

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Water Quality Control Commission

REGULATION NO. 21 - PROCEDURAL RULES

5 CCR 1002-21

[Editor's Notes follow the text of the rules at the end of this CCR Document.]

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

- A. This regulation shall govern all procedures and hearings before the Colorado Water Quality Control Commission ("the Commission") and the Colorado Water Quality Control Division ("the Division"). They are intended to assure that all such procedures and hearings will be fair and impartial.
- B. This regulation does not apply to interpretive rules or general statements of policy, which are not meant to be binding except as provided herein.
- C. Except when necessary to comply with applicable statutes, the requirements of this regulation may be waived whenever it is determined that strict adherence to the rules is not in the best interests of fairness or impartiality. In any such instance appropriate justification shall be provided to all interested persons or parties.
- 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 treatments systems regulations, or drinking water regulations, the provisions of this section shall be applicable.

B. Proposals for Rulemaking

- 1) Whenever the Commission contemplates rulemaking, public announcement of any informal pre-rulemaking proceedings may be made at such time and in such manner as the agency determines, and opportunity may be afforded interested persons to submit views or otherwise participate informally in conferences with the Commission or its staff on the proposals under consideration. It is within the discretion of the Commission to determine if and when such proceedings should occur. Whenever time and resources permit, it is the intention of the Commission to provide for and encourage informal comment and discussion regarding potential rulemaking issues prior to commencement of the formal rulemaking process.
- 2)
 - a) Any interested person shall have the right to petition the Commission in writing for the issuance, amendment, or repeal of a rule. Such petition shall be open to public inspection. Except as provided in section 21.8, action on such petition shall be within the discretion of the Commission, but when the Commission undertakes rulemaking on any matter, all related petitions for the issuance, amendment or repeal of rules on such matter shall be considered and acted upon in the same proceeding. If the Commission decides not to initiate rulemaking, it shall provide a brief written explanation of its reasons therefor to the petitioner.
 - b) Petitions for rulemaking shall include the following information:
 - i) Identification of the persons requesting rulemaking and the nature of the request;
 - ii) The language of the proposed rule;
 - iii) A statement of the Commission's authority to promulgate the rule;
 - iv) A concise general statement of the rule's basis and purpose. The Commission recommends that this proposed statement should not exceed five pages, single-spaced, in length. If the rule involves technological or scientific issues, this statement must include an evaluation of the scientific or technological rationale justifying the proposed rule; and
 - v) Any information which the petitioner wishes to be available to the Commission for the preparation of a regulatory analysis of the proposed rule, if such an analysis is requested before the hearing on the proposed rule pursuant to section 24-4-103(4.5), C.R.S. and section 21.3(J) of these rules.
 - c) Any person who petitions the Commission to amend a use classification or water quality standard must submit the proposal to the appropriate 208 planning agency(ies), if any, for at least 30 days for review, and shall include the response of such agencies to the proposal, if any, in documents submitted to the Commission for its consideration in acting on any such proposal. Where a hearing is held to consider classifications or standards amendments based on recommendations by the Division, the Division shall assure that any appropriate 208 planning agency has at least 30 days to review the proposal and shall forward any response to the Commission.

When the Commission proposes to amend a use classification or water quality standard based on a petition from any person, including a request made at triennial review, the Commission shall not be deemed to support the proposal based merely on the decision to conduct a rulemaking hearing. The Division shall offer into evidence any relevant information reasonably available to it at the time of the hearing.

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.
- 2) Notice of proposed rulemaking shall be published in the Colorado Register and shall state the time, place, and nature of the public rulemaking proceedings, the authority under which the rule is proposed, and either the terms or the substance of the proposed rule or a description of the subjects and issues involved.
- 3) Except as specified in section 21.3(M) with respect to classifying state waters, setting water quality standards, or promulgating control regulations, and in section 21.3(N) with respect to temporary or emergency rules, public rulemaking proceedings shall not be held less than twenty days after publication of notice as provided in this section. Publication shall be by electronic publication pursuant to section 24-4-103(11)(g), C.R.S.
- 4) Public notice may contain requirements with respect to special procedures, including requirements for written testimony, which the Commission deems appropriate as to any particular rulemaking hearing. The following shall either be included in the notice or shall be referenced in the notice, with copies available upon request to the Commission Office on and after the date of notice publication:
 - a) The language of the proposed rule; and
 - b) A proposed statement of basis, specific statutory authority and purpose.

Whenever practical, for proposed amendments to existing rules the notice shall include a marked-up version showing the proposed changes from the existing rules. If rules are proposed to incorporate material by reference in accordance with section 21.3 (L)(2), the notice shall indicate when and how such material will be available for comment during the rulemaking proceeding.

- 5)
 - a) The Commission may determine that receipt of only written comments on a published proposal, and any substantive written response(s) to such comments or issues raised in such comments, is sufficient public participation to establish an adequate record for Commission deliberation and decision-making. If the proponent of a proposal disagrees with any written comments submitted, the proponent shall submit a written response in accordance with the deadline established in the rulemaking proceeding notice. An opportunity shall be provided to other interested persons to submit written responses to comments in accordance with a deadline established in the rulemaking proceeding notice.
 - b) In accordance with section 21.3(D), the Commission may provide in the notice for a written-comment-only rulemaking proceeding that no party status shall be provided.
 - c) Should the Commission determine during the course of a written-comment-only rulemaking proceeding that significant, unanticipated controversy regarding the proposal exists, it may choose to terminate the rulemaking proceeding and re-notice it in accordance with its standard hearing procedures.

- 6) An amended notice may be issued by the Commission at any time prior to the hearing without necessitating a continuance of the hearing date, provided the original notice is not substantially altered to the prejudice of any interested person. If an amendment is substantial and prejudicial, the hearing date shall be continued to an appropriate date as determined by the Commission, and notice thereof shall be made in the same manner as the original notice.
- 7) The Commission may continue a hearing to another date by issuing written notice to that effect at any time prior to the close of the record, or by announcement at the date, time and place of the original hearing.

D. Party 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) All party status requests shall include:
 - a) Name of the organization, entity or person requesting party 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 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 the Water Quality Control Commission. In addition, everyone who submits a prehearing statement electronically may be required to provide paper copies to the Commission Office in the number and by the deadline established in hearing notice. 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) 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 or any governmental entity's position or proposal in a hearing is based in part on analysis of water quality data, the party or governmental entity 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 or governmental entity shall provide an electronically manipulable copy of its data to the Division and any party that requests it. If the Division or any party or governmental entity chooses to submit some or all of the data into the hearing record, the data exhibit may be provided in any electronic format that is on a list maintained by the Commission Office, notwithstanding the requirement to submit the prehearing statement in PDF format as specified above.
 - 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.
- 3) The object of the prehearing conference may include the formulation of stipulations or orders respecting the issues to be raised, and witnesses and exhibits to be presented by the parties (where applicable) or interested persons. The parties or interested persons should make known at the prehearing conference any objections to the procedures or evidence that may be raised at the hearing. Stipulations may be made at the prehearing conference to reflect any matters which have been agreed to or admitted by the parties or interested persons. A prehearing order shall be prepared by the Commission or at the Commission's direction by any person or party, based upon the prehearing conference, which shall reflect any rulings with respect to procedures to be followed at the hearing, or any other matter.
 - 4) Whenever adequate time is available, the Commission shall provide a reasonable period of time following the prehearing conference for the submission of written rebuttal statements, including testimony and exhibits. Except for such rebuttal, the Commission will not accept any further documentation or exhibits submitted by any party or by the Division after the prehearing conference except for good cause shown or as agreed upon by the parties and the chairperson of the prehearing conference.
 - 5) Any additional documentation to be submitted after the prehearing conference pursuant to subsection 4 of this section shall be delivered to the Commission Office within five working days after the prehearing conference unless otherwise provided in the notice of hearing or by the chairperson of the prehearing conference.
 - 6) Where scheduling permits and it appears that an additional prehearing discussion would be useful, a decision may be made at the prehearing conference to schedule an additional status conference prior to hearing.

- 7) Except as provided in section 21.3(E)(2)(b) above, PDF versions and the paper copies of any documents submitted after the initial party status request shall be submitted to the Commission Office in the number and by the deadline established in the hearing notice. (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.)

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 a nondispositive pre-hearing motion or pleading, though the Hearing Chair retains discretion to refer any pre-hearing motion or pleading to the full Commission for decision.

G. Discovery

The Commission or its designee may, on its own motion or upon the motion of any interested person or party for good cause shown, take depositions or have depositions taken, and fix the time and place therefor. Other forms of discovery may be allowed where the Commission deems it appropriate. Discovery may be requested by the Commission or its staff as well as by any interested person or party.

