

NOTICE OF PROPOSED RULEMAKING AND PUBLIC RULEMAKING HEARING BEFORE THE COLORADO WATER CONSERVATION BOARD

I. NATURE OF PUBLIC RULEMAKING HEARING

Pursuant to section 24-4-103, C.R.S., this is a notice of proposed rulemaking and public rulemaking hearing before the Colorado Water Conservation Board (“Board”) for consideration of amendments to the Board’s Rules and Regulations for Regulatory Floodplains in Colorado, 2 CCR 408-1 (“Rules”).

The Board is amending the Rules to: (1) update the standards and processes for floodplain designation to make the Rules consistent with Federal Emergency Management Administration (FEMA) floodplain mapping procedures, (2) amend and clarify Rule 4 definitions; (3) update references to external documents; and (4) revise for clarification the following Rules: Rule 5, Rule 7, Rule 8.D, Rule 10.C-F., Rule 11.B, Rule 12.D., Rule 12.J., the introductory paragraph to Rule 14, Rule 17, and Rule 20.

II. DESCRIPTION OF THE SUBJECTS AND ISSUES INVOLVED

Board Staff (“Staff”) drafted proposed changes to the Rules, solicited written comments from interested parties, and held public (a/k/a stakeholder) meetings on June 29, July 9, and July 12 2021, to allow interested parties to provide input on the proposed changes. At its July 22, 2021 meeting, the Board appointed a hearing officer and authorized Staff and the hearing officer to initiate the formal rulemaking process. The formal rulemaking process is initiated by filing a notice of proposed rulemaking with the Secretary of State and publication in the Colorado Register in accordance with section 24-4-103(2.5), C.R.S.

The primary purpose for the revisions to the Rules is to make them consistent with the FEMA’s Risk Mapping, Assessment and Planning Technical References, Guidelines and Standards for Flood Risk Analysis and Mapping Activities, December 1, 2020. The revisions to the Rules also: clarify defined terms contained in the Rules, including to make them consistent with FEMA definitions; clarify the use of defined terms throughout the Rules; move all incorporations by reference to Rule 17; and make the following additional clarifications:

RULE 5 REGULATORY FLOODPLAIN

- Clarifies that the Regulatory Floodplain is the 100-Year Floodplain unless a community chooses to regulate to the 500-Year-Floodplain.
- Clarifies that CWCB automatically designates 500-Year Floodplain information when available

RULE 7 STANDARDS FOR DELINEATION OF REGULATORY FLOODPLAIN INFORMATION

- Removal of Floodplain report requirements list – these are covered in external references and this section is redundant
- Clarified that reports submitted to CWCB must be in digital format

RULE 8 STANDARDS FOR REGULATORY FLOODWAYS

- Clarifies that Floodway regulations still apply to areas of Model-Backed Approximate Flood Elevations (Zone A) but not to Zone A without supporting documentation

RULE 10 CRITERIA FOR DETERMINING EFFECTS OF LEVEES ON REGULATORY FLOODPLAINS

- Refers to external documents for Levee requirements and restrictions to avoid redundancy

RULE 11 FLOODPLAIN MANAGEMENT REGULATIONS

- Clarification for regulations associated with non-residential structures to be in conformance FEMA

RULE 12 EFFECTS OF FLOOD MITIGATION MEASURES AND STREAM ALTERATION ACTIVITIES ON REGULATORY FLOODPLAINS

- Clarification and simplification of Rule 12.D maintenance requirements for dams and Levees in accordance with FEMA Guidelines.
- Clarification of the State's position of when a Letter of Map Revision (LOMR) is required and clarification that this does not circumvent other (i.e. FEMA) requirements
- Clarification on how to determine if increase or decrease of Base Flood Elevation of greater than 0.3 vertical feet has occurred.

RULE 14 DESIGNATION AND APPROVAL OF CHANGES TO REGULATORY FLOODPLAINS

- Clarification that undesignated information to a previously designated reach may be used under the following conditions:
 - The undesignated information has the same or greater level of detail as previously designated information
 - The undesignated information is more restrictive than the previously designated information
 - The Community ultimately obtains Board Designation and Approval of the information

RULE 17 INCORPORATION BY REFERENCE

- Previously, state and federal guidelines used by CWCB as resources for Floodplain management were incorporated by reference and repeated throughout the rules. References to incorporated resource documents remain throughout the Rules, while APA required information, in accordance with section 24-4-103(12.5), C.R.S. relocated to Rule 17

RULE 20 EFFECTIVE DATE

- Update effective date for these rule revisions
- Reference to Community ordinance updates removed.

These proposed revisions to the Rules also include minor clerical and grammatical revisions for

clarification and readability.

The language of the proposed amendments to the Rules, and a proposed statement of basis and purpose and specific statutory authority for the amendments, are available on the Board's website at <https://cwcb.colorado.gov/floodplain-rules-revisions>, and are available upon request of Staff. Please contact Kevin Houck at (303) 866-3441, extension 3219 or at kevin.houck@state.co.us for further information.

