

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 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, May 13, 2013
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 Colorado Department of Public Health and Environment's (Department's) mail room by May 1, 2013.

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 proposal.

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: Tuesday, February 26, 2013

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 Department's mail room 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 Attorney General's Office, 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 Department's mail room no later than **March 5, 2013**; 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 Department's mail room no later than **March 26, 2013**.

For each deadline, the required number of hard copies of documents must be received in the Department's mail room 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 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.colorado.gov/cs/Satellite/CDPHE-WQCC/CBON/1251590841546>, as Appendix C to the Public Participation Handbook. 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., **March 26, 2013**. Copies shall be submitted and distributed in the same manner as noted above for prehearing statements.

PREHEARING CONFERENCE:

DATE: Tuesday, April 9, 2013
TIME: 1:30 p.m.
PLACE: Florence Sabin Conference Room
Department of Public Health and Environment
4300 Cherry Creek Drive South
Denver, Colorado 80246

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 March 26, 2013 may be submitted by the Attorney General's Office, the Division and anyone seeking party status or mailing list status. Any such rebuttal statements must be received in the Department's mail room by **May 1, 2013**. An original and 13 copies of written rebuttal statements must be received in the Department's mail room 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.

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 Department's mail room 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.

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.

Dated this 14th day of January 2013 at Denver, Colorado.

WATER QUALITY CONTROL COMMISSION

Paul D. Frohardt, Administrator

EXHIBIT 1

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Water Quality Control Commission

PROCEDURAL RULES

5 CCR 1002-21

21.1 Authority

This regulation is adopted pursuant to the authority conferred upon the Commission in section 25-8-401(2), C.R.S. and is intended to be consistent with the requirements of the State Administrative Procedure Act, section 24-4-101 et seq. (the "APA"), C.R.S., the Colorado Water Quality Control Act, sections 25-8-101 et seq. (the "Act"), C.R.S., the On-site Wastewater Treatment Systems Act, section 25-10-101 et seq. (the "OWTS Act"), C.R.S., and the drinking water statutes, sections 25-1-114.1 and 25-1.5-201 et seq., C.R.S.

21.2 Scope and Purpose

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- D. In the event of a conflict between this regulation and the APA, the Act, the OWTS Act or the drinking water statutes, the statutes shall prevail.

21.3 Rulemaking Procedures

A. Applicability

Whenever the Commission adopts any rule or regulation including, but not limited to, any control regulation, classification of state waters, water quality standards, permit regulations, construction grant regulations, on-site wastewater treatment systems regulations, or drinking water regulations, the provisions of this section shall be applicable.

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C. Notice

- 1) Notwithstanding any notice that may be provided through the mailing lists maintained pursuant to sections 25-8-302(1)(e), and 24-4-103(3)(b), C.R.S., or otherwise, official notice of proposed rulemaking proceedings shall be filed with the Secretary of State in sufficient time for publication in the Colorado Register.

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D. Party Status/~~Mailing List~~ Status

- 1) Unless in its notice of proposed rulemaking issued pursuant to section 21.3(C) of this regulation the Commission specifies otherwise, status as a party as that term is defined in section 24-4-102(11), C.R.S., will be granted in rulemaking proceedings before the Commission. Where an opportunity to obtain party status is provided, it may be obtained in the manner prescribed in the

notice issued pursuant to section 21.3(C). One original, email attachment or fax of each party status request shall be submitted by the deadline established in the notice. Party status shall always be available in proceedings specified in section 21.3(M). Any person requesting a rulemaking hearing shall be granted party status without application therefor. Parties to rulemaking hearings shall have those rights specified in section 21.3(K)(2).

~~2) Any person with an intent to participate in the rulemaking process, but not as a party per section 24-4-102(11), C.R.S., may request mailing list status. Such status will allow receipt of all party documents (except individual exhibits more than five pages in length.) The request for mailing list status must be made by the same date party status is due. The request must demonstrate an active interest, an intent to participate, and an intent to provide written testimony, if any testimony is given, by the deadline specified in the hearing notice. Approval or disapproval of any mailing list status request shall be made by the Commission's representative at the same time that party status requests are acted on. Prehearing statements and subsequent documents shall be mailed by parties to mailing list status participants. With approval of the Commission representative, a party may be excused from mailing such documents to non-parties if the cost is demonstrated to be burdensome and it is demonstrated that some notice of the availability of such documents at the Commission Office is provided to the mailing list status participants.~~

32) All party status ~~and mailing list status~~ requests shall include:

- a) Name of the organization, entity or person requesting party status or mailing list status;
- b) A contact person (if different from (a));
- c) The contact person's mailing address;
- d) The contact person's phone number;
- ~~e) The contact person's fax number (if available);~~
- fe) The contact person's e-mail address (if available).