H. Subpoenas

Subpoenas shall be issued without discrimination between public and private persons or parties by the Commission or its designee. A subpoena shall be served in the same manner as a subpoena issued by a district court. Upon failure of any witness to comply with such subpoena, the Commission may petition any district court, setting forth that due notice has been given of the time and place of attendance of the witness and the service of the subpoena, in which event, the district court, after hearing evidence in support of or contrary to the petition, may enter an order as in other civil actions compelling the witness to attend and testify or produce books, records, or other evidence under penalty of punishment for contempt in case of contumacious failure to comply with the order of the court. A witness shall be entitled to the fees and mileage provided for a witness in sections 13-33-102 and 13-33-103, C.R.S.

I. Hearing Officers

Except as specified in subsection (M) below, the Commission may designate a hearing officer pursuant to part 10 of article 30 of title 24, C.R.S., subject to appropriations made to the Department of Public Health and Environment. When appropriate the hearing officer may be an employee of the Department of Public Health and Environment, or a member or the Administrator of the Commission.

J. Regulatory Analysis

Upon written request by any person received by the Commission at least fifteen days prior to the hearing on a proposed rule, the Commission shall prepare a regulatory analysis of the proposed rule, pursuant to section 24-4-103 (4.5), C.R.S. Such an analysis shall include:

- 1) A description of the classes of persons who will bear the costs and/or benefit from the proposed rule;

- 2) To the extent practicable, a description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes;
- 3) The probable costs to the Commission, the Division, or any other state agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- 4) A comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction;
- 5) A determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule; and
- 6) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the Commission or petitioner and the reasons the alternative methods were rejected in favor of the proposed rule.

The analysis shall include quantification of the data to the extent practicable and shall take account of both short-term and long-term consequences. The regulatory analysis shall be available for inspection at the Commission Office at least five days before the hearing on the proposed rule.

(Note: The petitioner for a proposed rule is encouraged to supply information with the prehearing statement which could provide the basis for a regulatory analysis. If such information is not provided, the Commission shall prepare the analysis (if one is requested pursuant to this section) based on information supplied by the parties, the Division, and the public, and on such other information as may reasonably be available.)

K. Conduct of Hearings

- 1) The Commission shall conduct a public rulemaking proceeding before promulgating any rule or regulation, in which it shall afford its staff and interested persons an opportunity to submit written data, views, or arguments, or written rebuttals. Oral testimony at hearings may be limited. Direct testimony should primarily summarize written evidence. Introduction of written material at the hearing will generally not be permitted except by the non-party general public.
- 2) Where participation as a party is allowed by the Commission, persons admitted as parties may make objections, and all witnesses shall be subject to cross-examination by or on behalf of persons who have obtained party status to the proceedings. In all hearings witnesses shall be subject to cross-examination by or on behalf of the Commission, and the Commission may allow its staff, or legal counsel for the Commission or its staff, to conduct cross-examination. Any witness whose oral and/or written testimony a party wishes to have as part of the record shall be available for cross-examination at the rulemaking hearing. Where lengthy cross-examination would use undue time, the hearing chair may have each party estimate the amount of time necessary for cross-examination and limit each party's time for cross-examination, taking such estimates into account.

- 3) The Commission in conducting any rulemaking hearing shall, in addition to the authority specified elsewhere, have authority on its own motion or upon the motion of any interested person or party for good cause shown to: administer oaths and affirmations; sign and issue subpoenas; regulate the course of the hearing, set the time and place for continued hearings, and fix the time for the filing of appropriate documents; take depositions or have depositions taken; issue appropriate orders which shall control the subsequent course of the proceedings; and take any other action authorized by agency rule consistent with the APA, the Act and the drinking water statutes. In the event more than one person engages in the conduct of a hearing, such persons shall designate one person to perform the functions of this subsection as can best be performed by one person only, and thereafter such person only shall perform those functions which are assigned by the several persons conducting such hearing.
- 4) The Commission encourages the greatest possible participation at rulemaking hearings by members of the general public, and every effort will be made to provide for and solicit such participation.
- 5) The presiding officer may allow parties to submit evidence not previously submitted under pre-hearing conference procedures for good cause shown, such as where necessary for purposes of rebuttal.
- 6) The Division shall act as staff to the Commission in all rulemaking proceedings, and as such shall participate in any manner deemed appropriate by the Commission.
- 7) The Commission, after the receipt of the evidence, may allow or require interested persons or parties to present oral or written summations of the facts and the law, either at the hearing or subsequent thereto, as deemed appropriate.
- 8) Communication, oral or in writing with individual Commission members is permissible if agreeable to the Commission member(s) in question, but such information, if materially related to issues raised in the rulemaking, shall be made part of the record by the Commissioner. Once the rulemaking record is closed, new information shall only be presented to the Commission as a whole, upon approval of a request to reopen the Commission record. Should ex parte communication with an individual Commission member inadvertently occur subsequent to the close of a rulemaking record, that fact shall be disclosed to the full Commission, and the Commission may, if appropriate, reopen the record to allow the parties and the public to respond to the substance of the ex-parte communication.

L. Final Agency Action and Post-Hearing Procedures

- 1) In adopting any rule or regulation the Commission shall consider all submissions. The rules or regulations promulgated shall be based on the record, which shall consist of proposed rules, evidence, exhibits, and other matters presented or considered, matters officially noticed, rulings on exceptions, any findings of fact and conclusions of law proposed by any party, and any written comments or briefs filed. The rules or regulations shall be consistent with the subject matter as set forth in the notice of proposed rulemaking (which, together with a proposed statement of basis, specific statutory authority, and purpose, and if requested pursuant to section 21.3(J), regulatory analysis, shall be made available to any person at least five days before the hearing). If a proposed final rule approved by the Commission differs substantially from the original noticed proposal, the Commission may, at the request of any person or on its own motion, make the proposed final rule available for additional comment prior to taking final action. If a rule is adopted in a form amending the proposed rule, the statement of basis and purpose shall be revised to explain the rule as actually adopted.

- 2)
 - a) Subject to the provisions of this subsection, the Commission may incorporate the following by reference in its rules without publishing the incorporated material in full only if the material has been properly identified in the notice of proposed rulemaking:
 - i) Federal rules, codes, or standards published in full in the Federal Register or the Code of Federal Regulations;
 - ii) Published rules, standards or guidelines of any nationally recognized association or organization.
 - b) The Commission may incorporate by reference the material set forth in paragraph (a) of this subsection only if it makes copies of the material available to the public no later than the date of publication of the notice of proposed rulemaking.
 - c) The reference to any incorporated material shall identify the incorporated material by appropriate agency, organization, or association and by date, title or citation. The reference shall also state that the rule does not include later amendments to or editions of the incorporated material. The Commission shall maintain certified copies of the complete text of the material incorporated, which copies shall be available for public inspection during regular business hours. If the version or edition of the material to be incorporated by reference has not previously been distributed to the state publications depository libraries, copies of such material shall be provided to the state publications depository and distribution center no later than the date of the notice of a rulemaking hearing to consider such incorporation. Certified copies of the material incorporated shall be provided at cost upon request. All material incorporated by reference may be examined at any state publications depository library.
 - d) The Commission shall include in any rule which incorporates material by reference the fact that the Administrator of the Commission, at the address of the Commission Office, will provide information regarding how the incorporated material may be obtained or examined and a statement indicating that any material that has been incorporated by reference in the rule may be examined at any state publications depository library.
- 3) After consideration of the relevant matter presented, the Commission shall include as part of the rules a general statement of their basis and purpose. The written statement of the basis and purpose of a rule which involves scientific or technological issues shall include an evaluation of the scientific or technological rationale justifying the rule.
- 4) No rule shall be issued by the Commission unless it is first submitted to the Attorney General for an opinion as to its constitutionality and legality. Any rule issued without being so submitted shall be void.
- 5) Each rule adopted by the Commission, together with the Attorney General's opinion rendered in connection therewith shall be filed within twenty days after adoption with the Secretary of State for publication in the Colorado Register. Rules revised to conform with action taken by the General Assembly shall be filed with the Secretary of State for publication in the Colorado Register and in the Code of Colorado Regulations.
- 6) A rule shall become effective twenty days after publication of the rule as finally adopted, as provided in paragraph (8) below, or on such later date as is stated in the rule. Once a rule becomes effective, the rulemaking process shall be deemed to have become final agency action for judicial review purposes.

