

STATE OF COLORADO

John W. Hickenlooper, Governor
Christopher E. Urbina, MD, MPH
Executive Director and Chief Medical Officer

WATER QUALITY CONTROL COMMISSION

<http://www.cdphe.state.co.us/op/wqcc/index.html>

4300 Cherry Creek Dr. South
Denver, Colorado 80246-1530
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**Colorado
Department
of Public Health
and Environment**

NOTICE OF PUBLIC RULEMAKING HEARING BEFORE THE COLORADO WATER QUALITY CONTROL COMMISSION

SUBJECT:

For consideration of the adoption of revisions to the Procedural Rules, Regulation #21 (5 CCR 1002-21).

The proposed revisions to Regulation #21 along with a proposed Statement of Basis, Specific Statutory Authority, and Purpose, are attached to this notice as Exhibit 1. Proposed new language is shown with double-underlining and proposed deletions are shown with ~~strikeouts~~. Any alternative proposals related to the revisions proposed in Exhibit 1, and developed in response to those proposed revisions, will also be considered.

HEARING SCHEDULE:

DATE: Monday, November 14, 2011
TIME: 9:00 a.m.
PLACE: Florence Sabin Conference Room
Department of Public Health and Environment
4300 Cherry Creek Drive South
Denver, Colorado 80246

PUBLIC PARTICIPATION ENCOURAGED:

The Commission encourages all interested persons to provide their opinions or recommendations regarding the matters to be addressed in this rulemaking hearing, either orally at the hearing or in writing prior to or at the hearing. Although oral testimony from those with party status (see below) and other interested persons will be received at the hearing, the time available for such oral testimony may be limited. Written submissions prior to the hearing are encouraged, so that they can be distributed to the Commission for review prior to the hearing. Oral testimony at the hearing should primarily summarize written material previously submitted. The hearing will emphasize Commission questioning of parties and other interested persons about their written prehearing submittals. Introduction of written material at the hearing by those with party status or mailing list status (see below) generally will not be permitted. The Commission requests that all interested persons submit to the Commission Office any available information that may be relevant in considering the noticed proposals.

PARTY STATUS/MAILING LIST STATUS:

Participation as a "party" to this hearing or acquisition of "mailing list status," will require compliance with section 21.3(D) of the Procedural Rules, Regulation #21 (5 CCR 1002-21). Mailing list status will allow receipt of all party documents (except individual exhibits more than five pages in length).

It is not necessary to acquire party status or mailing list status in order to testify or comment. **For each request for party status or mailing list status, please provide the organization's name, a contact person, mailing address, phone number, fax number and email address if available.** Written party status or mailing list status requests are due in the Commission Office on or before:

DATE: Tuesday, August 30, 2011
TIME: 5:00 p.m.

A single copy of the party status or mailing list status request may be transmitted as an email attachment to cdphe.wqcc@state.co.us, submitted by fax to 303-691-7702, mailed or otherwise conveyed so as to be received in the Commission Office no later than this deadline. PLEASE NOTE that, as indicated below, parties will have the option of distributing materials to other parties electronically, except in instances where a party has requested receiving hard copies of documents. Therefore, **anyone requesting party or mailing list status that wishes to receive hard copies of documents instead of emailed copies should so indicate in the party status/ mailing list status request so that this information can be included on the list distributed by the Commission Office.**

PREHEARING STATEMENTS:

PLEASE NOTE that for this hearing two separate deadlines for prehearing statements are established: (1) An original and 13 copies of an initial **Prehearing Statement** from the **Water Quality Control Division, as proponent of the revisions proposed in Exhibit 1 attached to this notice**, including written testimony and exhibits providing the basis for the proposals, must be received in the Commission Office no later than **September 7, 2011**; and (2) an original and 13 copies of a **Responsive Prehearing Statement**, including any exhibits, written testimony, and alternative proposals of **anyone seeking party status and intending to respond to the proponent's proposals** must be received in the Commission Office no later than **September 27, 2011**.

For each deadline, the required number of hard copies of documents must be received in the Commission office by the specified deadline. These requirements are not satisfied by electronic transmission of a facsimile copy or copies. However, **parties are also strongly encouraged to email a copy of their written documents to the Commission Office**, so that materials received can be posted on the Commission's web site. (Please email to cdphe.wqcc@state.co.us.) In addition, copies of these documents must be mailed or hand-delivered by the specified dates to all persons requesting party status or mailing list status, and to the Attorney General's Office representatives for the Commission and the Division, in accordance with a list provided by the Commission Office following the party status/ mailing list status deadline. **Alternatively, parties may email documents to those with party status or mailing list status by the specified dates**, except to those that the list distributed by the Commission Office identifies as requesting hard copies.