E. Prehearing Conference

- 1) The Commission may specify in the notice of proposed rulemaking that a prehearing conference will be held. Any such conference shall be held not less than 10 days in advance of the hearing, unless the Commission for good cause specifies otherwise. The Administrator of the Commission, a hearing officer or another member of the Commission may preside at any prehearing conference.
- 2) In accordance with and by the deadlines specified in the hearing notice, each applicant for party status, where applicable, the Division, and every interested person who intends to call witnesses at the hearing and offer exhibits into the record of the hearing, shall provide one PDF version of a prehearing statement to ~~every party status applicant, and an original and 13 copies to the Administrator of the Water Quality Control Commission. In addition, everyone who submits a prehearing statement electronically shall provide paper copies to the Commission Office in accordance with the hearing notice. (Note: This requirement is not satisfied by electronic transmission of a facsimile copy.) In addition, copies shall be provided directly to the Assistant Attorneys General for the Commission and the Division.~~ The hearing notice may establish different deadlines for prehearing statements by rulemaking proponents and by those responding to proposals. A prehearing statement shall contain the following:
 - a) A specific statement of the factual and legal claims asserted or a list of the issues to be resolved;

- b) Copies of all exhibits to be introduced at the hearing:
 - i) ~~(Note: Where the nature of an exhibit is such that providing copies would be unduly burdensome, the prehearing statement shall describe the exhibit and indicate that the exhibit shall be available for inspection at a specified location prior to the hearing. Any such exhibit shall where feasible be made available electronically and also be available for inspection at the prehearing conference and at the hearing, and shall become part of the record of the hearing);~~
 - ii) Where a party's position or proposal in a hearing is based in part on analysis of water quality data, the party shall submit its analysis of the data and a description of the data upon which the analysis is based, but is not required to submit the raw data into the hearing record. However, the party shall provide an electronically manipulable copy of its data to the Division and any party that requests it. If the Division or any party chooses to submit some or all of the data into the hearing record, it must be provided in PDF format.
- c) A list of witnesses to be called and a brief description of their testimony;
- d) Any alternative proposal to the proposed rule (Note: The submission of a proposed statement of basis and purpose and regulatory analysis for any alternative proposal is encouraged but not required);
- e) All written testimony to be offered into evidence at the hearing.

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- 7) Except as provided in section 21.3(E)(2)(b) above, PDF versions and the original and 13 paper copies of any documents submitted after the initial party status request shall be submitted to the Commission Office. (Note: The requirement for submittal of paper copies may be satisfied by delivery to the Colorado Department of Public Health and Environment's mail room by the specified due date.), and ~~copies sent to all other party status applicants, in accordance with a list provided by the Commission Office. (Note: This requirement is not satisfied by electronic transmission of a facsimile copy.)~~ In addition, copies shall be provided directly to the Assistant Attorneys General for the Commission and the Division.

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L. Final Agency Action and Post-Hearing Procedures

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- 7) ~~Publication of a~~An adopted rule shall be published in by the delivery or mailing of the Colorado Register and in the Code of Colorado Regulations. to persons on the mailing list maintained pursuant to section 103(11)(h) of the APA. The date of publication of the Colorado Register shall be the date of the last regular delivery or mailing. An unofficial version of the adopted rule shall also be posted on the Commission's web site. also be provided to all parties, persons with mailing list status, and other interested persons who participated in the rulemaking proceeding.

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M. Procedures to be Followed in Classifying State Waters, Setting Water Quality Standards and Adopting Control Regulations

- 1) Prior to classifying State waters and promulgating any water quality standard or any control regulation the Commission shall conduct a public rulemaking hearing thereon as provided in section 21.3 (B) through (L) and (N), except as is provided in this subsection M.
- 2) Notice of any such hearing shall conform to the requirements of this regulation, but shall be given at least sixty days prior to the hearing and shall include each proposed standard or regulation.
- 3) Any person desiring to propose a standard or regulation differing from the standard or regulation proposed by the Commission shall ~~file~~ email one PDF version of such other written proposal and, in accordance with the notice of proposed rulemaking provide 43 paper copies thereof ~~with to the~~ Commission as part of a prehearing statement in accordance with section 21.3(E), or, if party status is not applied for, by submission to the Commission Office prior to the prehearing conference. When on file, such proposal shall be open for public inspection.

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21.4 Adjudicatory Procedures

A. Applicability

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

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- h) Appeals of the determination of civil penalties for violations of the Colorado drinking water statutes and Primary Drinking Water Regulations, pursuant to section 25-1-114.1, C.R.S.; ~~and~~
- i) Appeals of final determinations of the Division on enforcement orders, violations of orders, and other determinations made pursuant to the Colorado Primary Drinking Water Regulations. Because appeals of such matters are first heard by the Division pursuant to subsection (3)(e) below, the Commission's review will be limited to record review of the Division's final determination.
- j) Hearings concerning Division determinations regarding self-evaluation disclosures pursuant to section 25-1-114.5(5), C.R.S., and
- k) Appeals of final determinations by the Division concerning Total Maximum Daily Loads ("TMDLs") pursuant to 5 CCR 1002-93. The publication of a final TMDL in the Water Quality Information Bulletin constitutes the Division's final determination on the TMDL.