- 7) An adopted rule shall be published in the Colorado Register and in the Code of Colorado Regulations. An unofficial version of the adopted rule shall also be posted on the Commission's web site.
- 8) All rules adopted by the Commission, including temporary or emergency rules, shall be submitted to the Office of Legislative Legal Services in the form and manner prescribed by the committee on legal services. Any rule issued without being so submitted within twenty days after the date of the Attorney General's opinion rendered thereon to the legislative drafting office shall be void. The Commission shall revise its rules to conform with the action taken by the General Assembly.
- 9) The Commission shall maintain a copy of its currently effective rules and the current status of each published proposal for rules and minutes of all its actions upon proposed rules, as well as any Attorney General's opinion rendered on any adopted or proposed rule, which shall be available for inspection by any person during regular office hours.
- 10) The Commission shall make available to the public and shall deliver to anyone requesting it a copy of any rule of the agency then in effect or of any notice of proposed rulemaking proceeding in which action has not been completed. Upon request, such copy shall be certified. The Commission may make a reasonable charge for supplying any such copy. Except for temporary or emergency rules, such copy shall be in the same format as the rule appears in the Code of Colorado Regulations or the Colorado Register.
- 11) The Commission shall maintain a docket listing the name, address, and telephone number of every person or party who has participated in a rulemaking proceeding by written statement, or by oral comment at a hearing.

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 email one PDF version of such other written proposal and, in accordance with the notice of proposed rulemaking may be required to provide paper copies thereof 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.
- 4) Witnesses at the hearing shall be subject to cross-examination by or on behalf of the Commission or its staff, by or on behalf of persons who have proposed standards or regulations pursuant to paragraph (3) of this subsection, and by or on behalf of persons who have obtained party status to the proceeding.
- 5) Except in written-comment-only rulemaking proceedings pursuant to section 21.3(C)(5) of these rules, in any proceeding under this subsection M the Commission shall provide interested persons the opportunity to participate as parties to the proceedings. The notice, procedures, and requirements for party status shall be the same in this regard as specified in section 21.4 of this regulation for adjudicatory hearings.

- 6) In any hearing regarding the classification of state waters or the promulgation of water quality standards, the Commission may not designate a hearing officer. Only the Commission or a committee of the Commission may conduct any such hearing.
- 7) Triennial review for any regulation (required by statute) shall commence with a public informational hearing or hearings, as determined by the Commission. Requests for changes in stream classifications and water quality standards shall be submitted to appropriate 208 planning agencies for review prior to a determination to act on any such request as required by section 21.3(B)(2)(c).

N. Emergency Rules

- 1) A temporary or emergency rule may be adopted without compliance with the procedures prescribed in this section and with less than 20 days notice (or where circumstances imperatively require, without notice) where the Commission finds that immediate adoption of the rule is imperatively necessary to comply with a state or federal law or federal regulation or for the preservation of public health, safety, or welfare and compliance with the requirements of this section would be contrary to the public interest. Such findings and a statement of the reasons for the action shall be published with the rule. A temporary or emergency rule shall become effective on adoption or on such later date as is stated in the rule, shall be published promptly, and shall have effect for not more than three months from the adoption thereof, unless made permanent by compliance with this section; provided, that any emergency rule relating to water quality classifications or standards or control regulations may be effective for a specified period longer than three months, but not longer than one year, if the Commission determines that such longer period is necessary to complete rulemaking pursuant to section 24-4-103, C.R.S., to reconsider the emergency rule.
- 2) Pursuant to section 25-8-208, C.R.S. the Commission may conduct emergency rulemaking in accordance with section 24-4-103(6), C.R.S. to consider the adoption of an interim water quality standard to apply in place of an existing water quality standard for a specified period of time, not to exceed one year, whenever the Commission finds, in its discretion, that the petitioner has established exigent circumstances which warrant the emergency action.

21.4 Adjudicatory Procedures

A. Applicability

- 1) In order to assure that all parties to any formal adjudicatory proceeding of the Commission or the Division are accorded due process of law, the provisions of this section shall be applicable, except in the event of a conflict with the specific provisions of this regulation applicable to special adjudicatory proceedings, (section 21.6 *et seq.*) in which case the latter shall prevail.
- 2) The Commission shall provide the opportunity for a formal public adjudicatory hearing in the following cases:
 - a) Appeals of variance decisions made by the Division pursuant to section 25-8-401(5), C.R.S. which do not involve discharge permit conditions required by the federal Clean Water Act (Federal Act), including but not limited to conditions required by control regulations but not mandated by the Federal Act, except where a hearing on such appeal is denied by the Commission pursuant to section 21.9 of this regulation;
 - b) Appeals of the determination of civil penalties for violations of the Act or any control regulation promulgated pursuant to the Act by the Executive Director or his/her designee pursuant to section 25-8-608, C.R.S., except for penalties;

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- (i) for violations of surface water discharge permits or portions thereof;
 - (ii) for discharging to surface waters without a permit; or
 - (iii) for engaging in activities without a surface water discharge permit when such a permit is required.
- c) Appeals of decisions of the Division concerning approval of the site locations or designs of domestic wastewater treatment works pursuant to section 25-8-702, C.R.S.;
 - d) Appeals of decisions with respect to 401 certifications, pursuant to section 25-8-302(1)(f), C.R.S.;
 - e) Appeals of final determinations by the Division on notices of alleged violations, pursuant to section 21.11(D) of these rules, except for alleged violations:
 - (i) of surface water discharge permits or portions thereof;
 - (ii) for discharging to surface waters without a permit; or
 - (iii) for engaging in activities without a surface water discharge permit when such a permit is required.
 - f) Appeals of final antidegradation review determinations by the Division, pursuant to section 21.16 of these rules;
 - g) Appeals of final decisions by the Cherry Creek Basin Water Quality Authority pursuant to Regulation #72, 5 CCR 1002-72 and, where specifically provided for in other State reservoir control regulations, appeals of final determinations by the Division regarding modifications to point source phosphorus allocations or concentrations (through trades, transfers, or withdrawals from reserve/emergency pools);
 - 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.;
 - 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 determinations by the Division concerning final Total Maximum Daily Loads ("TMDLs") pursuant to 5 CCR 1002-93 and section 21.18 of these rules.
- 3) The Division shall provide the opportunity for a formal public adjudicatory hearing in the following cases:
- a) Adjudications of discharge permits issued pursuant to section 25-8-501 through 504, C.R.S. including major permit modifications as specified in section 21.7 (B) of this regulation.
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- b) Appeals of the determination of civil penalties shall be heard by the Executive Director or his/her designee, pursuant to section 25-8-608, C.R.S. for:
 - (i) violations of any surface water discharge permit or portions thereof;
 - (ii) discharging to surface waters without a permit; or
 - (iii) engaging in activities without a surface water discharge permit when such a permit is required.
- c) Upon request of the permit applicant or permittee or any aggrieved person, review of technology-based effluent limitations based on best professional judgment, in accordance with section 24-4-105, C.R.S., these Procedural Rules and section 61.7 of the Colorado Discharge Permit System Regulations, 5 CCR 1002-61. Said hearing shall be held as part of a hearing requested to challenge the conditions of the permit under section 21.7 of this regulation. The necessity of effluent limitations based on best professional judgment, as well as the reasonableness of the effluent limitation, considering all the factors enumerated in section 61.8(2)(a)(ii) of the permit regulations (5 CCR 1002-61), must be supported by substantial evidence.
- d) Notices of alleged violations, pursuant to sections 25-8-602 and 603, C.R.S., for:
 - (i) violation of an order, permit, or control regulation;
 - (ii) discharging to state waters without a permit; or
 - (iii) engaging in activities without a surface water discharge permit when such a permit is required.
- e) Reviews of determinations made pursuant to the Colorado Primary Drinking Water Regulations including:
 - i) violations cited in enforcement orders;
 - ii) denials and revocations of integrated system applications and approvals;
 - iii) denials of plans and specifications;
 - iv) compliance schedules for exemptions and variances from maximum contaminant levels;
 - v) approvals and denials of variances and exemptions; and
 - vi) denials and revocations of disinfection waivers.

B. Requests for Adjudicatory Hearings

- 1) All requests for adjudicatory hearings must be timely filed pursuant to this regulation and applicable statutory requirements (see, e.g., 5 CCR 1002-61 Colorado Discharge Permit System Regulations, 5 CCR 1002-22 Procedural Regulations for Site Applications for Domestic Wastewater Treatment; section 25-8-603, C.R.S. regarding notices of violation; 5 CCR 1003-1 Primary Drinking Water Regulations.)
- 2) All requests for adjudicatory hearings shall contain the following information:

- a) Identification of the person(s) requesting the hearing and the subject matter of the request;
- b) The statutory and regulatory authority that forms the basis for the request;
- c) The basis upon which the applicant believes the Commission or the Division has committed error with respect to the subject matter of the request; and
- d) An estimate of the time that will be required for the hearing.

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.
- 4) In fixing the time and place for a hearing due regard shall be had for the convenience and necessity of the parties and their representatives.
- 5) Public notice may contain requirements with respect to special procedures, including requirements for written testimony, which the Commission or the Division deems appropriate as to any particular adjudicatory proceeding.
- 6) An amended notice may be issued by the Commission or the Division at any time prior to the hearing without necessitating a continuance of the hearing date, provided the original notice is not substantially altered to the prejudice of any party. If an amendment is substantial and prejudicial, the hearing date shall be continued to an appropriate date as determined by the Commission or the Division.
- 7) The Commission or the Division may continue a hearing to another date by issuing written notice to that effect at any time prior to the close of the record, or by announcement at the date, time and place of the original hearing.