III. SPECIFIC STATUTORY AUTHORITY

The statutory authority for promulgating the Rules and any amendments thereto is found at sections 37-60-106 and 37-60-108, C.R.S.

IV. PARTY STATUS

The Notice of Proposed Rulemaking and Public Rulemaking Hearing will be published in the Colorado Register on August 10, 2021. Applications for party status will be accepted through September 10, 2021. Applications for party status should be submitted to the Board's Hearing Officer, Jen Mele, by email to jen.mele@coag.gov. Applications for party status shall include: (1) the name of the person, persons or entity seeking party status; (2) a contact person, if different from IV.(1); (3) the appropriate mailing address, phone number, and email address for the contact person listed in IV.(2); (4) the interest of the person(s) or entity in the proposed amendments to the Rules; and (5) a description of the general nature of the evidence or information to be presented in the course of the proceedings.

V. PRE-HEARING CONFERENCE

Prior to the rulemaking hearing, the Hearing Officer will hold a pre-hearing conference. After September 10, 2021, when all party status applications have been received, the Hearing Officer will issue an order notifying all parties of the date, time, and location or call-in information for the first pre-hearing conference. The order will also provide any other deadlines and procedures that are appropriate at the time. Participation in the pre-hearing conference may be available by telephone or video conference at the Hearing Officer's discretion, and participation information will be included in an order of the Hearing Officer.

Each applicant for party status must submit a pre-hearing statement in order to participate in the pre-hearing conference.

VI. RULEMAKING HEARING

Date, Time, and Location

DATE: November 18, 2021

TIME: 9:00 a.m. (or as otherwise directed by the Hearing Officer)

LOCATION: Participation information to be provided at a later date (1) on the Board's website

at <https://cweb.colorado.gov/> and (2) order of the Hearing Officer to the people or entities who have applied for party status.

Procedures

The role of the Board's Hearing Officer is to provide orderly procedures for the rulemaking; ruling on substantive issues is a Board responsibility. The Hearing Officer will issue orders designed to streamline and clarify processes consistent with this Notice of Proposed Rulemaking and Public Rulemaking Hearing and as permitted by law.

The Board may ask questions of any person appearing before it.

The Board will consider alternative proposals related to the proposed amendments, subject to the procedures established by the Hearing Officer.

The Board may modify the proposed amendments to the Rules from those published in the Colorado Register. Only proposed amendments within the scope of this Notice will be considered for permanent adoption.

After the conclusion of the rulemaking hearing and after consideration of the relevant matters presented, the Board through its Hearing Officer will render its decision to the parties to the hearing.

Hearing Participation

At the hearing, parties shall be afforded the opportunity to submit written data, views, or arguments, and to present the same orally, unless the Board deems it unnecessary. The submittal of such material and summations, either in writing or orally, shall be as directed by the Hearing Officer or the Board.

If alternative amendments to the proposed amendments to the Rules are requested by a party, the Board encourages those amendments to be included in the written materials, along with a proposed statement of basis and purpose of the alternative amendments.

Once any written material is submitted, the material becomes part of the administrative rulemaking record and the property of the Board and will not be returned to the person(s) or entity submitting the material.

The Hearing Officer will decide the timing and order of oral presentations by the parties, if any. Any person who is not a party to the hearing but wishes to provide comment may do so in writing prior to the date of the hearing. The Board strongly encourages all interested persons to submit comments in writing; however, a short period of time at the rulemaking hearing (a total of 30 minutes or less) will be reserved for oral comments by interested persons who do not have party status.

VII. ADOPTION OF THE RULES

The Board will consider all information presented at the hearing.

The Board may modify the proposed amendments to the Rules in adopting amendments to the Rules.

The final amended Rules, as adopted by the Board, shall become effective no sooner than twenty (20) days after publication in the Colorado Register.

VIII. ADMINISTRATIVE RULEMAKING RECORD

Staff will maintain a record of the rulemaking proceeding pursuant to section 24-4-103(8.1) C.R.S. The initial proposed rule amendments submitted to the Secretary of State with this Notice of Proposed Rulemaking and Public Rulemaking Hearing are available on the Board's website at <https://cwcb.colorado.gov/floodplain-rules-revisions>.

The administrative rulemaking record, including the proposed rule amendments, submitted applications for party status, pre-hearing statements, submitted written comments, and all other written materials to be considered by the Board in this rulemaking, will be available following the conclusion of these proceedings and upon request to doug.mahan@state.co.us, and at the Board's office at 1313 Sherman Street, Room 718, Denver, CO 80203, during normal business hours (8:00 a.m.-5:00 p.m.), once state agencies are again open to the public.

DATED this 30th day of July, 2021.

Rebecca Mitchell
Director
Colorado Water Conservation Board
1313 Sherman Street, Rm. 718
Denver, CO 80203