of the area*. By cross-reference to the guidance for new systems (above), *area* at least includes adjacent communities, and probably more; for example, air quality degradations following population growth supported by new water systems is likely to be a regional, large-area effect.

Additional criteria can be imported from other 1041 sections by exercising the following general authority:

> *No provision in this article shall be construed as prohibiting a local government from adopting guidelines or regulations containing requirements which are more stringent than the requirements of the criteria listed in sections 24-65.1-202 and 24-65.1-204.* (CRS § 24-65.1-402(3))

Therefore, guidelines explicitly stated in the 1041 statutes for *areas* of state interest can be applied additionally to *activities* of state interest (and vice versa), and criteria for new water systems can be applied additionally to extensions of water systems (and vice versa).

(*continued in 1041 Paper #4*)

The 1041 Papers

4. Regulation of Activities of State Interest Under 1041

New water systems and extension of existing water systems (continued)

Local governments are authorized to adopt regulatory criteria more stringent than the criteria explicitly included in the 1041 law (see 1041 Papers #2 and #3). Criteria for *areas* of state interest can, therefore, be adopted into criteria for *activities* of state interest, such as development of new (or extension of existing) water systems. For example, the local resolution that designates water-system development as a matter of state interest might state, "If a proposed extension of a water system will affect resources described in CRS § 24-65.1-202(3), then a permit is required under this designation." That section reads:

> *Areas containing, or having a significant impact upon, historical, natural, or archaeological resources of statewide importance… shall be administered by the appropriate state agency in conjunction with the appropriate local government in a manner that will allow man to function in harmony with, rather than be destructive to, these resources. Consideration is to be given to the protection of those areas essential for wildlife habitat. Development in areas containing historical, archaeological, or natural resources shall be conducted in a manner which will minimize damage to those resources for future use.* CRS § 24-65.1-202(3)

Future use would generally be understood to include sustainable recreational use.

Efficient utilization of municipal and industrial water projects

> *Municipal and industrial water projects shall emphasize the most efficient use of water, including, to the extent permissible under existing law, the recycling and reuse of water. Urban development, population densities, and site layout and design of storm water and sanitation systems shall be accomplished in a manner that will prevent the pollution of aquifer recharge areas*. (CRS § 24-65.1-204)

The final sentence imposes restrictions on stormwater and sanitation water outfalls. One can reasonably infer, however, that the broad intent of the law is to protect recharge of aquifers, which involves both water quality (explicit in the law) and quantity (implicit). Management of water quality for recharge is an empty gesture if there is not sufficient water quantity to sustain aquifer recharge. It is possible, for example, to route stormwater discharge into a watercourse downstream of a recharge area, thus bypassing and not polluting the recharge area, but also depriving the aquifer of recharge. That strategy contrasts with on-site construction of detention ponds, routing of runoff through wetlands, and other means for delivering clean water to recharge areas. Bypassing recharge areas is inconsistent with the mandate for *most efficient use of water*.

Summary of regulation of water-related activities of state interest

Sustainability was not a term in general use in 1974 when the 1041 law was first passed. Reading the criteria together for new development and extension of water and sewage treatment systems, and efficient utilization of municipal and industrial water projects, and recognizing the authorization to impose standards more stringent than those contained in 1041 law itself, overall objectives of sustainability are evident:

- Sustain environmental conditions in the immediate area of a project and in its surrounding region
- Consider and avoid threats to economic and environmental sustainability in the area (and region) with attention to consequences of the project's stimulation of growth and development
- Under local option, extend these protections to natural, historic, recreational, and cultural resources.

The 1041 Papers

5. Regulation of Other Activities of State Interest Under 1041

Site selection of arterial highways and interchanges and collector highways

Specific criteria for highway expansion projects are stated in § 24-65.1-204(5):

> *Arterial highways and interchanges and collector highways shall be located so that:*
> - *Community traffic needs are met*
> - *Desirable community patterns are not disrupted*
> - *Direct conflicts with adopted local government, regional, and state master plans are avoided.*

As with water projects, more stringent criteria can be adopted from other sections of 1041 or elsewhere. For example, highway projects can be required to minimize adverse impacts on environmental quality and cultural resources. They can be required to be laid out so that they do not interrupt surface water flows that support aquifer recharge areas, and that runoff from impervious road surfaces does not pollute streams or aquifer recharge areas.

Site selection of rapid or mass transit terminals, stations, and fixed guideways

A light rail system like Denver's will not soon extend to Fort Collins. When that happens, though, protection using 1041 will be needed. Broad protections are given in 1041 law as follows, but specific protections added from other sections of 1041 or elsewhere would be needed to establish unambiguous standards.

> *Rapid or mass transit terminals, stations, or guideways shall be located in conformance with the applicable municipal master plan adopted pursuant to section CRS § 31-23-206, or any applicable master plan adopted pursuant to section CRS § 30-28-108. If no such master plan has been adopted, such areas shall be developed in a manner designed to minimize congestion in the streets; to secure safety from fire, floodwaters, and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; and to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Activities shall be conducted with reasonable consideration, among other things, as to the character of the area and its peculiar suitability for particular uses and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the jurisdiction of the applicable local government.* (CRS § 24-65.1-204(4)(a))

Other activities of state interest

The remaining activities of state interest are not likely to need designation by Fort Collins:

- Site selection and development of solid waste disposal sites [with certain exceptions]
- Site selection of airports
- Site selection and construction of major facilities of a public utility
- Site selection and development of new communities.

The 1041 Papers

6. Designation and Regulation of Areas of State Interest Under 1041

The following types of areas are eligible for designation by local governments as areas of state interest (CRS § 24-65.1-201):

1. *Mineral resource areas*
2. *Natural hazard areas*
3. *Areas containing, or having a significant impact upon, historical, natural, or archaeological resources of statewide importance*
4. *Areas around key facilities in which development may have a material effect upon the key facility or the surrounding community.*

Of these, #3 in the above list is most relevant to Fort Collins. A definition is provided:

> *"Historical or archaeological resources of statewide importance" means resources which have been officially included in the national register of historic places, designated by statute, or included in an established list of places compiled by the state historical society.* (CRS § 24-65.1-104(6))

A 9-mile stretch of the Cache la Poudre River National Heritage Area, designated by the U.S. Congress in 2009, lies within Fort Collins city limits. The Heritage Area itself is defined by the 100-year floodplain of the river. The Heritage Area within Fort Collins unquestionably qualifies for designation as an *area of state interest*.

Relevant minimum administration guidelines are specified:

> *Areas containing, or having a significant impact upon, historical, natural, or archaeological resources of statewide importance, as determined by the state historical society, the department of natural resources, and the appropriate local government, shall be administered by the appropriate state agency in conjunction with the appropriate local government in a manner that will allow man to function in harmony with, rather than be destructive to, these resources. Consideration is to be given to the protection of those areas essential for wildlife habitat. Development in areas containing historical, archaeological, or natural resources shall be conducted in a manner which will minimize damage to those resources for future use.* (CRS § 24-65.1-202(3))

Importantly, there is an explicit call for protection of wildlife habitat and protection of the uses of the area, which would generally be understood to include sustainable recreational use.

One objective of the 1041 statutes is for local governments to serve as agents or deputies of the state in protecting areas of statewide importance. In this regard, the City of Fort Collins has an optional but unmet responsibility to protect its section of the Heritage Area on behalf of the State of Colorado.

For the sake of the City itself, designation of the parts of the city that lie within the Cache la Poudre River National Heritage Area, as an Area of State Interest under 1041, would provide strong protection for 18 Natural Areas, a large part of Lee Martinez Park, the City's new Whitewater Park, and the Poudre Trail. <u>These assets represent tens of millions of dollars of Fort Collins citizens' investments</u>. They deserve strong protections.

The 1041 Papers

7. Public Process for Designation of Matters of State Interest

Process for designation of matters (areas or activities) of state interest (CRS § 24-65.1-404):

- A public hearing is required
- Notice is to be made of hearing and availability of hearing materials 30-60 days before the hearing
- At local option, establish a mailing list of applicants for notifications of 1041 designation process
- Within 30 days following the hearing, reject, amend, or adopt the proposed designation(s)
- Simultaneously adopt guidelines for administration of designated areas and activities
- During the designation and guideline adoption process, no development can be conducted.

Required specification of the areas or activities (CRS § 24-65.1-401):

After public hearing, a local government may designate matters of state interest within its jurisdiction, taking into consideration the intensity of current and foreseeable development pressures. A designation shall:

- *Specify the boundaries of the proposed area*
- *State reasons why the particular area or activity is of state interest, the dangers that would result from uncontrolled development of any such area or uncontrolled conduct of such activity, and the advantages of development of such area or conduct of such activity in a coordinated manner.*

Guidelines and regulations

The local regulatory process may occur in two phases (CRS § 24-65.1-402(1) and (2)):

The local government shall develop guidelines for administration of the designated matters of state interest. The content of such guidelines shall be such as to facilitate administration of matters of state interest consistent with sections 24-65.1-202 and 24-65.1-204.

Guidelines, but not detailed regulations, are required at the time of designation of matter(s) of state interest. Guidelines may apply to multiple matters.

A local government may adopt regulations interpreting and applying its adopted guidelines in relation to specific developments in areas of state interest and to specific activities of state interest.

Adoption of regulations specific to each area or activity are at local option and may be developed after designation and statement of general guidelines.

The 1041 Papers

8. Designation and Administration of Areas and Activities of State Interest

Permit required

Once an area or activity of state interest has been designated by a local jurisdiction, a permit is required:

> *Any person desiring to engage in development in an area of state interest or to conduct an activity of state interest shall file an application for a permit with the local government in which such development or activity is to take place. A reasonable fee determined by the local government sufficient to cover the cost of processing the application, including the cost of holding the necessary hearings, shall be paid at the time of filing such application.* (CRS § 24-65.1-501(1)(a))
>
> *"Person" means any individual, limited liability company, partnership, corporation, association, company, or other public or corporate body, including the federal government, and includes any political subdivision, agency, instrumentality, or corporation of the state.* (CRS § 24-65.1-102)

The phrase "*in which such development or activity is to take place*" (first sentence above) can be construed narrowly to mean the area and immediate vicinity of construction, or broadly to mean places significantly affected by the activity. Broad interpretation is supported and summarized in 1041 Paper #4 and is supported by Colorado Supreme Court decisions described in 1041 Paper #9.

If a project application is received before designation of an area or activity under 1041, then the local government may hold the application while it develops guidelines and holds the required designation hearing, and then grant or deny the permit. More often, a local government will designate its 1041 areas and activities, with guidelines, and afterwards receive applications. (CRS § 24-65.1-501(2)(b))

When a local government receives an application under 1041, it must schedule a hearing on the application within 30 days and make public notice of the hearing 30-60 days before the hearing (for a potential total of 90 days). Local governments may offer or require preliminary meetings, submissions, and reviews that precede the formal submission of an application; these are not prohibited by 1041 statutes. (CRS § 24-65.1-501(2)(a))

Full compliance with the guidelines and regulations is required

> *The local government may approve an application for a permit to engage in development in an <u>area</u> of state interest if the proposed development complies with the local government's guidelines and regulations governing such area. If the proposed development does not comply with the guidelines and regulations, the permit shall be denied.* (CRS § 24-65.1-501(3))
>
> *The local government may approve an application for a permit to conduct an <u>activity</u> of state interest if the proposed activity complies with the local government's regulations and guidelines for conduct of such activity. If the proposed activity does not comply with the guidelines and regulations, the permit shall be denied.* (CRS § 24-65.1-501(4))

Colorado courts have ruled that partial compliance is insufficient; failure to comply with any part of the regulatory standards requires denial of the permit.

Mayor
City Hall
300 LaPorte Ave.
PO Box 580
Fort Collins, CO 80522

970.416.2154
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fcgov.com

January 19, 2023

Land Conservation and Stewardship Board
c/o Katie Donahue, Natural Areas Department Director and LCSB Liaison
PO Box 580
Fort Collins, CO 80522

Dear Chair Elson, Vice Chair Cunniff, and Board Members:

On behalf of City Council, thank you for providing us with the January 11, 2023 memorandum regarding "1041 Regulations Recommendations" wherein you summarized the Board's recommendation to utilize the broader range of 1041 regulatory measures available to local governments to strengthen the City of Fort Collins' regulatory authority and commitment to protect public health, safety, welfare, the environment and wildlife resources.

We acknowledge that you are closely watching for the third iteration of the regulations to be provided before the January 25, 2023 Planning and Zoning Commission meeting. As you know, Council currently has this item scheduled for discussion on February 7, 2023 and we encourage you to view the proceedings in person at City Hall or online at fcgov.com.

Thank you for the expertise and perspectives that you bring to the Board and share with City Council.

Best Regards,

Jeni Arndt
Mayor

/sek

cc: City Council Members
Kelly DiMartino, City Manager

MEMORANDUM

Land Conservation & Stewardship Board

City of Fort Collins Boards & Commissions

To - Fort Collins City Council

From - Land Conservation and Stewardship Board (LCSB)

Date - January 11, 2023

Subject - 1041 Regulations Recommendations

While the Board appreciates that Natural Areas is of one of the three geographic areas to which the draft 1041 regulations apply, we recommend utilizing the broader range of 1041 regulatory measures available to local governments under C.R.C. § 24-65.1-101 et seq. and the City's Home Rule status to strengthen the regulatory authority and commitment of the City of Fort Collins to protect public health, safety, and welfare, the environment and wildlife resources within our city boundaries.