D. Party Status

- 1) The notice issued pursuant to section 21.4(C) of this regulation shall prescribe a date by which application for party status shall be filed, which will not be less than 15 days prior to the hearing. Thereafter application to be made a party shall not be granted except upon motion and for good cause shown. Any person who requests an adjudicatory hearing shall be granted party status and need not apply therefor.
- 2) A person who may be affected or aggrieved by the agency action shall be admitted as a party to the proceeding upon filing a timely written request. One original, email attachment or fax of each party status request shall be submitted in accordance with the requirements of this subsection.

- 3) Application to be made a party shall set forth a brief and plain statement of the reasons for seeking party status, the facts which entitle such person to be admitted, and the matters which such person claims should be decided. In addition it should contain a description of the general nature of the evidence to be presented in the course of the proceedings.
- 4) Party status may be granted by the Commission or its designee, or by the Division or its designee. Party status may be granted at the prehearing conference or other appropriate time prior to the hearing.
- 5) The Division shall automatically be a party in adjudicatory proceedings before the Commission in which it participates. In hearings held by the Division, whether or not conducted by a hearing officer as provided in section 25-8-401(4) C.R.S., the Division shall not be a party; however staff of the Division may participate as if an adversary in any such proceedings, with all the rights of a party, upon approval of the person conducting the hearing, when it is deemed appropriate for the establishment of an adequate record.
- 6) Nothing in this subsection shall prevent the Commission or the Division from admitting any person as a party to any proceedings for limited purposes.

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 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, each party or applicant for party status may be required to provide paper copies to the Commission Office in the number and by the deadline established in the hearing notice. The prehearing statement 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.

- 3) The object of the prehearing conference may include the formulation of stipulations respecting the issues to be raised, and witnesses and exhibits to be presented by the parties. The parties should make known at the prehearing conference any objections to the procedures or evidence that may be raised at the hearing. Stipulations may be made at the prehearing conference to reflect any matters which have been agreed to or admitted by the parties. A prehearing order shall be prepared by the person conducting the prehearing conference, or at his/her direction by any party, based upon the prehearing conference, which shall reflect any ruling made by the Commission or the Division with respect to procedures to be followed at the hearing or any other matter.
- 4) Any additional documentation to be submitted after the prehearing conference as permitted by this regulation shall be delivered to the Commission Office within 5 working days after the prehearing conference unless otherwise provided in the notice of hearing or by the chairperson of the prehearing conference.

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 a nondispositive pre-hearing motion or pleading, though the Hearing Chair retains discretion to refer any pre-hearing motion or pleading to the full Commission for decision.

G. Discovery

- 1) The Commission or its staff, the Division or any party to an adjudicatory hearing may take depositions and fix the time and place therefor. Such persons may also engage in the other forms of discovery provided by the Colorado rules of civil procedure, to the extent that time is available prior to the hearing for such discovery.
- 2) The Commission, the Division, or a duly-appointed designee may dispose of motions relating to discovery.
- 3) Discovery shall be completed no later than five days prior to the hearing date, except as otherwise ordered by the Commission, the Division, or a duly-appointed designee. Any notice of hearing issued in accordance with section 21.4(C) shall be valid, and the hearing may proceed, regardless of whether the period between notice and hearing is sufficient to enable all discovery to be completed.

H. Subpoenas

Subpoenas shall be issued without discrimination between public and private parties by the Commission or the Division. A subpoena shall be served in the same manner as a subpoena issued by a district court. Upon failure of any witness to comply with such subpoena, the Commission or the Division may petition any district court, setting forth that due notice has been given of the time and place of attendance of the witness and the service of the subpoena; in which event, the district court, after hearing evidence in support of or contrary to the petition may enter an order as in other civil actions compelling the witness to attend and testify or produce books, records, or other evidence, under penalty of punishment for contempt in case of contumacious failure to comply with the order of the court. A witness shall be entitled to the fees and mileage provided for a witness in a court of record.

I. Hearing Officers

- 1) The Commission or the Division may designate a hearing officer pursuant to part 10 of article 30 of title 24, C.R.S., subject to appropriations made to the Department of Public Health and Environment. When appropriate, the hearing officer may be an employee of the Department of Public Health and Environment or a member of, or the Administrator of, the Commission, except that no person engaged in conducting a hearing or participating in a decision or an initial decision shall be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigatory or prosecuting functions for the agency.
- 2) Upon the filing in good faith by a party of a timely and sufficient affidavit of personal bias of a decision-maker the hearing officer, the Commission or the Division shall forthwith rule upon the allegations in such affidavit as part of the record in the case. A hearing officer may at any time withdraw for good cause shown in which case another hearing officer may be assigned to continue the case, and he/she shall do so in such manner that no substantial prejudice to any party results therefrom. A member of the Commission, the Division employee conducting a hearing, or the Administrator of the Commission if conducting a hearing, may withdraw for any like reason and in like manner, unless such withdrawal makes it impossible for the agency to render a decision.

J. Conduct of Hearings

- 1) The Commission or the Division or any duly authorized designee conducting a hearing shall have authority to administer oaths and affirmations; sign and issue subpoenas; rule upon offers of proof and receive evidence; dispose of motions relating to the discovery and production of relevant documents and things for inspection, copying, or photographing; regulate the course of the hearing, set the time and place for continued hearings, and fix the time for the filing of briefs and other documents; direct the parties to appear and confer to consider the simplification of the issues, admissions of fact or of documents to avoid unnecessary proof, and limitation of the number of expert witnesses; issue appropriate orders which shall control the subsequent course of the proceedings; dispose of motions to dismiss for lack of agency jurisdiction over the subject matter or parties or for any other ground; dispose of motions to amend or to dismiss for lack of agency jurisdiction over the subject matter or parties or for any ground; dispose of motions to amend or to dismiss without prejudice applications and other pleadings; dispose of motions to intervene, procedural requests, or similar matters; reprimand or exclude from the hearing any person for any improper or indecorous conduct in his or her presence; award attorney fees for abuses of discovery procedures or as otherwise provided under the Colorado rules of civil procedure; and take any other action authorized by this rule consistent with the APA or in accordance, to the extent practicable, with the procedure in the district courts. All parties to the proceeding shall also have the right to cross-examine witnesses who testify at the proceeding. In the event more than one person engages in the conduct of a hearing, such persons shall designate one of their members to perform such of the above functions as can best be performed by one person only, and thereafter such person only shall perform those functions which are assigned to him or her by the several persons conducting such hearing.
- 2) All parties to the proceeding shall have the right to cross-examine witnesses who testify at the proceeding to the extent necessary for a full and true disclosure of the facts, and to make objections at the proceedings.
- 3)
 - a) In hearings before the Commission or the Division with respect to any alleged violation of a control regulation, permit or order, or the imposition of a civil penalty, the burden of proof shall be upon the Division;

- b) In hearings on orders or determinations of the Division concerning 401 certifications under section 25-8-302(1)(f) C.R.S., variances, site locations, the design of domestic wastewater treatment works, or TMDLs, the burden of proof shall be upon the person requesting the hearing;
 - c) In hearings on variance decisions by the Division which do not involve discharge permit conditions required by the Federal Act, the variance applicant shall bear the burden of proof;
 - d) In hearings on discharge permits, the burden of proof shall be assigned in accordance with the requirements of section 61.7(d) of the Colorado Discharge Permit System Regulations, 5 CCR 1002-61.
- 4) Every party to the proceeding shall have the right to present its case or defense by oral and documentary evidence and to submit rebuttal evidence. Where a hearing will be expedited and the interests of the parties will not be substantially prejudiced thereby, a person conducting a hearing may receive all or part of the evidence in written form.
 - 5) The rules of evidence and of civil procedure and requirements of proof shall conform, to the extent practicable, with those in civil nonjury cases in the district courts. However, when necessary to do so in order to ascertain facts affecting the substantial rights of the parties to the proceedings, the person so conducting the hearing may receive and consider evidence not admissible under such rules if such evidence possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs. Objections to evidentiary offers may be made and shall be noted in the record. The person conducting a hearing shall give effect to the rules of privilege recognized by law. He or she may exclude incompetent and unduly repetitious evidence. Documentary evidence may be received in the form of a copy or excerpt if the original is not readily available, but, upon request, the party shall be given an opportunity to compare the copy with the original.
 - 6) The Commission or the Division may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.
 - 7) The Commission or the Division may take notice of general, technical, or scientific facts within its knowledge, but only if the fact so noticed is specified in the record or is brought to the attention of the parties before final decision and every party is afforded an opportunity to controvert the fact so noticed.
 - 8) Any party, or the agent, servant, or employee of any party, permitted or compelled to testify or to submit data or evidence shall be entitled to the benefit of legal counsel of his or her own choosing and at his or her own expense, but a person may appear on their own behalf. An attorney who is a witness may not act as counsel for the party calling him or her as a witness. Any party, upon payment of a reasonable charge therefor, shall be entitled to procure a copy of the transcript of the record or any part thereof. Any person permitted or compelled to testify or to submit data or evidence shall be entitled to the benefit of legal counsel of his or her own choosing and, upon payment of a reasonable charge therefor, to procure a copy of the transcript of his or her testimony if it is recorded.
 - 9) Prompt notice shall be given of the refusal to accept for filing or the denial in whole or in part of any written applications or other request made in connection with any agency proceeding or action, with a statement of the grounds therefor.

