

# 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>

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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 permanent adoption of a temporary modification to the chronic arsenic standard for South Platte segment 14 in the Classifications and Numeric Standards for South Platte River Basin, Laramie River Basin, Republican River Basin, Smoky Hill River Basin, Regulation #38 (5 CCR 1002-38), which was adopted on an emergency basis on December 13, 2011.

The revisions to Regulations #38 proposed by the Water Quality Control Division, along with proposed Statements 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, August 13, 2012  
**TIME:** 11:00 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. Written submissions by interested members of the public that do not have party status or mailing list status (see below) should be sent in such a manner as to be received in the Commission office by August 1, 2012.

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.

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: Wednesday, May 23, 2012  
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](mailto: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 Exhibits 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 **June 6, 2012**; and (2) an original and 13 copies of a **Responsive Prehearing Statement**, including any exhibits, written testimony, and alternative proposals of the Water Quality Control Division or **anyone seeking party status and intending to respond to the proponent's proposals** must be received in the Commission Office no later than **July 5, 2012**.

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](mailto: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 Water Quality Control 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/wqcc/PubPart/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., **July 5, 2012**. Copies shall be submitted and distributed in the same manner as noted above for prehearing statements.

#### PREHEARING CONFERENCE:

DATE: Monday, July 16, 2012  
TIME: 2:00 p.m.  
PLACE: Sabin Conference 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 July 5, 2012 may be submitted by the Division and anyone seeking party status or mailing list status.** Any such rebuttal statements must be received in the Commission Office by **August 1, 2012**. 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, 25-8-203, 25-8-204 and 25-8-402, 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 19<sup>th</sup> day of April 2012 at Denver, Colorado.

WATER QUALITY CONTROL COMMISSION

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Paul D. Frohardt, Administrator

**EXHIBIT 1**  
**WATER QUALITY CONTROL DIVISION**

**COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT**  
**WATER QUALITY CONTROL COMMISSION**

5 CCR 1002-38

**REGULATION NO. 38**  
**CLASSIFICATIONS AND NUMERIC STANDARDS**  
**FOR**  
**SOUTH PLATTE RIVER BASIN, LARAMIE RIVER BASIN**  
**REPUBLICAN RIVER BASIN, SMOKY HILL RIVER BASIN**

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**38.6 TABLES**

REGULATION #38 STREAM CLASSIFICATIONS and WATER QUALITY STANDARDS

REGION: 3 AND 4 BASIN: <b>UPPER SOUTH PLATTE RIVER</b>	DESIG	CLASSIFICATIONS	NUMERIC STANDARDS			TEMPORARY MODIFICATIONS AND QUALIFIERS
			PHYSICAL and BIOLOGICAL	INORGANIC mg/l	METALS µg/l	

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14. Mainstem of the South Platte River from the outlet of Chatfield Reservoir to the Burlington Ditch diversion in Denver, Colorado.		Aq Life Warm 1 Recreation E Water Supply Agriculture	T=TVS(WS-I) °C summer=14 Feb-Nov D.O.=5.0 mg/l pH=6.5-9.0 E. Coli=126/100ml	NH <sub>3</sub> (ac/ch)=TVS Cl <sub>2</sub> (ac)=0.019 Cl <sub>2</sub> (ch)=0.011 CN=0.005	S=0.002 B=0.75 NO <sub>2</sub> =0.5 NO <sub>3</sub> =10 Cl=250 SO <sub>4</sub> =WS	As(ac)=340 As(ch)=0.02(Trec) Cd(ac/ch)=TVS CrIII(ac)=50(Trec) CrVI(ac/ch)=TVS Cu(ac/ch)=TVS Fe(ch)=WS(dis)	Fe(ch)=1000(Trec) Pb(ac/ch)=TVS Mn(ch)=190(dis) Mn(ac/ch)=TVS Hg(ch)=0.01(Tot) Ni(ac/ch)=TVS	Se(ac/ch)=TVS Ag(ac/ch)=TVS Zn(ac/ch)=TVS	Temporary modifications: Cu(ac/ch)=TVSx2.7 (Type iii). Applies below the confluence with Marcy Gulch. Expiration date of 12/31/2015. T=current conditions (Type iii). Expiration date of 12/31/2015. Se(ac/ch)=current conditions (Type iii). Expiration date of 12/31/2013. <u>As(ch)=0.02-3.0(Trec)</u> Expiration date of 10/31/13.
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**38.81 STATEMENT OF BASIS SPECIFIC STATUTORY AUTHORITY AND PURPOSE AUGUST 13, 2012 RULEMAKING; EFFECTIVE DATE SEPTEMBER 30, 2012**

The provisions of C.R.S. 25-8-202(1)(a), (b) and (2); 25-8-203; 25-8-204; and 25-8-402; provide the specific statutory authority for adoption of these regulatory amendments. The Commission also adopted in compliance with 24-4-103(4) C.R.S. the following statement of basis and purpose.