Please note that this memo was written in January 2023 prior to receiving the third major iteration of the 1041 draft regulations. Therefore, this memo is based on presentations and briefings from City Staff. As indicated by staff, the draft regulations will not be published for public review until just prior to the January 25, 2023, Planning and Zoning Commission meeting. The LCSB members intend to review any updates from staff, including the next major update of the draft regulations, and comment further as needed.

Concerns and Recommendations:

- Geographic Thresholds: The reduction in geographic scope from a city-wide application, inclusive of both city-owned property and property owned by private residents, to a substantially reduced scope is disappointing and **fails to comply** with original Ordinance, No. 122, 2021. While we appreciate that Natural Areas is of one of the three geographic areas that are protected by 1041 Powers, we also acknowledge that impacts to our Natural Areas can arise from projects occurring offsite of Natural Areas, for instance, with hazardous materials leaks from construction and maintenance operations, or upstream water diversions that affect historic downstream hydrological flows. Natural areas are inextricably interconnected with adjacent areas. **LCSB therefore recommends** that Council continue to develop and strengthen its 1041 regulations to the maximum extent permissible under State law.

- FONSI vs FONAI: The well-established "Finding of No Significant Impacts" (FONSI) process is well-understood in environmental law and practice. It has been used over many decades and has case law and regulatory interpretation supporting it. In contrast, the "Finding of Negligible Adverse Impacts" (FONAI) process is subjective and not widely used. **LCSB recommends** that Council retain the FONSI evaluation standard.

- Activities and Areas of State Interest: The **LCSB recommends** that Council expand the covered 1041 Activities to include Mineral Resource Areas to strengthen the City's regulatory authority over any proposed mineral extraction development and operations related to siting of surface or subsurface oil and natural gas wells or conveyance pipelines, sand and gravel extraction, or other extractive Activities as allowed by State statute.

- Buffer Zones: The Buffer Zones that exist in the City Code today are too small with respect to adverse impacts and are frequently compromised by existing development. The existence of the built environment does not mitigate potential impacts of the covered 1041 Activities. **LCSB recommends** that an ecologically-sound Natural Resources Buffer Standard be developed that would protect Natural Areas from on- and off-site impacts and require complete remediation should such impacts occur despite the existence of these regulations.

- Outreach and Neighborhood Meeting: For each application, **LCSB recommends** that the City should conduct a robust outreach process and include responses to any concerns collected in the Neighborhood Meeting and public comment process as a distinct criterion for the initial FONSI or FONAI determination.

- Financial Security Requirements: An ad-hoc process is not predictable for applicants or residents. **LCSB recommends** that guidelines and expectations regarding Financial Security be codified in policy.

- **LCSB recommends** that all projects that impact Natural Areas require full review regardless of project thresholds, including modifications and enlargements.

Finally, although LCSB recognizes that Staff was constrained in which potential 1041 Activities and Areas of Interest it was allowed to explore, **we recommend** that Council continue to further develop 1041 regulations which cover all possible city-wide Activities and Areas of Interest as allowed by State statute.

BUILDING COMMUNITY
Fort Collins Area Chamber of Commerce

225 S Meldrum • Fort Collins, CO 80521
(970) 482-3746
www.FortCollinsChamber.com

March 21, 2023

Fort Collins City Council
300 Laporte Ave.
Fort Collins, CO 80521

To: Mayor Arndt, Mayor Pro Tem Francis, and Council Members Gutowsky, Pignataro, Canonico, Peel and Ohlson

Madam Mayor and Members of Council:

The Fort Collins Chamber of Commerce is committed to fostering a vibrant, resilient economy that provides equitable opportunity for success. Not just for our members, but for the benefit of all businesses, their employees, and all those that rely upon the goods and services they provide. As the leading voice in this space, our vision extends well beyond the city limits of Fort Collins to encompass the entire region. The business community of Fort Collins prospers as Northern Colorado prospers.

In this context, the Chamber is gravely concerned by the ongoing effort to institute the far-reaching regulatory powers encompassed under proposed 1041 powers. The rulemaking process has surfaced multi-layered complexities that have ensnared the routine delivery of water and wastewater services across the region. Moreover, the evolving scope and scale of the proposed regulations threaten the economic well-being of business and the very residents of disproportionately impacted communities the regulations are intended to protect.

A summary of our over-arching concerns are as follows:

- **Too Complex.** City staff has made clear that administration and oversight of 1041 powers well exceeds internal technical and personnel capacity. Therefore, outside consultants will be necessary to evaluate projects deemed to be significant. Project applicants will be expected to cover such expense, in addition to their own consultants, in developing a project plan that meets all regulatory standards. Not only does this

raise the cost and delay implementation of water projects, but the outcome will largely be determined through the consensus of consultants that have no vested interest in the prosperity of our community. Nor does this approach lend itself to uniform outcomes over time as consistency is lost to a revolving door of outside experts and their professional disposition.

- **Adversarial.** Applicants subject to 1041 are CDOT, Fort Collins Water Utility department, Northern Water, and the water and sanitation districts that serve over city residents and businesses – and all those located outside city limits, but within the growth management area (GMA). Each of these project sponsors hold a shared interest in providing a high-quality service that protects our natural resources while minimizing cost to the consumer. The proposed regulations cast these critical partners as adversaries in need of restraint.

- **Overreaching.** The enabling state statute limits the scope of 1041 powers to "developments of statewide significance". However, at each stage of its evolution, the draft regulations establish thresholds that reflect the routine placement of water lines intended to serve land uses permitted by code. As well, the regulations are triggered by encroachment upon areas that are already subject to extensive approval and remediation requirements at the federal, state, and local levels.

Based upon the substance of these concerns, we respectfully request the **repeal of Ordinance No. 122, 2021**, which designated areas of statewide interest, and replace Resolution 2021-055 with a revised resolution directing the City Manager to pursue intergovernmental agreements (IGAs) with Northern Water and all water and sanitation districts operating within the Fort Collins GMA. The Chamber does not believe either tool is necessary relative to highway projects pursued by CDOT.

Compelling reasons to pursue IGAs as a solution to perceived lapses in our current regulatory and approval process are as follows:

- IGAs have been utilized extensively across our state to guide the design, siting, installation, monitoring, and remediation of utility and other projects that have potential to disturb our natural environment or adversely impact the health and wellbeing of residents.

- IGAs allow the City and stakeholders to establish common standards of conduct, specific requirements for projects of elevated scope or scale, expectations of desired outcomes, enforcement process, and dispute resolution.

- IGAs provide all parties of interest greater predictability with uniform standards that help contain costs and project timelines.

- IGAs dramatically lower the potential of litigation to resolve conflicts.

- IGAs better establish the collaborative nature of serving the needs of our community without adversely impacting the interests of surrounding jurisdictions.

- The work associated with constructing a well-designed IGA takes place upfront with the ability to refine the document as conditions evolve, rather than subjecting every utility project to special review and the potential for a protracted, arduous process that will deliver uneven outcomes.
- IGAs are not enforceable within the construct of 1041 powers and therefore, must be employed without that overhang.

The Chamber is fully vested in efforts to preserve and protect the natural environment that adds richness to our quality of life and overall wellbeing. Our members are among the most vocal champions of opportunities to elevate disproportionally impacted communities. Most importantly, the Chamber embraces the virtues of open space, recreational facilities, cultural amenities, and the quiet enjoyment of our natural areas that are all depend upon a dynamic, inclusive economy.

We stand as a trusted, engaged partner as you pursue an even better Fort Collins!

Respectfully,
Fort Collins Area Chamber of Commerce

Ann Hutchison, CAE
President & CEO

cc: Kelly DiMartino

Boxelder Sanitation District

3201 E. Mulberry Street, Unit Q
P.O. Box 1518
Fort Collins, CO 80522
Phone 970 498-0604

MEMORANDUM

From: Brian Zick

Date: March 24, 2023

Re: City of Fort Collins Draft Regulation Review

Boxelder Sanitation District was included on an email on February 10 from Kirk Longstein that asked for additional stakeholder input on the proposed version 3 of the 1041 regulations with specific responses to six policy issues, and provide input on project-sized thresholds.

Comments on Policy Issues

1. Should the code exclude an applicability of standards review (i.e., FONAI determination)?
    a. Comment: **No** and the terminology and the definitions should refer to FONSI *not* FONAI which is consistent with NEPA and other and regulations.

2. Should the Code allow council to deny a permit with conditions for re-submittal?
    a. Comment: Not sure of the intent of this item, but if a permit has conditions, those should be approved administratively.

3. Should the code regulate activity outside City that has impact inside?
    a. Comment: **No.** The City should not regulate projects that aren't in the City GMA.

4. Should work within existing easements that cross City Natural Areas be excluded?
    a. Comment: **Yes.** This is very important to Boxelder because of the number of sewers we have in natural areas**.**

5. Should the Code include the use of third-party contractors to support staff administration of permit applications?
    a. Comment: **No.** Outside consultants will increase the costs of the permitting process significantly and will create an unnecessary barrier for communication with the City.

6. Do project-size thresholds and exemptions for work within existing ROW reflect the intent to regulate "major" projects?
    a. Comment: **No.** Project threshold for sewer should be for pipes larger than 24 inches in diameter. This would be consistent with Colorado Department of Health and Environment Regulation 22 – Site Location and Design Regulations for Domestic Wastewater Treatment Works which defines interceptor sewers as 24-inch and larger with other factors as well.

Comments on potential impacted projects.

Boxelder has prepared Master Plans that define where sewer need to be located to provide service to properties in the Districts service area. The proposed 1041 regulations could affect how these projects are developed. One project that would be impacted is the Environment Regulation Boxelder Interceptor. This is a proposed 18-inch sewer that would be located on the east side of I-25 and generally follows Boxelder Creek. The attached map shows the general locations of the sewer. It has been planned for over 15 years but has not been extend north of Highway 14 because development has not occurred in that area. This sewer would be constructed as part of future development projects. The District would not build it in hopes of future development. Most of the Boxelder Creek is defined as wetlands or other natural vegetative areas. If enacted, these regulations may impede the District's ability to serve future development, pending determination on how the proposed regulation would affect this project. Without the regulation, this district would still have to comply with all NEPA requirements including wetland crossing, threatened and endangered species and archeological impacts. Also this is a relatively small sewer (18 inch) so it does not serve large statewide areas.

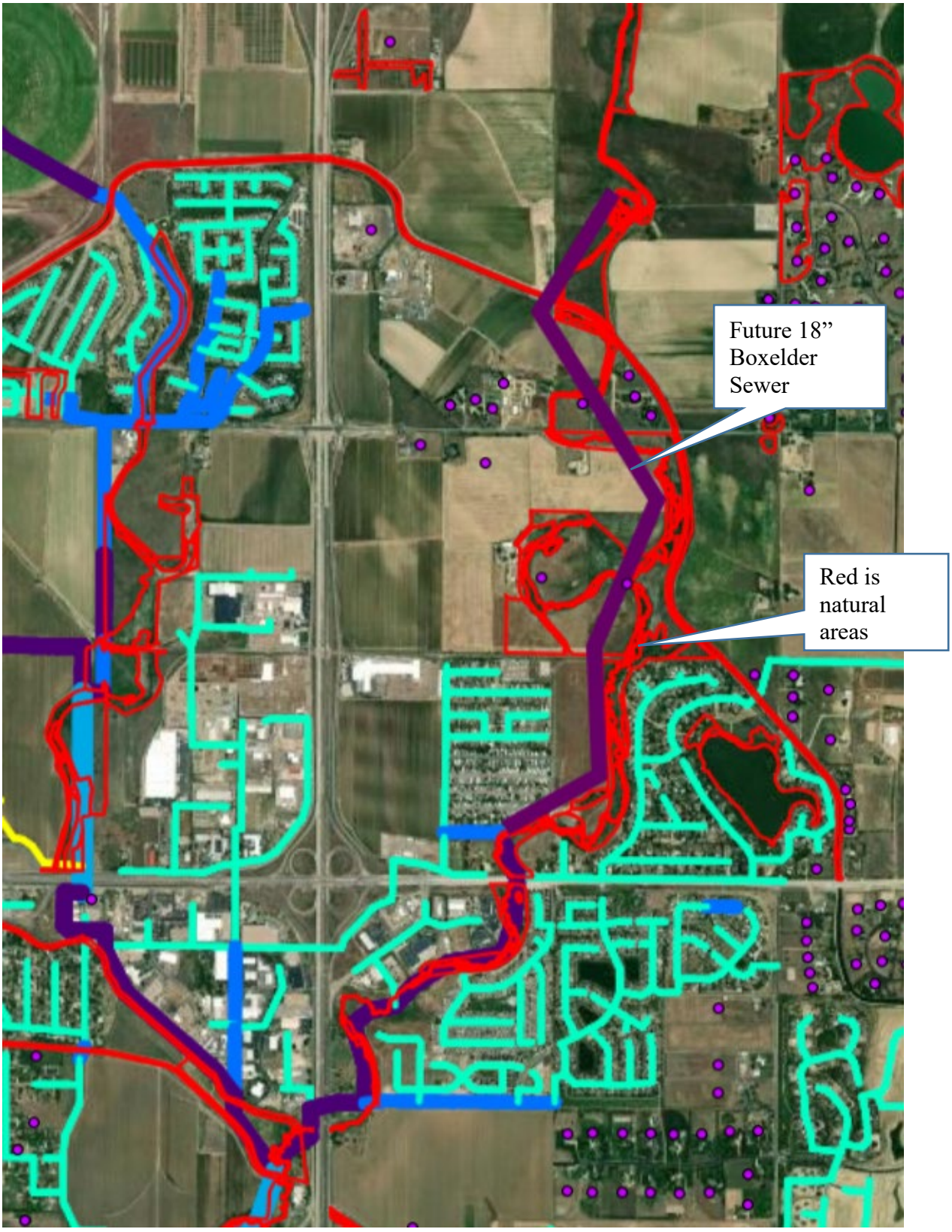
Future 18”
Boxelder
Sewer
Red is
natural
areas