- 10) The hearing officer shall cause the proceedings to be recorded by a reporter or by an electronic recording device. When required, the hearing officer shall cause the proceedings, or any portion thereof, to be transcribed, the cost thereof to be paid by the agency when it orders the transcription or by any party seeking to reverse or modify an initial decision of the hearing officer. If the agency acquires a copy of the proceedings, its copy of the transcription shall be made available to any party at reasonable times for inspection and study.
- 11) The presiding officer may allow the parties to submit evidence not previously submitted under prehearing conference procedures, but only for good cause shown, such as where necessary for purposes of rebuttal.
- 12) All hearings shall be conducted in the following order unless otherwise directed by the Commission or its designee:
 - a) Call to order, introductory remarks, and action on applications for party status;
 - b) Presentation of any stipulations or agreements of the parties, prehearing statements, proposed findings of fact, proposed conclusions of law, the prehearing order, and any other matter which was addressed at the prehearing conference;
 - c) Opening statements by the party upon whom the burden of proof rests;
 - d) Opening statements by all other parties;
 - e) Presentation of case-in-chief by party upon whom burden of proof rests;
 - f) Presentation by all other parties wishing to offer evidence in the order to be determined by the chairperson or the presiding officer at the hearing;
 - g) Rebuttal by the party upon whom the burden of proof exists;
 - h) Closing statement by party upon whom the burden of proof rests;
 - i) Closing statements of all other parties;
 - j) At the conclusion of any witness' testimony, or at the conclusion of the party's entire presentation, as may be determined by the hearing officer, chairperson, or presiding officer, all other parties may then cross examine such witness or witnesses. The order of cross-examination shall be determined by the hearing officer, chairperson or the presiding officer. The Commission or the Division by themselves or through counsel may examine any witness called by any party;
 - k) At the discretion of the hearing officer, chairperson, or presiding officer, any person, not a party to the proceedings who wishes to present testimony may do so by indicating his or her desire in writing. A sign-up form will be available prior to and during the hearing. Voluntary testimony not specifically requested per the written form may still be allowed. The parties shall be given an opportunity to respond to non-party evidence in a manner deemed appropriate by the presiding officer to avoid prejudice;
 - l) All briefs and memoranda of law which counsel choose to file shall be served on the Commission, Division, or their designees and all parties and persons who have applied for party status five (5) days prior to the hearing, unless otherwise specified.

- 13) No ex parte communications with or by the trier of fact or its designee may occur during the pendency of an adjudicatory proceeding, but the Commission or the Division by letter, copy to all parties, may request that certain information be provided to them or that certain tasks shall be performed.
- 14) The agency, after receipt of the evidence, may allow or require parties to present oral or written summations of the facts and the law, or both, either at the hearing or subsequent thereto, as deemed appropriate.

K. Final Agency Action

- 1) The agency shall proceed with reasonable dispatch to conclude any matter presented to it with due regard for the convenience of the parties or their representatives, giving precedence to rehearing proceedings after remand by court order.
- 2) The decision by the agency or initial decision by a hearing officer shall be based on the record. The record shall include: All pleadings, applications, evidence, exhibits and other papers presented or considered, matters officially noticed, rulings upon exceptions, any findings of fact and conclusions of law proposed by any party, and any written brief filed.
- 3) In any case in which the agency has conducted the hearing, the agency shall prepare, file, and serve upon each party its decision. In any case in which a hearing officer has conducted the hearing, the hearing officer shall prepare and file an initial decision which the agency shall serve upon each party, except where all parties with the consent of the agency have expressly waived their right to have an initial decision rendered by such hearing officer. Each decision and initial decision shall include a statement of findings and conclusions upon all the material issues of fact, law, or discretion presented by the record and the appropriate order, sanction, relief, or denial thereof. In the absence of an appeal to the agency by filing exceptions within thirty days after service of the initial decision of the hearing officer upon the parties, unless extended by the agency, or a review upon motion of the agency within thirty days after service of the initial decision of a hearing officer, every such initial decision of a hearing officer shall thereupon become the decision of the agency. In such case the evidence taken by the hearing officer need not be transcribed.
- 4) Any party who seeks to reverse or modify the initial decision of the hearing officer shall promptly file with the agency a designation of the parts of the transcript of the proceedings which shall be prepared and advance the cost thereof. A copy of this designation shall be served on all parties. Within 10 days thereafter, any other party or the agency may also file a designation of additional parts of the transcript of the proceedings which is to be included and advance the cost therefor. The transcript or the parts thereof which may be designated by the parties or the agency shall be prepared by the reporter or, in the case of an electronic recording device, the agency and shall thereafter be filed with the agency. No transcription is required if the agency's review is limited to a pure question of the law. The agency may permit oral argument. The grounds of the decision shall be within the scope of the issues presented on the record. The record shall include all matters constituting the record upon which the decision of the hearing officer was based, the rulings upon the proposed findings and conclusions, the initial decision of the hearing officer, and any other exceptions and briefs filed.
- 5) The findings of evidentiary fact, as distinguished from ultimate conclusions of fact, made by the hearing officer shall not be set aside by the agency on review of the hearing officer's initial decision unless such findings of evidentiary fact are contrary to the weight of the evidence. The agency may remand the case to the hearing officer for such further proceedings as it may direct, or it may affirm, set aside, or modify the order of any sanction or relief entered therein, in conformity with the facts and the law.

An order, permit, sanction, relief, or the equivalent or denial thereof which constitutes final agency action shall include a list of all parties to the agency proceeding and shall specify the date on which the action becomes effective.

- 6) Each decision and initial decision shall be served on each party by personal service or by mailing by first-class mail to the last address furnished the agency by such party and shall be effective as to such party on the date mailed or such later date as is stated in the decision.

21.5 Business Meetings and Informal Hearings

A. Business Meetings

- 1) The Commission shall hold regularly scheduled meetings as required by the Act for the conduct of its business, and such meetings are not subject to the requirements of the APA.
- 2) Dates for such meetings shall be set by agreement of the Commission members.
- 3) Agendas for such meetings shall be published and mailed to the Commission members and all persons on the mailing list required to be kept by section 302(1)(e) of the Act, at least five days prior to each meeting.
- 4) The proceedings of all such meetings shall be taped or otherwise recorded.
- 5) The chairperson of the Commission, an officer of the Commission, or a duly-appointed member of the Commission shall preside at each business meeting.
- 6) Business meetings should be conducted in accordance with Robert's Rules of Order-Revised but may proceed on an informal basis.
- 7) At business meetings the Commission may, in addition to other business, receive reports from the Division, the Administrator, or the Attorney General, or any other person at the discretion of the Commission. Any person seeking Commission action on any matter not already included on the agenda shall submit such matter to the Commission at least seven days prior to the meeting. Matters submitted beyond this deadline shall be considered at the next subsequent meeting, unless the Commission determines for good cause shown that the matter should be acted upon immediately.
- 8) All business meetings of the Commission shall be open to the public. However, the Commission may, in accordance with the Public Meetings Law, the Public Records Act, or as otherwise provided by law, exclude the public from attendance with respect to specific individual matters.
- 9) Members of the public may participate in business meetings in an appropriate manner as determined by the Commission in its discretion.

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 which result in a Commission approval action. The purposes of such hearings may include, but need not be limited to:
- a) Approval of Commission policy documents that do not have regulatory effect and are not intended to be binding;
 - b) Approval of proposed Section 319 nonpoint source project funding priorities;
 - c) Approval of Section 208 water quality management plans which shall include recommendations approved by the Commission following deliberation;
 - 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 will be published in the non-rulemaking section of the Colorado Register at least 20 days in advance on the hearing. There is no formal "party status" or mailing list status, generally written comments are not required to be mailed or e-mailed to other hearing participants, no prehearing conference is held, and generally no transcript is prepared. Written comments submitted prior to the hearing are encouraged, but written or oral comments are accepted at the hearing.