**BASIS AND PURPOSE**

The Commission adopted on a permanent basis the revisions to Regulation # 38, Classifications and Numeric Standards for South Platte River Basin, Laramie River Basin Republican River Basin, Smoky Hill River Basin, which had been adopted on an emergency basis on December 13, 2011, and extended the expiration date of the temporary modification. The Commission is readopting the rationale for that temporary modification at this time, while anticipating a future review of arsenic criteria and standards in an April 2013 rulemaking

Prior to the December 2011 emergency rulemaking, the Colorado Department of Transportation ("CDOT"), the Regional Transportation district ("RTD") and the City and County of Denver ("Denver"), requested an emergency adoption of a revision to the water-plus-fish (W+F) arsenic standard for Segment 14 of the Upper South Platte River Basin in order to facilitate the issuance of Colorado Discharge Permit System (CDPS) permits to segment 14 with chronic arsenic effluent limitations that are achievable with current and reasonable treatment capabilities.

In August of 2005 the Commission adopted revisions to the Basic Standards and Methodologies for Surface Waters (Regulation #31) to add a W+F table value standard of for chronic arsenic of 0.02 micrograms per liter ( $\mu\text{g/L}$ ). W+F standards are numeric human health-based water quality standards that are calculated protective values that take into account the combined exposure from the pollutant in drinking water and the pollutant accumulated in fish flesh. This criterion was generally adopted for water bodies with drinking water and aquatic life class 1 use designations in the basin hearings between 2006 and 2009.

The proposal on December 13, 2011 was to revise the W+F water quality standard for arsenic on Segment 14 from 0.02 micrograms per liter ( $\mu\text{g/L}$ ) to a range of 0.02 –7.6  $\mu\text{g/L}$ . The Division proposed the revision to the chronic arsenic standard for Segment 14 based on circumstances where entities that have been assigned chronic arsenic effluent limitations in a CDPS permit at or near the 0.02  $\mu\text{g/L}$  cannot achieve their chronic arsenic effluent limitations with treatment that may be beyond the current reasonable limit of technology. The Division examined the basis for the W+F standard and provided the Commission a policy option for an alternate W+F table value standard for chronic arsenic that it believed would be protective of human health for Segment 14 (7.6 is below the Safe Drinking Water Act protective level of 10  $\mu\text{g/L}$ ). Testimony was presented that as a practical matter, 3.0  $\mu\text{g/L}$  is the lowest level that is technologically achievable. Testimony was also presented that there is uncertainty regarding the arsenic level necessary to protect the W+F use and regarding the extent to which the arsenic levels are reversible (i.e., whether the levels in the ground water and the river are natural or human-induced irreversible).

As a matter of policy, the Commission decided that since the technologically achievable arsenic level is less stringent than the calculated W+F criterion, the W+F criterion for segment 14 will be a hybrid, based on a range of 0.02-3.0  $\mu\text{g/L}$ . The first number in the range shall be the strictly health-based value, based on the Commission's established methodology for human health-based standards that protect against the combined exposure of drinking water and eating fish. The second number in the range is the technologically achievable value of 3.0  $\mu\text{g/L}$ . The Commission adopted this revision in the form of a temporary modification in recognition of the uncertainty regarding use-protective values and achievability. In the emergency action, the temporary modification was adopted with an expiration date of December 12, 2012. In this rulemaking, the Commission is extending the expiration date to October 31, 2013. The Commission anticipates that there will be a rulemaking hearing in April 2013 to address the substantive

issues regarding arsenic criteria in Regulation #31 and arsenic standards in all basins. The extended expiration date is intended to provide time for that additional review.

Control requirements, such as discharge permits effluent limitations, shall be established using the first number in the range as the ambient water quality target, provided that no effluent limitation shall require an “end of pipe” discharge level more restrictive than the second number in the range during the effective period for this temporary modification.

The Commission found that the revision was necessary since achieving arsenic discharge permit limitations that result from the current arsenic standard appears to be technologically unachievable. CDOT, RTD, and the City and County of Denver (CCD) have expended significant public funds for multiple projects administered by these entities in attempting to comply with the limits.