Exhibit B-3 Boxelder Sanitation District: Boxelder Interceptor Basin Buildout

N HIGHWAY 1
E COUNTY ROAD 58
INTERSTATE 25 FRONTAGE RD NE
Larimer Cou
Weld County
N COUNTY ROAD 11
N COUNTY ROAD 9
N COUNTY ROAD 3
Range 68W
Range 67W
E COUNTY ROAD 56
E DOUGLAS RD
Boxelder Creek
COUNTRY CLUB RD
E COUNTY ROAD 50
MOUNTAIN VISTA DR
N TIMBERLINE RD
E VINE DR
E COUNTY ROAD 48
E COUNTY ROAD 52
JAYHAWK DR
WELD COUNTY ROAD 13
Township 8N
Township 7N
MULBERRY ST
E HIGHWAY 14
RIDGEVIEW LN
E PROSPECT RD
CAREFREE DR
E COUNTY ROAD 44
E COUNTY ROAD 42
E DRAKE RD
S TIMBERLINE
S COUNTY ROAD 9

Legend

- Existing Lift Stations
- Existing Force Mains
- Proposed Interceptors
- Existing Gravity Lines
- Service Area (208)
- Section

Sewer Basin

- Boxelder (Sub Basins 1-11)
- Cooper Slough
- Old Clay
- Poudre
- Drake

N
W E
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1 0.5 0 1 Mile

TEC

Boxelder Sanitation District

March 21, 2023

Mayor Jeni Arndt and Fort Collins City Council
300 W. Laporte Avenue
Fort Collins, CO 80521

Via mail and individual emails

RE: 1041 Regulations

Dear Mayor Arndt and Council Members:

Boxelder Sanitation District's Board of Directors is pleased to have this opportunity to respond to Council's recent request for additional stakeholder input addressing six policy issues and project-sized thresholds on Version 3 of the City's proposed 1041 Regulation.

As an alternative, Boxelder Sanitation District requests that the City Council would repeal/withdraw Ordinance No. 122, 2021, and replace Resolution 2021-055 with a revised resolution directing the City Manager to pursue intergovernmental agreements (IGAs) with Northern Water and ALL other water and sanitation districts operating within the Fort Collins GMA.

Boxelder Sanitation District has requested this approach since the initial consideration of the proposed 1041 regulation as a better solution for these several reasons:

- IGAs are extensively used statewide in all phases of utility projects – from design, siting, installation, monitoring, and remediation - with the potential to disturb our shared natural areas or adversely impact the public health and well-being
- IGAs provide for cooperation between the City and stakeholders in setting standards of conduct, specific requirements and expectations, and outcomes along with measures for enforcement and dispute resolution.
- IGAs provide predictability with uniform standards that help contain costs and ensure timely project completion for all parties.
- IGAs protect the interests of surrounding jurisdictions through their collaborative nature.
- IGAs are tailored to the specific project allowing for refinement as conditions evolve rather than a potential for protracted, arduous, and uneven processes that the proposed 1041 Regulation could deliver.

3201 East Mulberry, Unit Q – P.O. Box 1518 • Fort Collins, Colorado 80522
(970) 498-0604 • boxeldersanitation.org • info@boxeldersanitation.org

The Boxelder Sanitation District Board of Directors shares a common environmental stewardship with the City and wider area community. It is our mission to "…responsibly provide wastewater treatment to protect the public health and our Poudre River…". The District, with the City, is fully vested in the requirement to preserve and protect our natural environment that adds richness to our shared quality of life and well-being.

We believe that using the IGA approach best addresses the longer term need to ensure that no part of our communities is disproportionately impacted while embracing the virtues of natural open space, recreational, and cultural amenities in the enjoyment of a dynamic and inclusive economy.

Sincerely,

Dennis Gatlin
Chair, Board of Directors
Boxelder Sanitation District

March 24, 2023

City of Fort Collins City Council;
300 Laporte Avenue
Fort Collins, Colorado 80521

RE: ELCO Comments on Version Three of the Proposed City of Fort Collins 1041 Regulations

Dear Council Members,

On behalf of the Board of Directors for East Larimer County Water District (ELCO) we are providing our additional written comments regarding the new proposed 1041 Regulations. ELCO reiterates that it appreciates the opportunity to provide its perspective on how the proposed Regulations will impact local water service providers and other stakeholders if adopted in their current form. ELCO is disappointed that there was not sufficient time to provide suggested redline changes to the Regulations. Yet it appreciates the alternative to provide its suggested changes in written form directly to City Council. In doing so, ELCO has not attempted to make every change that it would like to see made. Rather, it has focused on those provisions of the Regulations that will have the greatest adverse impact on ELCO and its ability to perform its statutory responsibilities.

ELCO again wishes to thank Staff and the members of the consulting group for listening to its concerns, even if they were unable to address those concerns. As instructed, ELCO is providing, as an attachment, its comments and suggested changes to language and standards that ELCO believes in practice will ultimately be found to be improvidently adopted. ELCO recognizes the difficulty in attempting to craft language that will be usable across various types of developments. The perspective of attempting to craft language applicable on a global basis may be in itself the greatest shortcoming of the Regulations. Water and wastewater providers, such as ELCO, are an extremely limited and highly specialized class of applicants. A separate set of regulations that apply only to such providers would seem to be better suited to accomplishing the Regulations' stated goals while balancing the needs and concerns of the special districts that the City now wishes to regulate.

ELCO remains uncertain of the basis of many of the standards that the Regulations create, and it was unable to obtain definitive answers from Staff or the consultants. It is apparent that the standards are not based on any discussion with or recommendations from the service providers who have the most experience or any objective criteria that takes into account, for example, the practical impact of the difference between a pipeline that is 12 inches in diameter and one that is 24 inches in diameter, or how a linear distance of 1,320 feet may have a materially greater impact than a linear distance of a mile, other than just the difference covered, which is obvious.

As a result, the Regulations may ultimately prove to be so overly inclusive that they will become unworkable to apply and tortuous for the service providers who must attempt to follow them. Attached to this letter is an exhibit ELCO has prepared of the planned projects that likely will occur within a reasonable time that will be significantly impacted in terms of cost and time by the new Regulations. While ELCO would expect that it ultimately will be permitted to construct the projects, the time and resources that will be consumed will provide little benefit for anyone other than the consultants and other professionals that both ELCO and the City will need to retain to address the new Regulations. ELCO is also attaching its responses to the six questions Staff and the consultants provided, as instructed.

It is in the spirit of protecting the best interest of its customers by attempting to avoid what will become unproductive costs and delays that the Board provides ELCO's comments to City Council for its consideration. ELCO believes its recommendations are based upon years of experience in the construction, repair and replacement of pipelines and providing water service for customers within ELCO's water service area, which covers more than 50 square miles. ELCO believes that its comments and suggested changes, if considered and adopted, will have a significant benefit in reducing the expenditure of resources that will ultimately be borne by the taxpayers and others without materially reducing the goals the Regulations are attempting to achieve.

Sincerely,

Mike Scheid
General Manager
East Larimer County Water District

Encl.

ELCO Comments and Questions on the 3rd Draft of the City of Fort Collins Proposed 1041 Regulations

3-24-23

ELCO comments below are intended to address those provisions that will have, or have the potential to have, the greatest impact on the ability of ELCO to perform its responsibilities as a local water service provider. Others have indicated that they intend to comment on other provisions. ELCO may agree with those comments and upon ELCO's review of such may join in those comments. The comments provided below follow the format of citing to and quoting the relevant provision of the proposed draft Regulations followed by ELCO's comment in bold.

6.1.2 Purpose and Findings

(B) **Findings**

(2) These Regulations are necessary because of the intensity of current and foreseeable development pressures on and within the City

ELCO COMMENT: ELCO shares the concern with current and foreseeable development pressures as development continues to expand in northern Colorado. While the City may have determined some new regulations are required, it should be sensitive to the additional burdens the Regulations impose on ELCO and other service providers. The meetings with Staff and the City retained consultants have been helpful in addressing those concerns. The comments below are intended to attempt to balance the impact by suggesting minor language revisions, which if adopted, would significantly reduce the adverse impact the Regulations will have on ELCO. The City's legitimate concern with current and foreseeable development pressures within the City, in part, may be alleviated through better preplanning and coordination with service providers, such as ELCO, when land use plans are created or modified, and new development projects are proposed to better assess and understand the resources that will be necessary to provide service to a new development that the City is considering approving. The value and cost savings that can be achieved by City Planning Staff reaching out to the impacted water and wastewater districts that will be providing service to the planned development should not be supplanted by imposing new regulations that will increase the cost and hurdles on development without a careful balancing of the impact and a determination that less burdensome alternatives are not available. ELCO remains available to assist the City in better understanding the water infrastructure projects and the raw water supply that will be required to support a new City planned development within an ELCO service area. Attempting to address the impact of a development by imposing regulations on water and wastewater projects required to support a newly approved development within the City, rather than address those concerns on a case-by-case basis that addresses the particular impacts of that development before approval, is

problematic and appears to be out of order. Doing so will ultimately result in increased costs upon ELCO, which unfortunately will have to be passed through to ELCO customers and City residents. Such financial impact should be justified only if the benefit derived significantly outweighs the financial impact.

6.1.7 Maps

(B) Maps referred to in any such designations and regulations shall be available for inspection in the offices of the Community Development and Neighborhood Services Department.

ELCO COMMENT: The Maps, their accuracy and availability will be critical to the ability of service providers and stakeholders to determine whether a planned project is within an area designated as being an Area of State Interest. This information must be readily available and maintained current on the City's website so that stakeholders can rely on whether planned construction will lie within a location that the City has designated as being an Area of State Interest due to sensitive environmental or other features listed in 6.12(a)(4) and/or any associated buffers thereto, so they can consider possible alternative routes and plan accordingly.

6.1.9 Definitions

The definitions are important to allow service providers and others to understand the intent of the Regulations. Some of the definitions appear to be inconsistent with their use in the Regulations. A careful review of the definitions should be made prior to adoption to verify that they do not create ambiguity in the document as a whole. The following are definitions that ELCO currently has, and if adopted, will have difficulty understanding or applying:

ELCO COMMENT ON "DEVELOPMENT": ELCO suggests a definition may be needed for the term "Development." The undefined term "development" is used 177 times in the Regulations. Without a specific definition, ELCO must apply the general understanding of that term. Webster defines the word as "the act, process, or result of developing." That is not very helpful. Ultimately, ELCO will have to apply its own understanding, which may or may not agree with what Staff intended. If there is an intended understanding, a definition could be helpful.

ELCO COMMENT ON ADDING A TERM "PUBLIC RIGHT-OF-WAY." Based on discussions with Staff and other City representatives, ELCO understands that the intent is that any construction within a public Right-of-Way will not be subject to FONAI review. 6.6.5 references "non-right-of-way" but does not define or use the term public right-of-way. A public right-of-way has a different understanding than the type of easements ELCO typically obtains. Currently under C.R.S. §32-1-1006(1)(c)(I), ELCO, as a special district, has a right to install waterlines within a

public street or across a watercourse, subject only to certain restrictions, including the obligation to replace the streets when the construction requires cutting or excavation of a street. ELCO requests confirmation that the proposed Regulations are not intended to challenge or burden that State granted right. Having a definition of a Public Right-of-Way (which might reference the statute) would clarify that construction permitted under C.R.S. §32-1-1006(1)(c)(I) will not be subject to FONAI review. ELCO also suggests the draft provide a clear exemption for such construction. Whenever possible, ELCO uses this right at great savings to its customers. It does not believe that the City's intent is to restrict that right, but it would be helpful to clarify that intent.

Adverse impact shall mean the direct or indirect negative effect or consequence resulting from development. Adverse impact shall refer to the negative physical, environmental, economic, visual, auditory, or social consequences or effects that may or may not be avoidable or fully mitigable. Adverse impacts may include reasonably foreseeable effects or consequences caused by the development plan that may occur later in time or be cumulative in nature.

ELCO COMMENT: As defined, it appears that a finding of what qualifies as "adverse" will be made on a case-by-case basis. The term is inherently subjective. The definition is so broad that it is almost meaningless. The key to the definition is the use of the word "negative," which is synonymous with "bad." To make the application more difficult, the definition references "reasonably foreseeable effects or consequences," which itself is ambiguous. ELCO appreciates that creating a definition that best states what is intended is difficult. If the intent is that the determination will be a question of fact, that should be stated and the procedure for making that determination should be better defined. If it is a determination that cannot be made by service providers or other stakeholders without being subjected to FONAI review, service providers need to be aware of that fact at the planning stage so they can determine whether planned construction might be deemed to have a "negative" impact now or in the future so they can determine whether the risk of being subjected to FONAI review and the attendant costs should be avoided by altering, delaying or foregoing a planned project. That determination could impact the availability or financial viability of providing service to a planned development. It would be preferable if the determination were based on objective more concrete factors that would have greater reliability in application.