21.6 Appeals from Decisions of the Division Under Section 702 of the Act (Site Locations, Designs for Construction or Expansion)

- A. The Division shall review site applications and designs for the construction of domestic wastewater treatment works or the enlargement of the capacity of an existing domestic wastewater works, in accordance with section 702 of the Act and the regulations promulgated thereunder, 5 CCR 1002-22, Regulation No. 22 et seq. The Division shall not conduct hearings pursuant to section 21.4 of this regulation with respect to such matters.
- B. Decisions by the Division on site approvals or facility designs must be appealed to the Commission by any person adversely affected or aggrieved as a prerequisite to the right of judicial review pursuant to the APA. 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 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 90 days of the filing of the appeal the Commission shall commence a hearing to consider such appeals in accordance with section 105 of the APA and section 21.4 of this regulation. If appeal is made to the Commission, the decision shall be made in accordance with the criteria specified in Regulation No. 22 section 22.5 of the regulations for site applications.

21.7 Hearings on Discharge Permits

- A. Discharge permits required by section 501 of the Act shall be issued in accordance with the procedures specified in part 5 of the Act, section 105 of the APA, the discharge permit regulations, 5 CCR 1002-61, and section 21.4 of this regulation. In the event of a conflict between this regulation and the discharge permit regulations, the latter shall prevail.

- B. An applicant seeking a discharge permit or a modification of its existing permit or any person adversely affected or aggrieved by a Division determination regarding issuance or a condition of a discharge permit is entitled to a hearing in accordance with section 24-4-105, C.R.S.
- C.
- 1) Any applicant for a renewal permit may appeal the action of the Division on such permit to a hearing officer in accordance with section 24-4-105, C.R.S.
 - 2) Following the filing of the appeal and within 30 days of the issuance of the renewal permit, the applicant may request that the Division stay the contested terms and conditions of the permit. The Division shall act upon the stay request within 10 days of its receipt and shall grant the request if it reasonably appears that serious harm would otherwise result and refusal to grant a stay would be without sufficient corresponding public benefit.
 - 3) Any stay granted pursuant to this section shall expire upon action by the hearing officer under section 24-4-105, C.R.S. During the period of the stay the terms and conditions of the prior permit corresponding to the contested terms and conditions of the renewal permit shall be effective and enforceable.
 - 4) The decision to grant or deny a stay shall be subject to determination pursuant to section 25-8-404(4), C.R.S.
- D. If the Division issues a temporary permit pursuant to section 25-8-502(5)(a)(1) of the Act and section 61.9(A) of the Permit Regulations, the permit applicant may appeal the decision of the Division with respect to the temporary permit in accordance with section 21.4.A (3)(a) of this regulation.
- E. If an existing or temporary permit is extended by operation of section 25-8-502(5)(a)(l) of the Act and section 24-4-104 of the APA, public notice of the permit extension shall be given.

21.8 Water Quality Designations, Stream Standards and Classification Hearings pursuant to Section 25-8-207 C.R.S.

- A. Substantive requirements relating to reviews pursuant to section 25-8-207, C.R.S., are set forth in the Basic Standards and Methodologies for Surface Water, Regulation No. 31, section 31.6(3)(b).
- B. Hearings for review of existing water quality designations, stream standards and classifications pursuant to section 25-8-207 of the Act shall be subject to the notice and hearings requirements required for stream standard setting and use classification hearings provided in section 21.3M(1) and (2) of this regulation. Rulemaking hearings with respect to water quality designations, classifications and standards adopted prior to July 1, 1992, under this section shall be held as soon as practicable consistent with the requirements of the Commission's procedural regulations.
- C. The petitioner for review under section 25-8-207 of the Act shall bear the burden of proof. The petition shall include allegations which, if proven, are sufficient to support a finding pursuant to section 25-8-207 of the Act and section 31.6(3)(b) of the Basic Standards and Methodologies for Surface Water, 5 CCR 1002-31, along with an alternative designation, standard or classification and a statement of Basis and Purpose for the alternative proposal. Except as provided in this section all petitions for review under this section shall comply with the requirements for proposals for rulemaking under section 21.3.B of this regulation.

- D. Upon petition for a review under section 25-8-207, the Commission shall, in addition to public notice, give notice to all dischargers on the segment to be reviewed and other interested persons of which it has actual knowledge that the water quality designations, segment stream standards and use classifications shall not again be reviewed under section 25-8-207 until triennial review under section 25-8-202 C.R.S., except upon the Commission's own motion. All dischargers on the affected segment and all other interested persons shall be entitled to participate in the review as provided in section 21.3 of this regulation.
- E. Except as provided in this section, hearings under this section shall be held in accordance with the requirements of section 21.3 of this regulation.

21.9 Hearing on Variance Requests

- A. The Division may grant variances from control regulations or from discharge permit conditions pursuant to the authority granted in sections 205(6), 401(5) and 503(9) of the Act. The Division may grant a variance from otherwise applicable requirements only to the extent authorized in the Federal Act or implementing regulations.

At least 20 days prior to its determination with respect to any variance request the Division shall provide the applicant with all objections to the granting of the variance and any other substantial adverse comments, as well as its proposed decision on the variance request. The applicant shall be given 10 days to respond to all objections, comments, and the proposed decision. The Division shall provide reasonable opportunity to the applicant and interested persons for informal meetings to discuss the variance request. The Division shall not conduct public hearing with respect to any variance prior to its final determination regarding the variance.

- B. If the Division decides to grant a variance prior to issuance of a discharge permit, the Division shall publish for public notice and comment pursuant to section 25-8-401(5)(B), C.R.S. the entire draft permit with the variance incorporated in the draft. If the Division decides to grant a variance after a discharge permit has been issued, the Division shall publish for public notice and comment pursuant to section 25-8-401(5)(B), C.R.S. the variance as a proposed modification to the discharge permit. If the Division decides to grant a variance regarding a provision of a control regulation that will not be incorporated into a discharge permit, the Division shall publish notice of its variance decision 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.

An applicant seeking a variance from a provision of a control regulation or from a discharge permit condition and any person adversely affected or aggrieved by a Division determination regarding a variance are entitled to a hearing in accordance with section 24-4-105, C.R.S. Hearings regarding Division variance decisions involving discharge permit conditions required by the Federal Act shall be conducted in accordance with section 21.7 of this regulation. Hearings regarding Division variance decisions not involving discharge permit conditions required by the Federal Act shall be conducted in accordance with subsection 21.9.C of this regulation.

- C. An applicant or any person adversely affected or aggrieved by a Division variance decision not involving discharge permit conditions required by the Federal Act may appeal the Division's determination to the Commission. 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 mailing of the Water Quality Information Bulletin to those persons on the mailing list maintained by the Division pursuant to section 25-8-302(1)(e), C.R.S. or prior to operation of any new or expanded facility that would be affected by the control regulation, whichever comes first. Hearings under this subsection shall be conducted in accordance with section 24-4-105, C.R.S. and section 21.4 of this regulation.

- D. An applicant may seek a variance not in compliance with the deadlines established by this section by filing with the Administrator of the Commission a written request demonstrating good cause for the late application. The Commission will, at its next regular meeting not less than 15 days following receipt of the request, determine whether the applicant has demonstrated good cause for the late request and may grant a hearing before the Commission or remand the request to the Division for a hearing pursuant to subsection B or may deny the request. Commission denial of the request constitutes final agency action subject to judicial review.
- E. The requirements of this section are in addition to the requirements of sections 61.12 of the Colorado Discharge Permit System Regulations, 5 CCR 1002-61.

21.10 Hearings on 401 Certifications

Decisions by the Division with respect to 401 certifications as authorized by section 302(1)(f) of the Act may be appealed to the Commission by any person adversely affected or aggrieved by any such decision. 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 mailing of 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. Such appeals shall be heard in accordance with section 105 of the APA and section 21.4 of this regulation. The filing and disposition of any such appeal is a prerequisite to the right of judicial review pursuant to the APA.

21.11 Hearings on Notice of Alleged Violations

- A. In any notice of violation (“NOV”) given under section 602 of the Act, the Division shall require the alleged violator to answer each alleged violation and may require the alleged violator to appear before it for a public hearing to provide such answer. Such hearing shall be held no sooner than 15 days after service of the notice; except that the Division may set an earlier date for hearing if it is requested by the alleged violator. The answer filed in compliance with this section shall affirm or deny each allegation of the Division.
- B. If the Division does not require an alleged violator to appear for a public hearing, the alleged violator shall provide the answer required by the previous subsection within 30 days after service of the notice, and the alleged violator may request the Division to conduct a hearing. Such request shall be in writing and shall be filed with the Division no later than 30 days after issuance of the NOV. If such request is filed, a hearing shall be held within a reasonable time. The filing of an answer does not itself constitute a hearing request.
- C. If a hearing is held pursuant to the provisions of this section, it shall be public and, if the Division deems it practicable, shall be held in any county in which the violation is alleged to have occurred. The Division shall conduct any such hearing in accordance with section 105 of the APA and section 21.4 of this regulation.
- 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 24-4-105 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 the Water Quality Information Bulletin is published. 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.