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C. Notice

- 1) All formal adjudicatory hearings of the Commission and the Division shall be preceded by written notice thereof in accordance with the requirements of this section.
- 2) Any person entitled to notice of a hearing, including the petitioners, those persons on the mailing list maintained by the Division pursuant to section 25-8-302(1)(e) C.R.S., and any person requesting notice as to a particular matter, shall be given timely notice of the time, place, nature

of the hearing, and legal authority and jurisdiction under which it is to be held, and the matters of fact and law asserted.

- 3) Unless otherwise provided by law, such notice shall be served personally, by email, or by mailing by first-class mail to the last address furnished the Commission or the Division by the person to be notified, at least 20 days prior to the hearing.

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E. Prehearing Conference

- 1) The Commission or the Division may specify in the notice of hearing that a prehearing conference will be held. If not, any person who has applied to become a party may request in writing a prehearing conference to be held not less than 10 days in advance of the hearing unless otherwise determined by the Commission or the Division or by their respective designees.

Notice of any such request shall be served upon all other persons who have applied to become parties. A duly appointed committee of the Commission, the Administrator or the chairperson of the Commission, the Division director, or a duly-appointed hearing officer may preside at any prehearing conference.

- 2) Seven days prior to any prehearing conference, or at such other time as stated in the hearing notice, each party or applicant for party status shall ~~present one copy~~ provide one PDF version of a prehearing statement to every other party or applicant for party status, (one copy to the hearing officer, as appropriate), and for hearings before the Commission, ~~to the Commission, the Assistant Attorney(s) General, and the Director of the Water Quality Control Division.~~ In addition, in accordance with the notice of hearing, each party or applicant for party status shall provide paper copies to the Commission Office by the specified deadline, 13 copies to the Administrator of the Water Quality Control Commission, the Assistant Attorney(s) General, and the Director of the Water Quality Control Division, of a The prehearing statement, which shall contain the following:

- a) A specific statement of the factual and legal claims asserted;
- b) Copies of all exhibits to be introduced at the hearing;
- c) A list of witnesses to be called and a brief description of their testimony, or written testimony for each witness if required by the hearing notice;
- d) Proposed findings of fact and conclusions of law, unless a later date for this submission is specified in the hearing notice.

The notice may specify separate deadlines for submission of prehearing statements and rebuttal statements by proponents and opponents of an appeal.

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PROPOSED

21.39 Statement of Basis, Specific Statutory Authority and Purpose (May 13, 2013 Rulemaking, Final Action June 10, 2013, Effective July 30, 2013)

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 added language to the Procedural Rules acknowledging the Commission's statutory authority regarding On-site Wastewater Treatment Systems.

The Commission eliminated "mailing list status" in rulemaking hearings, because, with hearing documents readily available online, there is no longer a need to provide special accommodations for those who wish to monitor rulemaking hearings.

The Commission decided to streamline the requirements for exchange of documents among parties in rulemaking hearings. Because all submittals are posted on the Commission's web site and easily accessible, parties will no longer be required to email their documents to all parties to the rulemaking. Rather, their submission of electronic (PDF) versions of their documents to the Commission office will suffice. Unless the notice of rulemaking specifies otherwise, however, parties will continue to provide paper copies of their documents to the Department's mail room by the dates specified in the notice.

New provisions were added regarding the submission of data in rulemaking hearings. Where a party's position or proposal is based in part on analysis of water quality data, the party will be required to submit its analysis of the data and a description of the data upon which the analysis is based, but will not be required to submit the raw data into the hearing record. However, the party will be required to provide an electronically manipulable copy of the data to the Division and make it available to parties upon request. If the Division or any party chooses to submit some or all of the data into the hearing record, the data must be provided to the Commission office in PDF format to accommodate the State standards for retained electronic records.

Section 21.3(L)(7) was modified to align with revisions to the APA.

The Commission adopted a new subsection 21.4(A)(2)(k) to explicitly reflect that appeals of TMDLs are to be heard by the Commission. Such appeals may be filed with the Commission after a final determination is made by the Division. C.R.S. § 25-8-202(1)(k) states: "The Commission shall...act as an appellate body to review all determinations by the division except those determinations dealing with surface water discharge permits or portions thereof." There has been some uncertainty regarding what constitutes the Division's "determination" of TMDLs that triggers the right to appeal. The Division will develop a TMDL, provide public notice of a draft TMDL and an opportunity for public comment, prepare a response to those comments, make modifications to the TMDL as appropriate, and finalize the TMDL. The Division will then publish the final TMDL in the Water Quality Information Bulletin. The publication of the final TMDL in the Bulletin will constitute the Division's "determination" triggering the appeal period pursuant to C.R.S. § 25-8-202(1)(k). If no appeal is filed within the statutory timeframe, the Division will submit the final TMDL to EPA for approval.