Cumulative impacts shall mean the impact on the environment and cultural impacts which result from the incremental impact of the development plan when added to other present, and reasonable future actions.

ELCO COMMENT: What is stated above for "adverse," applies more to this definition. The phrases "cultural impacts" and "incremental impact of the

development plan when added to other present and reasonable future actions" could literally mean anything. Who can state what other "future actions" may or may not occur or whether such action might be "reasonable"? It will not be possible for ELCO to understand or apply these standards with any degree of reasonable predictability. As such, it will have to be assumed that any project that is subject to FONAI review may be denied. It does not appear that the drafters have considered how this standard will apply in practice. Perhaps examples of how the City or a decision maker is intended to sum different impacts to derive a "cumulative impact" would be helpful. As currently drafted, it is difficult to see how the standard can be applied consistently and predictably over time.

Major new domestic water system shall mean:
(1) A system of wells, water diversions, transmission mains, distribution mains, ditches, structures, and facilities, including water reservoirs, water storage tanks, water treatment plants or impoundments and their associated structures, through which a water supply is obtained, stored, and sold or distributed for domestic uses; or

(2) A system of wells, water diversions, transmission mains, distribution mains, ditches, structures, and facilities, including water reservoirs, water storage tanks, water treatment plants or impoundments and their associated structures, through which a water supply is obtained that will be used directly or by trade, substitution, augmentation, or exchange for water that will be used for human consumption or household use;

And all or part of a system described in (1) or (2) above meets one or more of the following criteria:

(a) Distribution and transmission lines greater than 12" diameter pipe and 1,320 linear feet in the aggregate for the proposed development plan; or

(b) Will require a new easement of 30-feet or greater in width and 1,320 linear feet in length in the aggregate for the proposed development plan.

In determining whether a proposed development plan is a major new domestic water supply system, the Director may consider water rights decrees, pending water rights applications, intergovernmental agreements, treaties, water supply contracts and any other evidence of the ultimate use of the water for domestic, human consumption or household use. Domestic water supply systems shall not include that portion of a system that serves agricultural customers, irrigation facilities or stormwater infrastructure.

ELCO COMMENT: This definition is an example of imposing a standard without consideration of the impact of its application. Although ELCO was told Staff would not consider changes to the draft at this time, Staff and City representatives in telephone conversations did indicate changes to the standard may be considered.

Minor changes to the language in the draft could have substantial impact in application. To avoid extending application of this definition to projects that may not have been intended, ELCO suggests the following changes:

(1) Change "easement" to "permanent easement" to avoid including a temporary construction easement in the calculation. Including the width of a temporary constriction easement would have the effect of overstating any impact and unreasonably extend the applicability of the Regulations;

(2) Use width of easement as the determining criteria in lieu of pipeline diameter. Other than the NEWT 42" pipeline project, all of ELCO's water lines are located in permanent easements that are 30 feet in width or less. This includes pipelines from 2 to 24 inches in diameter. Easement width limits the area of disturbance a pipeline project will have and is generally independent of the diameter of the pipeline located within in the easement. ELCO recognizes and acknowledges that there may be a limit to the pipeline diameter that can be reasonably located within a 30-foot-wide permanent easement, but there is not a significant likelihood that service providers would attempt to place a line that was too large for the size of the easement acquired;

(3) Change 30 feet or greater to greater than 30 feet. Forcing service providers to reduce their standard 30-feet easements to 29 feet does not provide any benefit to anyone (ELCO understands that Staff now supports this change);

(4) Delete or rework the last paragraph. When considering the impact a pipeline project will have on the property and other features it will cross, allowing the Director to consider water rights decrees, pending water rights applications, intergovernmental agreements, treaties, water supply contracts and any other evidence of the ultimate use of the water for domestic, human consumption or household makes little sense. Is the intent to attempt to regulate the water supply that will be delivered by a water pipeline project? The City does not have the right or jurisdiction to determine what a water provider may or may not do with their own water resources. Such determinations are part of the powers granted by the State to water districts. Water districts, like ELCO, are in the best position to make any determinations regarding the amount of water that should be required for development. In addition, the determinations of the amount of water a developer will need for a development may be an issue that has already been determined in water court, if applicable. Will service providers now need to consider how the language in a court decree, intergovernmental agreement, treaties (ELCO does not enter into treaties [being a formally concluded and ratified agreement between countries]) or water supply contract might impact the later consideration of whether a project is a Major new domestic water system?

(5) Is there an intent for the phrase "ultimate use of the water for domestic, human consumption or household use"? ELCO, as a domestic water supplier, provides domestic (treated or potable) water service, which may include agricultural customers within its service area for domestic use. ELCO does not provide water service to "agricultural customers" for ag production (irrigation). For one, in most cases, it would be cost prohibitive for an ag producer to use potable water for ag production. Non-potable water is not provided by ELCO or other service providers. An owner secures water rights to non-potable water through other means. This phrase appears to reflect a lack of understanding of how water service is provided and is confusing. ELCO suggests that it be clarified or deleted.

Major extension of an existing domestic water <u>treatment</u> system shall mean the expansion of an existing domestic water treatment plant or capacity for storage that will result in a material change, or the extension or upgrade of existing transmission mains, distribution mains, or new pump stations that will result in a material change. Major extension of an existing domestic water treatment system shall exclude the following:

(1) Any maintenance, repair, adjustment;

(2) Existing pipeline or the relocation, or enlargement of an existing pipeline within the same easement;

(3) Expanding any existing easement to a total width of 30-feet or less and for a distance of 1,320 linear feet or less; or

(4) Any facility or pump station or storage tank that does not increase the rated capacity from the Colorado Department of Public Health and Environment.

ELCO COMMENT: The addition of the word "treatment" suggests there is an intended difference between a "domestic water system" and a "domestic water treatment system." If that is intended, some explanation should be provided of the difference.

There also appears to be an inconsistency in the requirements of the two definitions regarding easement width. Subsection (b) of the definition of "Major new domestic water system" refers to a "new easement <u>30-feet or greater</u> in width." The definition of "Major extension of an existing domestic water treatment system, exclusion (3)" refers to the expansion of any existing easement to a total width of 30 feet or less. ELCO suggests both definitions should use the same standard of a permanent easement greater than 30-feet in width. ELCO does not understand the basis of 1,320 linear feet in length in the aggregate…." ELCO would prefer the length to be more reasonable such as one mile in length.

Material change shall mean any change in a development plan approved under these Regulations which significantly expands the scale, magnitude, or nature of the approved development plan or the adverse impacts considered by the Permit Authority in approval of the original permit.

ELCO COMMENT: Change "original permit" to "original permit approved under these Regulations." This change will clarify that the change does not apply to a development plan (pipeline project) that was not part of a City permitting process under these Regulations (including because it was not required) and no original permit was previously issued. The language as drafted seems to reflect an attempt to apply the City review and permitting processes used for residential or non-residential development projects to linear pipeline projects, which historically has not been the case.

6.4.1 Exemptions

ELCO COMMENT: ELCO feels that it is imperative that the exemptions and exclusions included in any City 1041 regulation language be made abundantly clear to avoid confusion on the part of a potential applicant when considering any future projects that may be subject to the Regulations. Staff and other representatives for the City have indicated that they understand ELCO's concern that ELCO be able, by reviewing the exemptions, to determine itself whether the exemption applies. This is critical to allow ELCO to limit the impact of the Regulations on ELCO's daily operations, as they currently exist. If possible, the exemptions should be provided in an appendix to the Regulations and be written in concrete language and standards that are not subject to interpretation. ELCO suggests the following exemptions:

A. Any construction, repair, replacement, expansion, relocation of a pipeline within:

- **(1) a Public Right-of-Way or Right-of-Way shown on any recorded plat or development plan approved by the City,**
- **(2) an existing permanent easement,**
- **(3) a new permanent easement that is not greater than 30-feet width,**
- **(4) partially within a Public Right-of-Way and partially within a new permanent easement that is not greater than 30-feet in width; or**
- **(5) partially within an existing permanent easement and partially within a new permanent easement that is not greater than 30 feet in width.**

B. Any construction, repair, replacement, expansion or relocation of a pipeline that is not greater than 1 mile in length and greater than 24 inches in diameter. (24 inches is the industry standard diameter designation).

C. Any other construction, repair, replacement, expansion, relocation of a pipeline that is not within an area designated by the City as an Area of State Interest.

6.6.3 Pre-Application Area or Activity Review

(A) The purpose of the pre-application area or activity review is to determine if a permit is required for the proposed development plan, application submittal requirements, procedural requirements, and relevant agencies to coordinate with as part of any permit review process. Topics of discussion may include, as relevant to the specific application, but are not limited to:

(1) Characteristics of the activity, including its location, proximity to natural and human-made features; the size and accessibility of the site; surrounding development and land uses; and its potential impact on surrounding areas, including potential environmental effects and planned mitigation strategies.

(2) The nature of the development proposed, including land use types and their densities; placement of proposed buildings, pipelines, structures, operations, and maintenance; the protection of natural habitats and features, historic and cultural resources, and City natural areas, parks, or other City property or assets; staging areas during construction; alternatives considered; proposed parking areas and internal circulation system, including trails, the total ground coverage of paved areas and structures; and types of water and wastewater treatment systems proposed.

ELCO COMMENT: ELCO understands that this section is intended to apply to projects that could impact an area designated by the City as an Area of State Interest on the Map. If there are buffer areas to these designated areas, the distances should be stated in the Regulations or, if the distances will vary, be provided on the Map. In addition, consideration should be made for the fact that land use type and density do not apply to pipeline projects. Without this distinction, it is not clear whether standards developed for residential projects would be misapplied to a pipeline project. The "catch all approach," while convenient to the drafter, creates a high degree of uncertainty and unnecessary costs for a potential applicant.

6.6.3 Pre-Application Area or Activity Review (continued)

(B) To schedule the pre-application area or activity review, the applicant must first provide the Director with the following:

(1) Names and addresses of all persons proposing the activity or development;

(2) Name and qualifications of the person(s) responding on behalf of the applicant;

(3) A written summary of the desired location of the proposed development plan including a vicinity map showing the location of three (3) siting and design alternatives, one of which is the preferred location, drafted at approximately thirty percent (30%) completeness. One (1) of the three (3) alternatives submitted shall avoid natural features and historic and cultural resources and avoid the need for mitigation to the maximum extent feasible;

ELCO COMMENT: In ELCO's experience, pipeline projects that require review and potentially a City or County permit, start with a routing study in order to come up with an approved project alignment or route prior to beginning design. Requiring approximately 30% design completion prior to having a finalized route is problematic because changes to the route will require changes to the design increasing costs and creating delays for the applicant, which are ultimately passed on to their customers in the form of higher rates.

6.7.1 Review Standards for All Applications

In addition to the review standards for specific activities listed at Divisions 6.8 and 6.9, all applications under these Regulations, in consideration of proposed mitigation measures, shall be evaluated against the following general standards, to the extent applicable or relevant to the development plan, in City Council's reasonable judgment. To the extent a permit application may not comply with a particular standard, the applicant may demonstrate compliance with such standard by proposing mitigation measures that sufficiently offset the extent of noncompliance. If City Council finds the development plan does not comply with all applicable standards, the permit shall be denied unless City Council, in its sole discretion, imposes conditions pursuant to Section 6.6.14 which if fulfilled would bring the development plan into compliance with all applicable standards, in which case City Council may approve the permit. City Council may also impose additional conditions pursuant to Section 6.6.14 on any permit. The common review standards are as follows: ….

ELCO COMMENT: ELCO questions whether any or most of these standards would apply to a pipeline project or construction of a new Domestic Water System or expansion of an existing Domestic Water System. Again the "catch all" approach can have the impact of causing unnecessary significant costs in attempting to apply standards that have no application. The language as currently drafted states that City Council must find all standards are met. It is difficult to see how these determinations might be applied without the establishment of baseline conditions. As a result, service providers subject to the process will be required to expend enormous costs in planning for any possibility. The process seems to have the potential of a significant waste of public funds as applied to special districts.

6.7.1 Review Standards for All Applications (cont.)

(A) The applicant has obtained or will obtain all property rights, permits and approvals necessary for the proposal, including surface, mineral and water rights.

(B) The health, welfare and safety of the community members of the City will be protected and served.

(C) The proposed activity is in conformance with the Fort Collins Comprehensive Plan and other duly adopted plans of the City, or other applicable regional, state or federal land development or water quality plan.
(D) The development plan is not subject to risk from natural or human caused environmental hazards. The determination of risk from natural hazards to the development plan may include but is not limited to the following considerations:

(1) Unstable slopes including landslides and rock slides.

(2) Expansive or evaporative soils and risk of subsidence.

(3) Wildfire hazard areas.

(4) Floodplains.

(E) The development plan will not [have] an adverse impact on the capability of local governments affected by the development plan to provide local infrastructure and services or exceed the capacity of service delivery systems. The determination of the effects of the development plan on local government services may include but is not limited to the following considerations:

(1) Current and projected capacity of roads, schools, infrastructure, drainage and/or stormwater infrastructure, housing, and other local government facilities and services necessary to accommodate development, and the impact of the development plan upon the current and projected capacity.