21.12 Hearings on Civil Penalties

- A. The Division may assess civil penalties as provided in section 608 of the Water Quality Control Act and section 25-1-114.1 C.R.S. of the drinking water statutes.
- 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 the appellant desires to raise before the Commission or the Executive Director or his/her designee.
- C. The Commission or Division, as appropriate, shall conduct such hearings in accordance with section 105 of the APA and section 21.4 of this regulation. In any such hearing the Commission or Division shall not hear evidence for the purpose of determining if the underlying violations have occurred, but may only consider evidence relevant to the appropriateness of the amount of the penalty.
- D. Penalties may be collected by the Division by action instituted in a court of competent jurisdiction for collection of such penalties, where payment is not received within 60 days after final agency action assessing the penalties.

21.13 Declaratory Orders

- A. Any person may petition the Commission or the Division for a declaratory order to remove uncertainties as to the applicability to the petitioner of any statutory provision or of any rule or order of the Commission or Division. Such petitions shall not relate to the manner in which a statutory provision or rule is being applied.
- B. The Commission or the Division will determine, after notice to the petitioner and opportunity to be heard, whether to rule upon the merits of any such petition. The Commission shall dispose of such matters as regular business items at a business meeting.
- C. In determining whether to rule upon a petition filed pursuant to this section, the following matters will be considered among others:
 - 1) Whether a ruling on the petition will remove uncertainties as to the applicability to petitioner of any statutory provision or rule or order of the Commission or the Division.
 - 2) Whether the petition involves any subject, question or issue which is the subject of a formal or informal matter or investigation currently pending before the Commission or the Division.
 - 3) Whether the petition involves any subject, question or issue which is the subject of a formal or informal matter or investigation currently pending before the Commission or the Division or a court but not involving any petitioner.
 - 4) Whether the petition seeks a ruling on a moot or hypothetical question or will result in an advisory ruling or order.

- 5) Whether the petitioner has some other adequate legal remedy, other than an action for declaratory relief pursuant to rule 57, Colo. R. Civ. P., which will remove any uncertainty as to the applicability to the petitioner of the statute, rule or order in question.
- D. Any petition filed pursuant to this section shall set forth the following:
- 1) The name and address of the petitioner and whether the petitioner is the holder of a discharge permit pursuant to the Colorado Water Quality Control Act, section, 25-8-101 et seq. C.R.S.
 - 2) The statute, rule or order to which the petition relates.
 - 3) A concise statement of all the facts necessary to show the nature of the uncertainty and the manner in which the statute, rule or order in question applies or potentially applies to the petitioner.
- E. If the Commission or the Division determines that it will rule on the petition, the following procedures shall apply:
- 1) The Commission or the Division may rule upon the petition based solely upon the facts presented in the petition. In such a case:
 - a) Any ruling of the Commission or the Division will apply only to the extent of the facts presented in the petition and any amendment to the petition.
 - b) The Commission or the Division may order the petitioner to file a written brief, memorandum or statement of position.
 - c) The Commission or the Division may set the petition, upon due notice to the petitioner, for a non-evidentiary hearing.
 - d) The Commission or the Division may dispose of the petition on the sole basis of the matters set forth in the petition.
 - e) The Commission or the Division may request the petitioner to submit additional facts in writing. In such event, such additional facts will be considered as an amendment to the petition.
 - f) The Commission or the Division may take administrative notice of facts pursuant to the APA (section 24-4-105(8), C.R.S.) and may utilize its experience, technical competence and specialized knowledge in the disposition of the petition.
 - g) If the Commission or the Division rules upon the petition without a hearing, it shall promptly notify the petitioner of its decision.
 - 2) The Commission or the Division may, in its discretion, set the petition for hearing, upon due notice to petitioner, for the purpose of obtaining additional facts or information or to determine the truth of any facts set forth in the petition or to hear oral argument on the petition. The notice to the petitioner setting such hearing shall set forth, to the extent known, the factual or other matters into which the agency intends to inquire. For the purpose of such a hearing, to the extent necessary, the petitioner shall have the burden of proving all of the facts stated in the petition, all of the facts necessary to show the nature of the controversy or uncertainty and the manner in which the statute, rule or order in question applies or potentially applies to the petitioner and any other facts the petitioner desires the Commission or the Division to consider.

- F. The parties to any proceeding pursuant to this section shall be the petitioner and the Division if appropriate.
- G. Any declaratory order or other order disposing of a petition pursuant to this section shall constitute final agency action subject to judicial review pursuant to the APA (section 24-4-106 C.R.S.).

21.14 Reconsideration

A. Reconsideration of Adjudicatory Action Upon Motion of a Party

- 1) During the time permitted for seeking judicial review of any final order or determination of the Commission or Division rendered in any adjudicatory proceeding, any party directly affected by such order or determination may apply to the Commission or the Division, as appropriate, for a hearing or rehearing with respect to, or reconsideration of, such order or determination. The determination by the Commission or the Division of whether to grant or deny the application for a hearing, rehearing, or reconsideration shall be made within ten days after receipt by the Commission or Division of such application. Such determination by the Commission may be made by telephone or mail or at a meeting, but in any event shall be confirmed at the next meeting of the Commission.
- 2) If the application for a hearing, rehearing, or reconsideration is granted, the order or determination to which such application pertains shall not be considered final for purposes of judicial review, and the Commission or the Division may affirm, reverse, or modify, in whole or in part, the pertinent order or determination; thereafter such order or determination shall be final and not subject to stay or reconsideration under this section.
- 3) If the application for a hearing, rehearing, or reconsideration is denied, the order or determination to which such application pertains shall be considered final agency action as of the date specified in section 21.4(K)(6). An application under this section extends the time period for seeking judicial review of the original order or determination only for the number of days that it is pending, since such an application merely stays the time period for seeking judicial review.
- 4) The decision to grant or deny a hearing, rehearing or reconsideration pursuant to this section is not subject to judicial review.

B. Reconsideration of Rulemaking Action

Reconsideration of rulemaking action of the Commission may be sought in accordance with the provisions of section 21.3(B)(2) pertaining to petitions for rulemaking. Any such request shall be evaluated according to the established regulations and policies of the Commission where applicable, and may be granted for good cause shown. Such a request is not a pre-requisite to the right of judicial review of the rule on which it is based and does not affect the time period for seeking judicial review of the rule. The decision to grant or deny such request is not itself final agency action subject to judicial review.

C. Reconsideration of Decisions by the Division or the Executive Director of the Department of Public Health and Environment (or His/Her Designee) Upon Own Motion

Where any person appeals to the Commission a decision or order of the Division or the Executive Director of the Department of Public Health and Environment (or his/her designee), the Division or the Executive Director (or his/her designee) shall retain continuing jurisdiction over the decision or order until the Commission holds its appeal hearing, and may reconsider and revise the decision or order at any time prior to said hearing. Prior to reconsidering and revising any such decision or order, the Division or the Executive Director (or his/her designee) shall consult with all interested parties. If the person who has requested the hearing no longer wishes to have the hearing after the decision or order has been reconsidered and revised, the person shall file a notice of withdrawal of appeal with the Commission, and the hearing shall not be held. The revised decision or order shall then be subject to appeal to the Commission pursuant to the provisions of the Act, the drinking water statutes and this regulation.

21.15 Definitions

The definitions of terms used in this regulation shall be in accordance with the Act, the drinking water statutes, the APA, and other applicable regulations of the Commission unless the context requires otherwise.

21.16 Antidegradation Review Procedures-Public Participation and Intergovernmental Coordination

- A. Substantive provisions relating to antidegradation reviews are set forth in the Basic Standards and Methodologies for Surface Water, Regulation No. 31, section 31.8 (5 CCR 1002-31).
- B. Notice of Preliminary Antidegradation Review Determination

These notice requirements apply to activities with new or increased water quality impacts that may degrade the quality of reviewable waters subject to antidegradation review requirements (see Basic Standards and Methodologies for Surface Water, Regulation No. 31, section 31.8(1)(b)).

- 1) Notice that the Division has reached a preliminary antidegradation review determination shall be provided at the time and in the manner described below for each category of Division reviews. Only one antidegradation review shall occur, in conjunction with the earliest applicable Division review listed below; provided, that the Division may perform a supplemental antidegradation review if it determines that subsequent changes in the project would result in substantially different water quality impacts
 - a) When the Division receives notification that section 201 facility planning will occur for sewage treatment plan projects seeking a grant or loan; the Division shall give notice of the preliminary antidegradation determination by publication in the next feasible Water Quality Information Bulletin sent to persons on the mailing list maintained by the Division pursuant to section 25-8-302 (1)(e), C.R.S., and by mailing a copy of the preliminary antidegradation determination to the activity proponent, Environmental Protection Agency, any regional council of governments, county, local health department, and cities and towns that the Division believes may be affected by the proposed activity, and to any persons that the activity proponent requests receive such notice.