Also **note** that the Commission has prepared a document entitled **Information for Parties to Water Quality Control Commission Rulemaking Hearings**. A copy of this document will be mailed or emailed to all persons requesting party status or mailing list status. It is also posted on the Commission's web site at <http://www.cdphe.state.co.us/op/wgcc/PublicParticipation/HBappC.pdf>. Following the suggestions set forth in this document will enhance the effectiveness of parties' input for this proceeding. **Please note the request that all parties submit two-sided copies of all hearing documents on three-hole punch paper.**

MAILING LIST STATUS COMMENTS:

Those requesting mailing list status shall provide written testimony, if any testimony is to be offered for the hearing, by the above deadline for responsive prehearing statements – i.e., **September 27, 2011**. Copies shall be submitted and distributed in the same manner as noted above for prehearing statements.

PREHEARING CONFERENCE:

DATE: Wednesday, October 12, 2011
TIME: 9:00 a.m.
PLACE: Sabin Room, Department of Public Health and Environment
4300 Cherry Creek Drive South
Denver, Colorado

Attendance at the prehearing conference is mandatory for all persons requesting party status. An opportunity may be available to participate in this prehearing conference by telephone. Persons wishing to participate by telephone should notify the Commission Office as early as possible.

REBUTTAL STATEMENTS:

Written rebuttal statements responding to the prehearing statements due on September 27, 2011 may be submitted by anyone seeking party status or mailing list status. Any such rebuttal statements must be received in the Commission Office by **November 2, 2011**. An original and 13 copies of written rebuttal statements must be received in the Commission Office by this deadline, and submission of an emailed copy as noted above is strongly encouraged. In addition, copies of these documents must be mailed or hand-delivered by that date to all those requesting party status or mailing list status, and to the Attorney General's Office representatives for the Commission and Division. **Alternatively, parties may email documents to those with party status or mailing list status by this deadline**, except to those that the list distributed by the Commission Office identifies as requesting hard copies. No other written materials will be accepted following this deadline except for good cause shown.

SPECIFIC STATUTORY AUTHORITY:

The provisions of sections 25-8-202 and 25-8-401 C.R.S. provide the specific statutory authority for consideration of the regulatory amendments proposed by this notice. Should the Commission adopt the regulatory language as proposed in this notice or alternative

amendments, it will also adopt, in compliance with section 24-4-103(4) C.R.S., an appropriate Statement of Basis, Specific Statutory Authority, and Purpose.

NOTIFICATION OF POTENTIAL MATERIAL INJURY TO WATER RIGHTS:

In accordance with section 25-8-104(2)(d), C.R.S., any person who believes that the actions proposed in this notice have the potential to cause material injury to his or her water rights is requested to so indicate in the party status request submitted. In order for this potential to be considered fully by the Commission and the other agencies listed in the statute, persons must fully explain the basis for their claim in their prehearing statement which is due in the Commission Office on the date specified above. This explanation should identify and describe the water right(s), and explain how and to what degree the material injury will be incurred.

Dated this 22nd day of July 2011 at Denver, Colorado.

WATER QUALITY CONTROL COMMISSION

Paul D. Frohardt, Administrator

EXHIBIT 1
WATER QUALITY CONTROL DIVISION

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Water Quality Control Commission

PROCEDURAL RULES

5 CCR 1002-21

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21.3 Rulemaking Procedures

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F. Motions

The Commission may require that, as part of the prehearing conference or otherwise, parties or interested persons submit in advance of the hearing all motions or requests for rulings that such person or party intends to make with respect to the proposed rulemaking, except where, due to the lack of material information, such motions or requests cannot reasonably be submitted in advance of the hearing. These shall include motions regarding procedures, the scope and nature of the proceedings, or any other matter that requires a determination by the Commission prior to final agency action based on the record, or any matter that may reasonably be disposed of by the Commission prior to receiving testimony or other evidence. A Commission member acting as Hearing Chair may rule upon any nondispositive pre-hearing motion or pleading; however, the Hearing Chair retains discretion to refer any pre-hearing motion or pleading to the full Commission for decision.

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21.4 Adjudicatory Procedures

A. Applicability

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- 3) The Division shall provide the opportunity for a formal public adjudicatory hearing in the following cases:

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- d) Notices of alleged violations, pursuant to sections 25-8-602 and 603, C.R.S., for:

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- (ii) discharging to ~~surface~~ state waters without a permit; or

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F. Motions

The Commission or the Division may require that, as part of the prehearing conference or otherwise, parties shall submit in advance of the hearing all motions or requests for rulings that a party intends to make with respect to the proceedings. These may include motions regarding procedures, the scope and nature of the proceedings, or any other matter that requires a determination by the Commission or the Division prior to final agency action based on the record, or any matter that may reasonably be disposed of by the Commission or the Division prior to the receipt of testimony or other evidence. A Commission member acting as Hearing Chair may rule upon any nondispositive pre-hearing motion or pleading, however, the Hearing Chair retains discretion to refer any pre-hearing motion or pleading to the full Commission for decision.