ELCO COMMENT: This is another example of the difficulty of applying the general standards to special districts, like ELCO. ELCO is itself a governmental entity. ELCO is charged with the responsibility to provide water service to customers within its service area. The City Council has no ability to determine whether ELCO's proposed project (development plan) is needed to provide infrastructure and services or whether ELCO's current infrastructure has reached capacity. Surely, the City would not deny a project because it determined that ELCO had sufficient capacity within its existing system. That may sound absurd, but it demonstrates the practical absurdities that ELCO will incur by attempting to force ELCO into these Regulations without careful consideration of the affect. The language states that the City is concerned with the potential impact a development plan may have on a local

governments' ability to provide local infrastructure and services. Yet, it does not appear that the City is concerned how application of the Regulations will impact ELCO's ability to provide local infrastructure and services to its customers, many of which are City residents. There is no doubt the impact will result in increased costs and delays, as well as the possible denial of water service delivery to future developments. These impacts could actually result in harming the State interest in providing affordable water service, which would greatly outweigh any benefit to any City determined State interest. ELCO is not arguing none of the Regulations should apply to Domestic Water Systems; it is only saying that careful consideration should be made as to potential adverse impact of the Regulations, which does not appear to have been fully considered.

6.8.3 Specific Review Standards for Major New Domestic Water or Sewage Treatment Systems or Major Extensions

A permit application for the site selection and construction of a major new domestic water or sewage treatment system or major extension of such system shall be approved with or without conditions only if the development plan complies with the review standards in Section 6.7.1 and the below standards, to the extent applicable or relevant. To the extent a permit application may not comply with a particular standard, the applicant may demonstrate compliance with such standard by proposing mitigation measures that sufficiently offset the extent of noncompliance. If City Council finds the development plan does not comply with all applicable standards, the permit shall be denied unless City Council, in its sole discretion, imposes conditions pursuant to Section 6.6.14 which if fulfilled would bring the development plan into compliance with all applicable standards, in which case City Council may approve the permit. City Council may also impose additional conditions pursuant to Section 6.6.14 on any permit. The specific review standards are:

(A) New domestic water and sewage treatment systems shall only be constructed in areas which will result in the proper use of existing treatment plants and the orderly development of domestic water and sewage treatment systems within the City; and

(B) Area and community development and population trends must demonstrate clearly a need for such development.

ELCO COMMENT: It is questionable whether the City has the power to impose its determination on a special district as to whether there would be a "proper use of existing treatment plants and the orderly development of domestic water and sewage treatment systems within the City." If the City has this power, it must be apart from the adoption of these Regulations. These Regulations do not provide the City any new power or right that it does not possess from some other source. The City Planning Staff or a retained third-party consultant and/or the City Council have no power or

ability to make any determination regarding "the proper use of existing treatment plants and the orderly development of domestic water and sewage treatment systems." That decision would need to be made by a court if and when the matter became ripe for determination and was brought by parties having appropriate standing. The City does have the police power and the power granted by the legislature to designate Areas of State Interest and might be able to regulate construction of a new domestic water system to protect that interest. But it cannot restrict construction based on a determination that the construction is not needed because it will not result in the proper use of existing treatment plants and the orderly development of domestic water and sewage treatment systems within the City.

	FONAI	1041
ELCO Estimated Cost per 1041 Application:	**$50,000**	**$100,000**

ELCO Projects Potentially Subject to City of Fort Collins 1041 Regulations

Project	Dia.	Length (ft)	FONAI	1041
Extend 16" line from Brightwater Dr to the extension of an 8" line in Richard's Lake Rd/CR 52.	16	2,700	$50,000	
Install 12" line along Hwy 14 from 12" at Boxelder Cir east to LCR 3	12	3,560	$50,000	
Replace 2" line in the E. Frontage Rd with a 12" line from Mountain Vista to area N11	12	2,700	$50,000	
Extend the 12" line in Mountain Vista east of I-25 to CR 5	12	3,600	$50,000	
Extend 16" line from growth area O14 to the existing 2" line in CR 9	16	1,350		$100,000
Install a 12" line along Richards Lake Rd from Catamaran Cove to Abbotsford St	12	4,400		$100,000
Install a 12" line from CR 13/Inverness Rd to Abbotsford St, then south to Richards Lake Rd	12	4,915	$50,000	
Install a 12" line along Abbotsford St from Richards Lake Rd to Gregory Rd	12	2,050	$50,000	
Install a 16" line from PS 1 to Tank 2 parallel to the existing 12"/14" line	16	15,350		$100,000
Install 16" line in LCR 3 from 24" in Vine Dr. south to Hwy 14	16	5,280	$50,000	
Construct a 1.75 MG storage tank for Zone 1 storage				$100,000
10" AC upsize to 12" PVC west of Lemay - Lemay to Ford lane	12	2,600		$100,000
10" AC upsize to 12" PVC north of Ford Lane to Country Club Road	12	1,500	$50,000	
10" AC upsize to 12" PVC north of Country Club Rd to Highland Place Rd	12	2,000		$100,000
Lemay 10" AC Replacement - Upsize to 12" - Northfield Phase 2 Development	12	1,500	$50,000	
14" Replacement with 16" PVC through Lee Martinez Farm	16	2,700		$100,000
14" Replacement with 16" PVC on west side of Waterfield	16	2,500		$100,000
Pump Station 1 rebuild and upsizing				$100,000
12" or 16" line in Hwy 14 from CR5 to County Line	16	13,000	$50,000	
12" Segment in Douglas Rd.	12	225		$100,000
Replace 3" line in Evans Drive with 12" line	12	645	$50,000	
Install a 12" line in Cottonwood Shores from CR 58 to the last fire hydrant	12	3,960	$50,000	
ELCO Estimated Cost (by type):			**$ 600,000**	**$1,000,000**

Total ELCO Estimated Cost **$1,600,000**

ELCO Answers to City Policy Issues and Questions for Re-Engagement

1. Should the code exclude an applicability of standards review (i.e., FONAI determination)? – **Yes**
    a. Should full permit submittal documents be prescribed in detail? - **Yes**
    b. Should geographic thresholds move to common and general review standards? – **Yes**
    c. Should a neighborhood meeting be required? – **No**

2. Should the Code allow council to deny a permit with conditions for re-submittal? – **Yes**
    a. Should an applicant be allowed to return directly to a hearing or start at the beginning? **An applicant should be allowed to return directly to a hearing.**
    b. Should there be specific criteria for denial of a permit? – **Yes**

3. Should the code regulate activity outside City that has impact inside? – **No**
    a. No changes needed to the current version of the draft

4. Should work within existing easements that cross City Natural Areas be excluded? – **Yes**
    a. No changes needed to the current version of the draft

5. Should the Code include the use of third-party contractors to support staff administration of permit applications? – **No**
    a. Should council support a supplemental appropriation for 1.5 FTE to administer 1041 permit applications? – **Yes**

6. Do project-size thresholds and exemptions for work within existing ROW reflect the intent to regulate "major" projects? – **No**
    a. What additional exemptions should the Code add?
    If a water pipeline project is or will be located in an existing or City planned future ROW it should be exempt.
    b. What project size thresholds would appropriately reflect a "major" project under these regulations?
    Any water pipeline project greater than 1 mile in length and greater than 24 inches in diameter (industry standard diameter designation) and located outside a public ROW.

From: Ray Watts
To: Kirk Longstein; Barry Noon-Contact; Mark Houdashelt-Contact; lopez; Michelle Haefele; Ross Cunniff; Dawson Metcalf-Contact; Gary Wockner
Subject: [EXTERNAL] Re: FONAI vs. FONSI
Date: Thursday, April 13, 2023 1:16:05 PM

Hi Kirk,

We have had some email discussion, and the main question is about the "magnitude" term. What you have shown explicitly is geographic extent, and that is one factor that counts in evaluation of magnitude. There are other things, though, that should also count. One example that we came up with is the comparative magnitude of clearcutting a forest, as opposed to selective cutting.

Here are some of the dimensions that should enter into "magnitude":

- spatial extent (applies to all below)
- physical changes (e.g. impervious surfaces, water diversion)
- chemical changes (e.g. urban stormwater runoff)
- biological changes (e.g. habitat loss or degradation)
- ecological connections (e.g., habitat fragmentation)

We all liked the explicit call-out of *duration* and *likelihood* as FONSI factors.

Other group members are welcome to add more comments!

Ray

From: Kirk Longstein <klongstein@fcgov.com>
Sent: Wednesday, April 12, 2023 1:01 PM
To: Ray Watts <wattsray@comcast.net>; Barry Noon-Contact <barry.noon@colostate.edu>; Mark Houdashelt-Contact <mark.houdashelt@gmail.com>; lopez <lopez.apclass@gmail.com>; Michelle Haefele <michelle.haefele@outlook.com>; Ross Cunniff <rcunniff@gmail.com>; Dawson Metcalf-Contact <dawson.metcalf@colostate.edu>; Gary Wockner <gary.wockner@savethepoudre.org>
Subject: RE: FONAI vs. FONSI

Researching this question more, and curious if there are any thoughts on the proposed definitions as written below:

- ~~***Impact*** *shall mean the direct or indirect negative effect or consequence resulting from development that may or may not be avoidable or fully mitigated.*~~

- ***Cumulative impacts*** *shall mean the impact on the environment and cultural impacts which result from the incremental impact of the development plan*

when added to other present, and reasonable future actions.

- ***Significant** shall be determined within the geographic context of the development plan, and relate to the magnitude, duration and likelihood of an impact.*

- ***Finding of No Significant Impact (FONSI)** shall mean the decision by the Director of Community Development and Neighborhood Services as to whether a potential impact is not significant based on the scale and context of the proposed development plan as well as the magnitude, duration, and likelihood of an impact occurring.*

Magnitude of Impact	Duration of Impact	Likelihood of Impact
localized Beyond the boundaries of the development plan	Short-term Long-term Irreversible	Unlikely to occur Probably will occur

Thanks for your continued feedback.

Kirk

Kirk Longstein, AICP
(he/him/his)
Senior Environmental Planner
City of Fort Collins
Direct: 970-416-2865

From: Ray Watts <wattsray@comcast.net>
Sent: Monday, February 13, 2023 6:21 PM
To: Barry Noon-Contact <barry.noon@colostate.edu>; Kirk Longstein <klongstein@fcgov.com>; Mark Houdashelt-Contact <mark.houdashelt@gmail.com>; lopez <lopez.apclass@gmail.com>; Michelle Haefele <michelle.haefele@outlook.com>; Ross Cunniff <rcunniff@gmail.com>; Dawson Metcalf-Contact <dawson.metcalf@colostate.edu>; Gary Wockner <gary.wockner@savethepoudre.org>
Subject: [EXTERNAL] Re: FONAI vs. FONSI

Hi Kirk et al,

I completely concur with Barry's thoughts. "Negligible" means "can be ignored." But one person would ignore an impact that another person would say could not be ignored. In fairness, the traditional FONSI or FONSAI uses the ambiguous word "significant," and that suffers the same problem. I wrote earlier to Kirk, that the more traditional term (FONSI or

FONSAI) at least has decades of interpretation by authors of EAs and EISs, by EPA, and by courts, and this adds some (small) degree of firmness to the standard. Barry is spot on, though: the best standards would be quantitative or expressed on a ranked scale. The Natural Areas Department has made steps in this direction with its standards for easements in Natural Areas (https://www.fcgov.com/naturalareas/files/2022-easement-application.pdf).

Ambiguity in 1041 code language might be reduced by referencing external standards documents. The Natural Areas easement standards does this, and specifies that "The City Manager or his or her designee shall develop and maintain a general list of resource protection standards that are applicable to natural areas and conserved lands" (p. 6). I note that in the pdf cited above there is neither a web reference to the standards list, nor specific identification of the City Manager's designee...so there is room there for improvement.

For those who have time, it is worth reviewing the Natural Areas standards. They contain many of the elements that are needed in 1041 regs.

Ray

From: Noon,Barry <Barry.Noon@colostate.edu>
Sent: Monday, February 13, 2023 10:36 AM
To: Kirk Longstein <klongstein@fcgov.com>; Mark Houdashelt-Contact <mark.houdashelt@gmail.com>; lopez <lopez.apclass@gmail.com>; Michelle Haefele <michelle.haefele@outlook.com>; Ross Cunniff <rcunniff@gmail.com>; Metcalf,Dawson <Dawson.Metcalf@colostate.edu>; Gary Wockner <gary.wockner@savethepoudre.org>; Ray Watts <wattsray@comcast.net>
Subject: RE: FONAI vs. FONSI

Hi Kirk and Committee Members

I do not like the term "**Finding of Negligible Adverse Impact** (FONAI)". If an action is deemed "adverse" how can is simultaneously be deemed "negligible"? In my opinion, pairing these two words together is a nonsequitur.

As you discuss, the term "adverse impact" can, and perhaps should be, qualified in terms of its intensity, reversibility, and cumulative impact. Qualifying terms should be those easily understood by the public—for example, low, medium, or high and the criteria used to assign a ranking made very transparent.

Barry

Barry R. Noon, PhD
Professor Emeritus
Department of Fish, Wildlife and Conservation Biology
Colorado State University

970-305-1581

From: Kirk Longstein <klongstein@fcgov.com>
Sent: Friday, February 10, 2023 1:42 PM
To: Mark Houdashelt-Contact <mark.houdashelt@gmail.com>; lopez <lopez.apclass@gmail.com>; Michelle Haefele <michelle.haefele@outlook.com>; Ross Cunniff <rcunniff@gmail.com>; Metcalf,Dawson <Dawson.Metcalf@colostate.edu>; Noon,Barry <Barry.Noon@colostate.edu>; Gary Wockner <gary.wockner@savethepoudre.org>; Ray Watts <wattsray@comcast.net>
Subject: FONAI vs. FONSI

**** Caution: EXTERNAL Sender ****
Hi everyone,

I hope folks had the opportunity to watch the Feb 7 Council meeting. At this point you may be aware that Council adopted a motion to delay the first reading of 1041 until May 2. This gives us the opportunity to continue our dialogue and work through some of the outstanding comments. Below are a few bullets of our next steps together:

Reengagement plan (TBD) - The purpose of this plan is to clearly outline questions for working group participants that will inform Council decision points ahead of May 2. Key milestones for reengagement:

- Feb 20 – Begin meeting with stakeholders
- March 24 - Stakeholder comment period ends
- April 14 - Council memo including key decision points.
- May 2 – First reading of 1041

Given our staffing capacity, I've engaged a third-party consultant to support the re-engagement plan. Logan-Simpson will continue to work on reengagement as they have supported the project since it began in 2021. Stay tuned and more to come on re-engagement.

I started diving deeper into the comments related to FONAI vs FONSI, and I want to hear people thoughts. We received pretty direct feedback from Council that whatever decision points are presented ahead of May 2, it should "not weaken" the current v3 1041 regs. As I start to look deeper into changing the definitions from "Negligible" to "Significant" – I'm concerned that this change does in fact weaken the code, and I want to confirm with my environmental stakeholders that this is not an unintended consequence from your letters to Council. A few thoughts to consider:

Many comments from stakeholders have stated that "Negligible" is not a term that has been tested in Court and not a term used by NEPA/CEQ or any other environmental impact analysis. However, "Negligible" is commonly used within federal agency NEPA guidance and methodology for conducting supplemental environmental assessment and Categorical Exclusion (CATEX). When

determining if a project has the potential for a "significant" adverse impact its evaluated within the context, intensity, duration, direct/indirect, cumulative impacts. When analyzing impact intensity, the definition of intensity is measured on a scale from **negligible, minor, moderate, or major.** Negligible being the lowest of intensity. Here is a legal framework from Congress to consider.

As currently written in the v3 1041 regulations, here is the definition of "Adverse Impact":

> ***Adverse impact*** *shall mean the direct or indirect negative effect or consequence resulting from development. Adverse impact shall refer to the negative physical, environmental, economic, visual, auditory, or social consequences or effects that may or may not be avoidable or fully mitigable. Adverse impacts may include reasonably foreseeable effects or consequences caused by the development plan that may occur later in time or be cumulative in nature.*

Also to consider is that v3 of the 1041 regs includes a definition for cumulative impacts:

> ***Cumulative impacts*** *shall mean the impact on the environment and cultural impacts which result from the incremental impact of the development plan when added to other present, and reasonable future actions*

When paired with negligible, one may interpret that a **Finding of Negligible Adverse Impact** (FONAI) is the potential for impact at a lower intensity than major, and a higher standards than an impact deemed "significant".

Please take a look and let me know if you think that FONSI is the appropriate term and level of impact that the City should be reviewing 1041 permit applications. And if you believe that changing the definition from "negligible" to "significant" will weaken or strengthen the Code as drafted.

As always, thank you for your continued feedback. I look forward to continuing our discussion.

Kirk

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Kirk Longstein, AICP
(he/him/his)
Senior Environmental Planner
City of Fort Collins
Direct: 970-416-2865

Necessary Repairs to Draft 1041 Regulations and Review Procedures #3

1 Recognition of extramural jurisdiction

The *site* of a project is undefined in 1041 law. Given the overall purpose and intention of 1041 law:

- It is justifiable to define a project's *site* to include any place where significant adverse impacts reasonably can be anticipated.
- This may place part(s) of the *site* within jurisdiction(s) other than that where its major construction occurs (the host jurisdiction).
- The adversely affected jurisdictions can designate matters of state interest and require the applicant to obtain additional permit(s) from them. If the host jurisdiction has no applicable 1041 regulations, these may be the only required 1041 permits.
- Regulatory standards that apply (those that relate to reasonably anticipated adverse impacts) should be determined during application review (i.e., not selected or excluded *a priori*).

Version Three of Fort Collins draft 1041 regulations does not recognize the rights of Fort Collins to regulate projects based on reasonably anticipated adverse impacts on the City from external projects. There is no prohibition of such regulation in 1041 law. Although extramural regulation may be novel, 1041 authorizes local governments to adopt more stringent regulations and this is one way to do so.

2 No "approval with conditions" (p. 37, and maybe other places)

- 1041 statutes are explicit that the project must meet all regulatory requirements or it cannot be permitted. A permit that is approved without meeting all the requirements is not valid.
- If a permit is denied by staff and Planning and Zoning Commission recommendation and the denial is appealed to Council, then Council's review must find error in factual determinations. The regulations should say this.

3 Scope of application of review standards

- The entire city should be the scope.
- Places with elevated standards (e.g., Natural Areas) will have those higher standards applied as part of application review.
- Other places, not yet identified, may host protected assets; these should not be excluded before application review.
- Predetermined criteria may inadvertently and unfairly put some parts of the City at protective disadvantage.

An example. A two-mile flight is a "stroll" for most birds. A resident who lives two miles from the nearest mapped bird habitat feeds wild birds, including some that regularly commute from a nesting habitat to their feeder. If project construction occurs just over the fence from the feeder and interrupts the feeding, then it has an ecological impact on the population at the nesting habitat. The entire city is ecologically connected.

Developers' testimony and efforts to limit the geographic extent of 1041 regulation fly in the face of modern understanding of ecological and environmental connectivity and interdependence. For a City that hosts one of the foremost environmental research institutions of the nation, ecological gerrymandering is a shameful act.

4 Period of public comment should replace or supplement neighborhood meeting

- This should be a period for receipt of public comments, not a single meeting notified only to nearby residents.
- There should be opportunity for receipt of written as well as oral comments.
- Notification with one-mile radius and a neighborhood meeting is okay for projects in the City.
- FOR EXTRAMURAL PROJECT REGULATION this needs complete rewording.
- It would be good public process to tabulate the nature and sense (support/opposition) of comments. That tabulation should be considered in determination of FONSI.

5 FONSI or FONAI

- In the latest iteration of staff-recommended revisions to draft #3, the only review that precedes "FONAI" is geographic. First, we recommend eliminating geographic screening. This eliminates the need for FONAI or its alternative, FONSI.
- Permit matters may go to court, where there is a body of precedent for interpretation of FONSI and none for FONAI. If this decision point is to be used at some presently unknown stage of the process, then FONSI should be the term used.
- There is no discernible difference in intent or applicability of the terms.
- The term with precedent should prevail.

6 Regulatory size threshold for water projects

- 1041, in CRS § 24-65.1-104, refers to a CRS section that includes statutory definition of a small water project as one serving a population of 3,300 or less (CRS § 25-9-102(4.8)).
- Multiple local jurisdictions have used a much smaller population or household count, on the order of tens (not the roughly 800 for a population of 3,300).
- It is unknown whether this is the threshold of a "major water project" because the "major" threshold is not define in 1041 and statutes vary in terminology.
- Consider using this threshold in place of pipe diameters, but keeping disturbance width and length thresholds.

- So, the regulatory threshold would be ANY of:
    - New easement 30' wide or more, or widening of an existing easement to 30' wide or more.
    - New easement longer than 1,320' of any width
    - Serving population of (pick a number)
- An applicant might claim its project to be "not major" if it serves fewer than 3,300 persons. The City is allowed, however, under 1041, to use criteria more stringent than those articulated directly in 1041 statutes.

7 Cumulative impacts should have NO time limits

Old developments have permanent impacts. These do not fade away after ten years. Examples:

- Impervious surfaces installed 50 years ago cause the same adverse impacts as impervious surfaces installed one year ago.
- A dam or diversion installed 50 years ago has the same impact as one installed 1 year ago.
- Etc.

There is no physical or biological basis for a time threshold on cumulative impacts. They must ALL be considered.

8 Ecological Characterization

This is circular reasoning. The ECS is part of determining where adverse impacts may occur, yet the area of adverse impacts is here used to define limits of the ECS. Consider this adjustment:

- Areas of anticipated physical impacts may be identified first.
- An ECS shall include those physical impact areas with a minimum one-mile additional buffer. Places within that larger zone where biological impacts can be expected, and further zones where lateral ecological connections indicate further biological impacts, must be identified in the ECS. All the identified areas of ecological impact are to be added to the full area of anticipated adverse impacts.

  An example. Physical changes will dry a wetland that hosts redwing blackbirds. The birds in that wetland are known to migrate to and feed daily at another wetland 1.5 miles distant. Both wetlands must be included in the final area of anticipated adverse impacts.

9 Changes to development plan

If there is no FONSI, then the applicant is given a period to adjust the development plan. It is important here not to get into short cycles of review and adjustment; that would, in effect, put staff in the position of designing the project for the applicant. This should be a "one and done" process. If it does not get done in one pass, then there needs to be a substantial wait time before re-application for essentially the same project is allows.

Eliminate all loop-backs to pre-application review (see the above comment concerning staff involvement).

- Plan revisions must respond to something—what is it?
- What governs the degree to which public comments flow through into the requirements for revision?
- Who writes the requirements for revision and who approves the requirements?
- What determines the length of the adjustment period? If additional analysis is required, this could imply a long interval needed by the applicant. We suggest a 90-day adjustment period; if this is not adequate, then a long waiting period and full do-over is required.
- Presumably staff reviews the adjusted plan and recommends permit approval or denial. There should be notation in flow charts that ALL requirements under 1041 regs must be satisfied or the permit must be denied (per 1041 statute).

10 Historical and cultural resource definition

- Must include designation by Congress (that is how the Cache la Poudre National Heritage Area was established)

11 Public hearing required (p. 14)

- 1041 statutes require a hearing before designating a matter of state interest and adopting guidelines for administration (NOT regulations, those are optional for the local government to adopt and, because they are optional, the process and timing of adoption of regulations is totally under local-government control and unspecified in 1041 statutes)

12 Intensity of current and foreseeable development (p. 15)

- 1041 requires consideration of these pressures in the area, not only in the City (24-65.1-204)

13 Who is the Director?

- It must be stated in the Definitions (it is not).

14 Permit authority established (p. 20)

- The Director of the Planning and Zoning Commission does not exist!

15 Missing word (p. 30)

- The development plan will not cause an adverse impact. "cause" is missing.

16 River recreation (p. 31)

- "Changes to access to recreational resources" does not capture changes to the resources themselves. Impacts on kayaking, tubing, standup paddleboarding, and other moving-water activities should be explicitly listed (these are major river uses).

17 Connection of surface water and groundwater (p. 32-33)

- Recharge of aquifers incorporates all the surface waters that inundate the recharge areas. These include contaminated water from urban runoff. Those contaminated inputs to aquifer recharge are diluted (not always simultaneously) by high-volume flows of uncontaminated water from spring snowmelt runoff. Thus, reducing uncontaminated high flows has an inverse impact on the quality, as well as the quantity, of aquifer recharge waters. Models are required to demonstrate "no significant impact."

From: Ray Watts
To: Kirk Longstein; Ross Cunniff
Cc: lopez
Subject: [EXTERNAL] Re: Land Conservation Stewardship Board recommendation re: 1041 regulations
Date: Wednesday, March 15, 2023 8:26:12 PM

Hi Kirk,

Welcome back!

As various people have learned more about 1041 and what it can regulate, some have gotten interested in applying 1041 powers in more ways. This may be an inevitable consequence of greater awareness.

I am one of those who think that the City should at least explore the possibility of designating an "Area containing, or having a significant impact upon, historical, natural, or archaeological resources of statewide importance" (CRS § 24-65.1-201(c)), namely that part of Fort Collins that coincides geographically with the Cache la Poudre National Heritage Area. We need to be careful not to say that we are designating the Cache la Poudre National Heritage Area per se, because it is not only a place, but also an institution whose federal charter does not embrace involvement in local government affairs. The Heritage Area's mission is "to inspire learning, preservation, recreation, and stewardship," clearly overlapping with potential 1041 protections, but the Heritage Area pursues its mission in ways that are policy neutral with respect to local government.

I favor a shorthand and will use it here: call *the part of Fort Collins that coincides geographically with the Cache la Poudre National Heritage Area* (too big of a mouthful) "the Fort Collins Poudre Heritage District"—or, once introduced, just "The Poudre Heritage District." It coincides geographically with the National Heritage Area but is a separate entity designated by the City.

First, the Poudre Heritage District clearly qualifies for *area of state interest* designation under the 1041 definition

> *"Historical or archaeological resources of statewide importance" means resources which have been officially included in the national register of historic places, designated by statute, or included in an established list of places compiled by the state historical society.* CRS § 24-65.1-104(6)

The Poudre Heritage District is a place designated by the U.S. Congress as having historical importance, so it has been designated by statute.

The City is not obligated to designate all possible things under 1041 (like nuclear detonations!). For me, the reason to designate the Heritage District is the protective language that is "baked into" 1041 statutes:

Areas containing, or having a significant impact upon, historical, natural, or archaeological resources of statewide importance, as determined by the state historical society, the department of natural resources, and the appropriate local government, shall be administered by the appropriate state agency in conjunction with the appropriate local government in a manner that will allow man to function in harmony with, rather than be destructive to, these resources. Consideration is to be given to the protection of those areas essential for wildlife habitat. Development in areas containing historical, archaeological, or natural resources shall be conducted in a manner which will minimize damage to those resources for future use. (CRS § 24-65.1-202(3))

These protections harmonize perfectly with management objectives of Natural Areas, 18 of which along the Poudre River would be wholly or partly within the Heritage District. These protections are far broader than anything to be found in the 1041 language for water and sewage systems. Of particular importance is the protection of future use, which would generally be understood to include recreational use. Regulations for the Heritage District could include numerous things in addition to pipes and roads (the two designated activities)—light and noise pollution, for example. Protection under the 1041 umbrella is legally far stronger and more enforceable than regulation under Natural Area Department policies, such as its management plans and easement policies, even if the language is identical. The Poudre corridor, or the Heritage District if it is so called, is the ecological and recreational gem of Fort Collins. It contains the City's only native forest, its largest contiguous wildlife habitat, the new Whitewater Park, a significant part of the regional Poudre Trail, and numerous historical sites. Its protection is worth the effort.