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21.5 Business Meetings and Informal Hearings

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B. Informal Hearings

1) The Commission may conduct informal hearings not subject to the requirements of the APA, the Act, the drinking water statutes or sections 21.3 and 21.4 of this regulation in order to solicit information from the public with respect to specified matters in order to consider for adoption interpretive rules or statements of policy not intended to be binding, or for such other purposes as may be appropriate. The Commission shall determine the procedures to be followed for such hearings on a case-by-case basis.

2) The Commission may conduct administrative action hearings that do not involve formal rulemaking, but that result in a Commission approval action. The purposes of such hearings may include, but are not limited to:

a) Approval of Commission policy documents;

b) Approval of proposed Section 319 nonpoint source project funding priorities;

c) Approval of Section 208 water quality management plans;

d) Approval of the Section 303(d) Listing Methodology, for development of Colorado's list of impaired waters;

e) Approval of the Section 305(b) Report on the Status of Water Quality in Colorado;

f) Approval of a Colorado Nonpoint Source Management Program;

g) Approval of Intended Use Plans.

Administrative action hearings are not subject to the formal legal requirements of rulemaking hearings. Notice of such hearings is not published in the Colorado Register; there is no formal "party status"; no prehearing conference is held; and generally no transcript is prepared. Notice shall be published in the monthly Water Quality Information Bulletin and on the Commission's

web site. Written comments submitted prior to the hearing are encouraged, but written or oral comments shall be accepted at the hearing.

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21.11 Hearings on Notice of Alleged Violations

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- D. All determinations by the Division concerning notices of alleged violations, except alleged violations of surface water discharge permits or portions thereof, operating without a permit, or for engaging in activities without a surface water discharge permit when such a permit is required, must be appealed to the Commission by any person adversely aggrieved or affected as a prerequisite to the right of judicial review pursuant to sections 24-4-1058 and 106, C.R.S. The appeal shall be made in writing to the office of the Administrator of the Commission and must be postmarked no later than 30 days after the date ~~of the mailing of the Division's decision is published in the Water Quality Information Bulletin sent to those persons on the mailing list maintained by the Division pursuant to section 25-8-302(1)(e), C.R.S.~~ Within 60 days of the filing of the appeal the Commission shall commence a hearing to consider such appeals in accordance with section 24-4-105, C.R.S. and section 21.4 of this regulation; provided, that, if the Division has previously held a hearing regarding the alleged violations under section 24-4-105, C.R.S., the Commission's review will be limited to record review of the Division's final determination.

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21.12 Hearings on Civil Penalty Appeals

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- B. Penalties shall be determined by the Executive Director or his/her designee and may be appealed to the Commission or the Executive Director in accordance with section 21.4. An appeal to the Executive Director or his/her designee shall be made in writing to the Director of the Water Quality Control Division and shall be postmarked no later than 30 days after the issuance of the penalty determination. An appeal to the Commission shall be made in writing to the office of the Administrator of the Commission and shall be postmarked no later than 30 days after the issuance of the penalty determination. In his/her written appeal the appellant shall also state those objections or mitigating factors ~~which that~~ the appellant desires to raise before the Commission or the Executive Director or his/her designee.

WATER QUALITY CONTROL DIVISION PROPOSED

21.38 Statement of Basis, Specific Statutory Authority and Purpose (November 14, 2011 Rulemaking, Effective December 30, 2011)

The provisions of sections 25-8-202 and 401 provide the specific statutory authority for adoption of these regulatory requirements. The Commission also adopted the following statement of basis and purpose.

Basis and Purpose

In this rulemaking, the Commission adopted several changes to its Procedural Regulations to provide helpful clarifications for those involved in Commission processes.

The Commission adopted regulatory changes to specify that when appealing a civil penalty, in addition to stating mitigating factors, a party's written appeal must also specifically identify the appellant's objections to the civil penalty.

At the January 10, 2011 hearing the Commission adopted changes to section 21.4(A)(3)(d) to clarify that the Division shall provide a hearing for review of notices of alleged violations. Pursuant to the Water Quality Control Act, the Division shall hold such hearings for all notices of alleged violation, whether involving discharges to surface water or groundwater. The provisions of section 21.4(A)(3)(d) were not intended to narrow this authority. Accordingly, the Commission clarified that the Division shall hold hearings for notices of alleged violations for discharges without a permit to all state waters.

The Commission modified the provisions of 21.11(D) to specify that the 30 day appeal period begins to run upon the publication date of the Water Quality Information Bulletin which contains the Notice of Violation being appealed.

The Commission adopted regulations to address the scope of authority of a hearing chair in both a rulemaking and adjudicatory proceeding.

The Commission also adopted provisions recognizing its practice to hold informal hearings, such as administrative action hearings.