My discussion with the Land Conservation and Stewardship Board, making the points of the previous paragraph, contributed to Ross's note to Council.

As I think you know, I am taking an educational approach. If people fully understand the process, perhaps they will slow down and work at a measured pace. I am in the process of explaining, to those with whom I correspond, that 1041 regulation follows steps:

1. Designation of an area or activity, simultaneously with required guidelines.
2. OPTIONAL development and adoption of detailed regulations, which may include moratoriums on activities of state interest or projects within the designated areas of state interest.

Designation is relatively simple. Then, because detailed regulations are not required by 1041

statutes, the procedures for their development and adoption are totally under City control—and that process, as we fully realize at this point, can get messy. In my thinking, there is no reason to stop, slow down, or reverse the two activity designations that are under way. Let's deal with the complexities of those regs and get them done. Designation of the Heritage District (the first, simple step) can be done simultaneously, and development of detailed regulations can follow later when staff and funding allow.

Onward through the fog,

Ray

From: Kirk Longstein <klongstein@fcgov.com>
Sent: Wednesday, March 15, 2023 9:56 AM
To: Ross Cunniff <rcunniff@gmail.com>
Cc: Ray Watts <wattsray@comcast.net>; lopez <lopez.apclass@gmail.com>
Subject: Land Conservation Stewardship Board recommendation re: 1041 regulations

Hi Ross, I'm back from leave and reading through notes. Curious if you want to try and meet up (or connect over the phone) next week to create a plan for how we can set this idea in motion. In addition to adding the national heritage area, I've also heard folks express interest to designating "Utilities" "geothermal site selection" "Mineral resource areas".

Adding an Area of State Interest (as suggested) must go through a separate Designation & Moratorium process with the City Council (C.R.S. 24-65.1-404). The Code's current Section 6.2 (Procedure for Designation of Matters of State Interest) lays out the administrative process to designate additional Activities or Areas of State Interest after adoption if council so chooses. The 1041 regulations cannot include additional Activities or Areas of State Interest until designated through such a process – which would require additional stakeholder engagement, staff analysis, and another moratorium. At minimum the House Bill requires 30 day notice prior to a hearing of any additional designation which would mean a separate hearing prior to the one scheduled May 2 …this delay would further extend the current moratorium – which is scheduled (March 21 hearing) to be extended to June 30.

Let me know your thoughts – look forward to connecting soon.

Kirk

. . . . . .
Kirk Longstein, AICP
(he/him/his)
Senior Environmental Planner
City of Fort Collins
Direct: 970-416-2865

From: Ross Cunniff <rcunniff@gmail.com>

Sent: Tuesday, March 14, 2023 1:19 PM
To: City Leaders <CityLeaders@fcgov.com>
Subject: [EXTERNAL] Land Conservation Stewardship Board recommendation re: 1041 regulations

Mayor Arndt, Councilmembers,

Last week, the Land Conservation Stewardship Board passed a motion regarding 1041 regulations that I wanted you to be aware of:

> The Board recommends that the City Council designate the Cache la Poudre River National Heritage Area as an area of statewide interest, with respect to 1041 regulations consistent with Colorado Revised Statutes 24-65.1.

This is in addition to, and parallel with, any other 1041 regulations the Council may be adopting. I would be glad to talk with you more if you have any questions.

Thank you,
Ross Cunniff
Chair, Land Conservation Stewardship Board

MEMORANDUM

DATE: April 20, 2023

TO: Mayor and City Councilmembers

FROM: Land Conservation & Stewardship Board

RE: 1041 Regulations

Please see the attached memos from January 11, 2023 and March 8, 2023 which the LCSB is re-submitting to City Council in advance of the May 2, 2023 City Council meeting agenda item regarding 1041 Regulations.

Thank you.

MEMORANDUM

Land Conservation & Stewardship Board

To - Fort Collins City Council

From - Land Conservation and Stewardship Board (LCSB)

Date - January 11, 2023

Subject - 1041 Regulations Recommendations

While the Board appreciates that Natural Areas is of one of the three geographic areas to which the draft 1041 regulations apply, we recommend utilizing the broader range of 1041 regulatory measures available to local governments under C.R.C. § 24-65.1-101 et seq. and the City's Home Rule status to strengthen the regulatory authority and commitment of the City of Fort Collins to protect public health, safety, and welfare, the environment and wildlife resources within our city boundaries.

Please note that this memo was written in January 2023 prior to receiving the third major iteration of the 1041 draft regulations. Therefore, this memo is based on presentations and briefings from City Staff. As indicated by staff, the draft regulations will not be published for public review until just prior to the January 25, 2023, Planning and Zoning Commission meeting. The LCSB members intend to review any updates from staff, including the next major update of the draft regulations, and comment further as needed.

Concerns and Recommendations:

- Geographic Thresholds: The reduction in geographic scope from a city-wide application, inclusive of both city-owned property and property owned by private residents, to a substantially reduced scope is disappointing and **fails to comply** with original Ordinance, No. 122, 2021. While we appreciate that Natural Areas is of one of the three geographic areas that are protected by 1041 Powers, we also acknowledge that impacts to our Natural Areas can arise from projects occurring offsite of Natural Areas, for instance, with hazardous materials leaks from construction and maintenance operations, or upstream water diversions that affect historic downstream hydrological flows. Natural areas are inextricably interconnected with adjacent areas. **LCSB therefore recommends** that Council continue to develop and strengthen its 1041 regulations to the maximum extent permissible under State law.

- FONSI vs FONAI: The well-established "Finding of No Significant Impacts" (FONSI) process is well-understood in environmental law and practice. It has been used over many decades and has case law and regulatory interpretation supporting it. In contrast, the "Finding of Negligible Adverse Impacts" (FONAI) process is subjective and not widely used. **LCSB recommends** that Council retain the FONSI evaluation standard.

- Activities and Areas of State Interest: The **LCSB recommends** that Council expand the covered 1041 Activities to include Mineral Resource Areas to strengthen the City's regulatory authority over any proposed mineral extraction development and operations related to siting of surface or subsurface oil and natural gas wells or conveyance pipelines, sand and gravel extraction, or other extractive Activities as allowed by State statute.

- Buffer Zones: The Buffer Zones that exist in the City Code today are too small with respect to adverse impacts and are frequently compromised by existing development. The existence of the built environment does not mitigate potential impacts of the covered 1041 Activities. **LCSB recommends** that an ecologically-sound Natural Resources Buffer Standard be developed that would protect Natural Areas from on- and off-site impacts and require complete remediation should such impacts occur despite the existence of these regulations.

- Outreach and Neighborhood Meeting: For each application, **LCSB recommends** that the City should conduct a robust outreach process and include responses to any concerns collected in the Neighborhood Meeting and public comment process as a distinct criterion for the initial FONSI or FONAI determination.

- Financial Security Requirements: An ad-hoc process is not predictable for applicants or residents. **LCSB recommends** that guidelines and expectations regarding Financial Security be codified in policy.

- **LCSB recommends** that all projects that impact Natural Areas require full review regardless of project thresholds, including modifications and enlargements.

Finally, although LCSB recognizes that Staff was constrained in which potential 1041 Activities and Areas of Interest it was allowed to explore, **we recommend** that Council continue to further develop 1041 regulations which cover all possible city-wide Activities and Areas of Interest as allowed by State statute.

MEMORANDUM

Land Conservation & Stewardship Board

To - Fort Collins City Council

From - Land Conservation and Stewardship Board (LCSB)

Date - March 8, 2023

Subject - Land Conservation and Stewardship Board input on Draft 1041 Regulations

This memo is to provide City Council with an update on the discussion of the 1041 regulations and the federally designated Cache la Poudre River National Heritage Area during the Land Conservation and Stewardship Board (LCSB) meeting on March 8, 2023. 1041 Draft Regulations are scheduled to be discussed at the May 2, 2023, City Council meeting.

Chair Cunniff made a motion that the Land Conservation and Stewardship Board recommend that City Council designate the Cache la Poudre River National Heritage Area as an area of statewide interest, with respect to 1041 regulations consistent with Colorado Revised Statutes 24-65.1. Member Elson seconded the motion. The motion was approved unanimously 7-0.

NORTH WELD COUNTY WATER DISTRICT

32825 CR 39 LUCERNE, CO 80646

P.O. BOX 56 BUS: 970-356-3020 FAX: 970-395-0997

WWW.NWCWD.ORG EMAIL: WATER@NWCWD.ORG

City of Fort Collins
City Council
300 Laporte Avenue
Fort Collins, CO 80521

RE: Comments and Concerns on the Guidelines and Regulations for Areas and Activities of State Interest of the City of Fort Collins

Dear Council Members:

The North Weld County Water District ("District") appreciates the opportunity to provide comments and participate in the stakeholder process for the proposed 1041 regulations ("Regulations"). The District has reviewed the third version of the proposed Regulations and has identified some continuing concerns with the language. This letter does not address all of the issues or concerns the District has identified with the current draft of the Regulations but sites some examples of problematic language issues and inconstancies. The District believes that the language as provided needs additional revisions, and additional stakeholder time to review and comment on subsequent language modifications. There are currently issues with inconsistent definitions throughout the document, but more importantly the review process under the Regulations is unclear, and the Regulations do not align with the stated purpose of the program.

One example of process issue is related to language in Division 6.6 of the Regulations, the pre-application procedures. City staff recommends alternatives analysis, ecological characterization, conceptual mitigation plans and cumulative impact analysis before a project can even be considered for a FONAI. In addition, City staff suggested that the Regulations will be fully administered by a third-party consultant and all costs associated with this administration to be passed along to the applicant, with completion determined by Director. Under this structure, costs can go unchecked and make projects more expensive to the District

and ultimately to the public they are intended to benefit. Finally, the Regulations, as currently drafted, are not complete. City staff committed to providing a checklist of application materials necessary to meet the minimum thresholds of an application to meet "completeness" review. A checklist is requested by stakeholders in order to provide clarity about the Regulations requirements and avoid unnecessarily costly third-party reviews with no constraints on requests for additional information that could lead to a potential for a perceived arbitrary review process. We suggest that prior to acceptance of these Regulations the completeness checklist be developed and incorporated in the Regulations.

As another example, potions of the Regulations do not support the stated purpose of the Regulations as outlined in Division 6.1.2, Purpose and Findings. In brief, the purpose stated is to protect the environment, promote efficient use of public resources, protect natural and cultural resources, and ensure planned and coordinated development of infrastructure. The Regulations, however, require approvals through the proposed 1041 process for existing system changes such as pressurization of existing lines and upsizing existing infrastructure that lie in existing ROW or existing easements. The purpose and the process are inconsistent. The purpose is to limit impact to the natural areas, however, the Regulations as drafted may force applicants to seek new infrastructure alternatives and cause impacts by finding alternative routing or developing additional infrastructure to meet the system capacity requirements. The no-impact alternatives, such as upsizing pumpstations or upsizing lines during replacement programs, should be exempt from this complicated process and used as alternatives to new infrastructure which would otherwise be subject to the Regulations.

The District believes that the current version of the Regulations requires additional language revisions to support both process efficiencies and clarity and support the stated purpose of the Regulations. The District request that prior to approval of the Regulation language, a fourth version be shared, and stakeholders should be given appropriate time to review and provide comment should be allowed.

We appreciate the opportunity to participate in the stakeholder process.

Sincerely,

Eric Reckentine

Eric Reckentine
General Manager
NWCWD

From: Peggy Montano
To: Kirk Longstein
Cc: Stephanie Cecil; Carl Brouwer
Subject: [EXTERNAL] Response to your email. See the green text below.
Date: Monday, April 10, 2023 5:07:24 PM
Attachments: image001.png

I'm glad we are having this conversation because we may be thinking about this differently, and if our team needs to add clarity, then let's make sure we get this cleared up so that the intent matches the language in the Code. The Intent: applications pursuant Article 6 (activities of statewide interest) which are not "approved with conditions" by the decision maker may seek an appeal (also, all FONAI determinations will have an opportunity to an administrative appeal) outlined by Article 2 of the Land Use Code. If the applicant is pursuing an appeal then the 90 day shot clock (60 days for completeness check following a FONAI determination) is waived by the applicant. The final decision of denial is when the City Council upholds their decision not to "approve with conditions" following an appeal of such decision – final decision of denial. **Here is where there is confusion-Can the applicant modify the proposal during this process? That was my thought initially- if there is something the applicant can modify (self-imposed conditions?) then the Applicant should have an opportunity to do so.**

AGREE-This will be helpful-please include if possible.

Fort Collins existing general procedures LUC 2.1.6 Optional Pre-application Review

> Well in advance of thinking about conditions with approval, denials and appeals – please consider the value of an optional pre-application review. As I've said in the past, the intent of the 1041 review procedures is to avoid/mitigate the potential for adverse impacts and so to the extent that we can solve these issues early in the process, the less likely we will continue to have issues at the end of the process.

This is ok. If the conditions imposed are reasonable I suspect that is ok. The internal appeal is not unlike those I have seen in other municipalities. The proposed article 6 addition to the land use code 6.6.13 approval or denial of permit application:

> *(C) If City Council finds that there is insufficient information concerning any of the applicable standards to determine that such standards have been met, City Council may deny the permit, may approve with conditions pursuant to Section 6.6.14 which if fulfilled would bring the development plan into compliance with all applicable standards, or may continue the public hearing or reopen a previously closed public hearing for additional information to be received. However, no continuance to receive additional evidence may exceed sixty (60) days unless agreed to by City Council and the applicant.*

Fort Collins existing appeal procedures are outlined in LUC 2.2.12.

Strongly Disagree - Essential services like water supply are very different than oil and gas development on a particular property or a housing development – those may wait some time for a revisit through the process. Also, the language in the statute is directly contrary to this " cooling off period" particularly if it is very long. The statute says clearly that nothing should be construed as modifying or amending the court decrees and the decrees have no "waiting period" at all.

Fort Collins existing "cooling off period" in LUC 2.2.11(e)(9)

Post denial re-submittal delay. Property that is the subject of an overall development plan or a project development plan that has been denied by the decision maker or denied by City Council upon appeal, or withdrawn by the applicant, shall be ineligible to serve, in whole or in part, as the subject of another overall development plan or project development plan application for a period of six (6) months from the date of the final decision of denial or the date of withdrawal (as applicable) of the plan unless the Director determines that the new plan includes substantial changes in land use, residential density and/or nonresidential intensity.

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From: Kirk Longstein
To: Peggy Montano
Cc: Stephanie Cecil; Carl Brouwer; bwind@northernwater.org
Subject: RE: 1041 regulation comment
Date: Friday, April 7, 2023 10:32:00 AM
Attachments: image001.png

Thank you for the follow up, Peggy. A public memo to City Council is planned for next Thursday that will include choices/policy direction for the Council consideration during the May 2 hearing, including your questions related to resubmittal after a final decision of denial. Let me take a closer look at your proposed language with the team and get back to you.

I'm glad we are having this conversation because we may be thinking about this differently, and if our team needs to add clarity, then let's make sure we get this cleared up so that the intent matches the language in the Code. The Intent: applications pursuant Article 6 (activities of statewide interest) which are not "approved with conditions" by the decision maker may seek an appeal (also, all FONAI determinations will have an opportunity to an administrative appeal) outlined by Article 2 of the Land Use Code. If the applicant is pursuing an appeal then the 90 day shot clock (60 days for completeness check following a FONAI determination) is waived by the applicant. The final decision of denial is when the City Council upholds their decision not to "approve with conditions" following an appeal of such decision – final decision of denial.

> Fort Collins existing general procedures LUC 2.1.6 Optional Pre-application Review
>
> > Well in advance of thinking about conditions with approval, denials and appeals – please consider the value of an optional pre-application review. As I've said in the past, the intent of the 1041 review procedures is to avoid/mitigate the potential for adverse impacts and so to the extent that we can solve these issues early in the process, the less likely we will continue to have issues at the end of the process.
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>
> Fort Collins existing appeal procedures are outlined in LUC 2.2.12.
>
> Fort Collins existing "cooling off period" in LUC 2.2.11(e)(9)
>
> > *Post denial re-submittal delay. Property that is the subject of an overall development*

plan or a project development plan that has been denied by the decision maker or denied by City Council upon appeal, or withdrawn by the applicant, shall be ineligible to serve, in whole or in part, as the subject of another overall development plan or project development plan application for a period of six (6) months from the date of the final decision of denial or the date of withdrawal (as applicable) of the plan unless the Director determines that the new plan includes substantial changes in land use, residential density and/or nonresidential intensity.

I've never worked in Weld County and so admittedly I'm not an expert – in our recent video meeting, I was referring to the following Code section which in my understanding would occur after the appeals period that you cite below, and following the final decision of denial:

WELD COUNTY LAND USE CODE REFERENCE Sec. 2-3-10. - Previously denied applications for land use matters.
Except in those cases to which the requirements of Subsection B below apply, neither an applicant nor his or her successors in interest in property for which a land use application was denied within the preceding five (5) years may submit a land use application or request a rehearing on a previously submitted application for any portion of the property contained in the original application unless the Board of County Commissioners has determined that, based upon a showing by the applicant, there has been a substantial change in the facts and circumstances regarding the application subsequent to the original decision of denial by the Board of County Commissioners or that there is newly discovered evidence which would have been likely to affect the outcome of the original decision that the applicant could not have discovered with diligent effort prior to the original decision of denial.

Please let me know if you have any thoughts or recommendations.

Kirk

. . . . . .
Kirk Longstein, AICP
(he/him/his)
Senior Environmental Planner
City of Fort Collins
Direct: 970-416-2865

From: Peggy Montano <pmontano@troutlaw.com>
Sent: Friday, April 7, 2023 8:02 AM
To: Kirk Longstein <klongstein@fcgov.com>
Cc: Stephanie Cecil <scecil@northernwater.org>; Carl Brouwer <cbrouwer@northernwater.org>; bwind@northernwater.org
Subject: [EXTERNAL] 1041 regulation comment

Kirk , thank you for the continued opportunity to comment on the draft 1041 regulations. In our recent video meeting, you asked specifically for a discussion of the

following provision in Northern's January letter.:

> **2. Avoiding Application of Regulation that Effectively Prevents or Delays Use of Water Rights**. Not only should specific criteria for denial of a permit be made public if a permit is denied, but an applicant should be given an opportunity to return directly to council if the applicant can cure the perceived deficiency. Requiring an applicant to return to the beginning of a long process could prevent or needlessly delay the exercise of water rights, is punitive, and a waste of taxpayer resources.

After our discussion of concerns about a modification of a development proposal possible creating new adverse effects, I suggested a limited reconsideration and have drafted some proposed language below.

> Whenever City Council determines that a permit will be denied, the denial must specify the criteria used in evaluating the development plan, the criteria the development plan fails to satisfy, the reasons for denial, and the development plan modification needed to satisfy permit requirements. The denial document will be served upon the applicant and the applicant may, within sixty (60) days of such service, be allowed a limited modification(s) of the development plan. A modification(s) is limited to changes which would not cause the need for an additional scope of analysis. A determination of the scope of analysis will be subject to a completeness judgement of the Director under 6.6.5 (F) . If the limited modification development plan is determined to be complete, the City Council will then re-consider the proposal with such modification(s). If a permit application is denied after such reconsideration, no new application for the same or substantially similar proposal shall be filed for at least 30 days from the date of the final decision denying the application or proposal.

You suggested we look at the Weld County regulations for a cooling off period. I did review them, and below is what is current in Weld County on that issue. I did not find a "cooling off period" for oil and gas 1041 regulations. To the contrary, the appeal is fast.:

- *Motion for reconsideration.* A motion for reconsideration may be considered by the Hearing Officer in cases where a 1041 WOGLA Permit has been denied. Such motion must be filed no later than ten (10) days after the Applicant has received notice of the denial. A motion for reconsideration must state, with sufficient clarity, the specific reason(s) the Applicant believes the denial was the incorrect decision.

Right to appeal. The appellant must file a written notice with the OGED Director within

ten (10) days of receiving the Hearing Officer's final order. The notice of appeal must specifically state what part of the decision the appellant believes the Hearing Officer either misinterpreted the facts presented in the Application and/or in the 1041 WOGLA Hearing, or misapplied the regulations set forth in Article V. The notice shall not exceed five (5) pages in length. The OGED Director may submit a memorandum brief but must do so within ten (10) working days of receiving the notice of appeal. Any such memorandum brief shall not exceed five (5) pages in length.

Review of appeal and decision. The OGED Director shall transmit the Hearing Officer's order, the notice of appeal and any memorandum brief to the Board of County Commissioners for review within twenty-one (21) days of receiving the notice of appeal. The Board of County Commissioners may affirm the Hearing Officer's order, modify it in whole or in part, or remand the matter to the Hearing Officer for further fact-finding. A modification may only be made if, based upon the Hearing Officer's findings of fact, the order clearly shows the Hearing Officer either misinterpreted the facts presented in the Application and/or in the 1041 WOGLA Hearing, or misapplied the regulations set forth in Article V. The Board of County Commissioners may review the entire 1041 WOGLA Hearing record upon a majority vote of the Board of County Commissioners. The Board of County Commissioners shall transmit a written decision on the appeal to the OGED Director within ten (10) working days after receiving the notice of appeal and other documents allowed herein. The OGED Director shall thereafter communicate the decision to the Applicant and the Hearing Officer within five (5) working days of receiving the Commissioners' decision.

(Weld County Code Ordinance 2020-12 ; Weld County Code Ordinance 2021-17)

Please advise if there is any other input that may be helpful.
Peggy

Peggy E. Montaño

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Northern Colorado Water Conservancy District
220 Water Avenue • Berthoud, Colorado 80513
800-369-7246 • www.northernwater.org

March 22, 2023

Honorable Jeni Arndt, Mayor
P.O. Box 580
Fort Collins, CO 80522
jarndt@fcgov.com

Fort Collins City Council
P.O. Box 580
Fort Collins, CO 80522
cityleaders@fcgov.com

Re: 1041 Regulations Comments

Dear Mayor Arndt and Councilors Gutowsky, Pignataro, Canonico, Peel, Ohlson, and Francis:

Following the February 7, 2023, Council hearing regarding proposed 1041 regulations, stakeholders were asked to respond to a series of comments compiled by Fort Collins staff. We have done so and also recognize that a multitude of comments have been made. For this reason, we are streamlining our comments in this letter to focus on a select few issues.

The reliability of water supplies for all Coloradoans is imperative and is recognized by statute in 1041 saying that "nothing in this article (the article being the Areas and Activities of State Interest statute) shall be construed as "Modifying or amending existing laws or court decrees with respect to the determination and administration of water rights"[1]. Some of the provisions of the regulations as proposed appear to conflict with this statute and exceed the authority provided by the 1041 statutes, and other provisions will undercut that reliability and conflict with this statutory provision if they are applied in an uneven or subjective manner. Either result will lead to expensive and needless litigation.

With those overarching considerations in mind, the following three issues in the 1041 proposal and discussions are most key to regulation by Fort Collins of the development of water facilities.

1. **Geographic Scope is Limited to the Area of Construction or Activity**. Whatever review standards are applied to the facilities, the criteria are to be applied "on the land where the construction or activity occurs"[2]. Not outside the city boundaries or even across town. This was clearly demonstrated in the *Thornton* opinion where the court overturned the application of a

[1] C.R.S.§ 24-65.1-106
[2] C.R.S. §24-65.1-102

criteria by Larimer County looking at agriculture across the county rather than at the site of proposed facilities.[3]

2. Avoiding Application of Regulation that Effectively Prevents or Delays Use of Water Rights. Not only should specific criteria for denial of a permit be made public if a permit is denied, but an applicant should be given an opportunity to return directly to council if the applicant can cure the perceived deficiency. Requiring an applicant to return to the beginning of a long process could prevent or needlessly delay the exercise of water rights, is punitive, and a waste of taxpayer resources.

3. 1041 Cannot Modify the Water Rights Granted Through Colorado's Water Courts. We urge rejection of arguments regarding a "down the river" alternative. Opponents of water projects on the Poudre have advocated publicly for water to be run down the Poudre past Fort Collins and then pumped back for use. Continuing in this argument, the same opponents recently, in litigation against the NISP 1041 permit issued by Larimer County, argue in their brief for a "down the river" alternative to be imposed by the district court and the opponents make the unprecedented claim that the 1041 statute grants the power to local governments to select the diversion point of a water project over the project owner's water right decree. They then insert a footnote stating that the Colorado Court of Appeals was wrong in a decision ruling that 1041 does not grant that power.[4] This brief is publicly available, and if this argument is asserted in this rulemaking before you, we urge that you consult with your own attorneys regarding this unprecedented claim of authority. A change of a point of diversion of a water right is a highly regulated and litigated matter in Colorado's Water Courts.

In closing, we request that you extend the time 45 to 60 days for further consideration of this matter. Water facilities can and should be constructed and maintained in a reasonable manner with consideration for the concerns of the city as well as the water supply needs of the communities dependent upon the water and the water rights decrees they hold. All means and methods to arrive at a reasonable middle ground should be cautiously considered before moving forward.

Sincerely,

Peggy E. Montaño
for Trout Raley
General Counsel to
Northern Colorado Water Conservancy District

[3] See Thornton v. Larimer County slip opinion at 22 "First, the Board abused its discretion by effectively requiring Thornton to analyze the "cumulative impacts of irrigated farmland turning to dryland" as a result of the TWP. As the district court concluded, such considerations are beyond the Board's jurisdiction to regulate the "siting and development" of certain domestic water pipelines. See Land Use Code § 14.4(J); § 24-65.1-102(1), C.R.S. 2021 ("'Development' means any construction or activity which changes the basic character or the use of the land on which the construction or activity occurs.")

[4] See Plaintiff's Consolidated Reply Brief, No Pipe Dream Corporation v. Larimer County, Case No. 202CV30800

cc: City of Dacono
City of Evans
City of Fort Lupton
City of Fort Moran
City of Lafayette
Fort Collins Loveland Water District
Left Hand Water District
Morgan County Quality Water District
Town of Eaton
Town of Erie
Town of Severance
Town of Windsor
Weld County Water District