- b) When the Division receives a request for approval of the site location or design of domestic wastewater treatment works, pursuant to section 25-8-702, C.R.S.; the Division shall give notice of the preliminary antidegradation determination by publication in the next feasible Water Quality Information Bulletin sent to persons on the mailing list maintained by the Division pursuant to section 25-8-302 (1)(e), C.R.S., and by mailing a copy of the preliminary antidegradation determination to the activity proponent, Environmental Protection Agency, any regional council of governments, county, local health departments, and cities and towns that the Division believes may be affected by the proposed activity, and to any persons that the activity proponent requests receive such notice.
 - c) When the Division receives a surface water discharge permit application, pursuant to section 25-8-501 C.R.S.; the Division shall give notice of the preliminary antidegradation determination by inclusion with the notice of the proposed permit pursuant to the procedures in section 61.5(2)(e), of the Colorado State Discharge Permit System Regulations.
 - d) When the Division receives a request for section 401 certification, pursuant to section 25-8-302(1)(f), C.R.S., the Division shall give notice of the preliminary antidegradation determination in the draft certification determination and by inclusion in the next feasible Water Quality Information Bulletin sent to persons on the mailing list maintained by the Division pursuant to section 25-8-302(1)(e), C.R.S., and by mailing a copy of the preliminary draft certification determination to the activity proponent, Environmental Protection Agency, any regional council of governments, county, local health departments, and cities and towns that the Division believes may be affected by the proposed activity, and to any persons that the activity proponent requests receive such notice.
- 2) The notice of antidegradation review determination shall include:
- a) Identification of the proponent of the proposed activity;
 - b) A description of the type of proposed activity;
 - c) Identification of the stream segment, river basin, and county in which the proposed activity is located;
 - d) The preliminary antidegradation review determination of the Division, including the rationale for the determination citing the considerations in Regulation No. 31, section 31.8(3) of the Basic Standards and Methodologies for Surface Water.
 - e) A request for the submission of comments (within 30 days or such longer period as the Division may establish) regarding:
 - i) The significance of any water quality degradation expected to result from the proposed activity;
 - ii) Whether the proposed activity is important economic or social development; and
 - iii) Whether there are economically, environmentally, and technologically reasonable water quality control alternatives available that would result in no degradation or less degradation of state waters.

C. Final Antidegradation Review Determination

- 1) Prior to making its final antidegradation review determination, the Division shall consider all comments received in response to the notices required by this section.
- 2) At its discretion, prior to making its final antidegradation review determination the Division may conduct one or more public meetings to receive or exchange information regarding the proposed activity, if the Division determines that such a meeting would be helpful.
- 3) For those projects requiring 401 certification that the Corps of Engineers determines require an environmental impact statement (EIS) and/or a public hearing, the Division shall not make a final antidegradation review determination until such EIS or hearing is completed.
- 4) The Division shall not make a final antidegradation review determination for those discharge permits for which a public meeting is conducted until the public meeting(s) provided for in section 61.5(3) of the Colorado State Discharge Permit System Regulations have been completed.
- 5) Copies of the final determination shall be circulated to the activity proponent and to all persons requesting notification in response to the earlier notice of antidegradation review.

D. Appeals of Final Determinations

- 1) The Division's determination of the significance of any water quality degradation pursuant to Regulation No. 31, section 31.8(3)(c) of the Basic Standards and Methodologies for Surface Water, and its determination whether degradation is necessary to accommodate important economic or social development in the area in which the waters are located, pursuant to section 31.8(3)(d) of that rule, shall be subject to *de novo* review by the Commission in accordance with the procedures set forth in section 21.4 of this rule.
- 2) A review of a final antidegradation review determination by the Division may be initiated on the Commission's own motion, pursuant to a petition by any interested person who has submitted written comments during the Division review process, or on the Commission's determination pursuant to section 24-4-105(2), C.R.S.

21.17 Potential Conflicts of Interest

A. Definitions

For purposes of this regulation, the following definitions shall apply:

- 1) "Actual conflict of interest" means a direct and substantial financial interest of a Commission member or his/her employer in the outcome of any rulemaking, adjudication, or other action under consideration by the Commission. An official act directly and substantially affecting to its economic benefit a business or other undertaking in which a Commission member either has a substantial financial interest or is engaged as counsel, consultant, representative, or agency would constitute an actual conflict of interest.
- 2) "Apparent conflict of interest" means an interest in the outcome of any rulemaking, adjudication, or other action under consideration by the Commission that is not an actual conflict of interest but presents circumstances in which the public is likely to reasonably perceive that a Commission member has personal interests that demonstrate bias and will make it difficult for him/her to participate objectively in the action under consideration.

Neither an actual nor an apparent conflict of interest exists merely from the fact that a Commission member or his/her employer has a pre-established policy position on an issue under consideration.

B. Applicability

The provisions of this section shall apply to any and all proceedings requiring or resulting in a formal action by the Commission. Commission members shall not participate in such proceedings if an actual conflict of interest is determined to exist in accordance with this section, except as provided below. If an apparent conflict of interest is determined to exist, that fact shall be disclosed prior to Commission action.

C. Actual Conflict of Interest

- 1) If a member of the Commission perceives that he or she has an actual conflict of interest regarding any matter before the Commission, the Commissioner shall disclose the basis of the conflict of interest to the Commission and others in attendance before the discussion or hearing begins or as soon thereafter as the Commissioner perceives there is an actual conflict of interest and disqualify himself or herself from any further participation or voting on the matter at hand.
- 2) Members of the public, parties to the proceeding at issue, or other Commission members may bring to the Commission's attention circumstances that they believe constitute an actual conflict of interest for a Commission member with respect to the proceeding. If the Commission member in question does not agree that the conflict exists and does not agree that disqualification is appropriate, the Commission Chairman will ask for comments from the Attorney General's Office representative and from any members, parties, or public present. The Commission, after appropriate discussions, will vote on whether there is or is not an actual conflict of interest and the member will be bound by its vote. If the Commission determines that there is a conflict, such member shall be disqualified from further participation or voting on the matter at hand, except as provided below.
- 3) Commission members who do not participate in an action due to a conflict of interest will be counted as present for purposes of determining a quorum, if they remain present at the Commission proceeding in question. In this case, final action by the Commission requires a majority of the quorum present, counting both those members participating in the action and those not participating. The foregoing notwithstanding, if disqualification of the member or members in question would prevent Commission action, the member or members may participate in spite of an actual conflict of interest if they have complied with the disclosure requirements applicable to an apparent conflict of interest prior to acting.

D. Apparent Conflict of Interest

- 1) If a member of the Commission perceives that he or she may have an apparent conflict of interest regarding any matter before the Commission, the Commissioner shall disclose the basis of the possible apparent conflict of interest to the Commission and others in attendance before the discussion or hearing begins or as soon thereafter as the Commissioner perceives the possible apparent conflict of interest. Following this disclosure, the Commission member may participate in the proceeding, unless the Commissioner chooses to voluntarily disqualify himself/herself.
- 2) If a Commission member chooses to participate in a proceeding following disclosure of an apparent conflict of interest, the Commissioner may also give notice to the Secretary of State pursuant to section 24-18-110, C.R.S., listing the amount of any financial interest, the purpose and duration of any services rendered, and the compensation received for the services or such other information as is necessary to describe the Commissioner's interest.

- 3) In determining whether there is in fact an apparent conflict of interest that warrants disclosure, Commission members shall take into consideration:
- a) The need to maintain public confidence in the integrity of the government of the State of Colorado;
 - b) The likelihood that the Commission member in question will be able to participate objectively in the action under consideration;
 - c) The statutory requirement that Commission membership reflect geographical representation, including at least two members from west of the continental divide;
 - d) The statutory requirement that Commission membership reflect the various interests in water in the state;
 - e) The nature of the proceedings and issues in question (e.g. rulemaking v. informational hearings; issues of general applicability v. specific impact); and
 - f) Whether the potentially affected party or parties wish to waive their objection to the potential conflict (where the affected parties can be clearly defined).

21.18 Hearings on Total Maximum Daily Loads

The publication of a final TMDL in the Water Quality Information Bulletin constitutes the Division's determination on the final TMDL. Any 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 publication of a final TMDL in the Water Quality Information Bulletin. If no such appeal is timely filed, the Division may submit the final TMDL to EPA. If an appeal is timely filed, it shall be heard by the Commission in accordance with section 105 of the APA and section 21.4 of this regulation, except that notice of any adjudicatory hearing shall also be provided to all dischargers with Waste Load Allocations in the TMDL and to the proponent of a third-party TMDL. The Division will not submit the final TMDL to EPA until at least 30 days after the Commission's decision regarding any appeal becomes final. The filing and disposition of an appeal to the Commission is a prerequisite to the right of judicial review pursuant to the APA.

21.19 Reserved

STATEMENT OF FISCAL IMPACT PROCEDURAL REGULATIONS

Because these rules are procedural only, and they are deemed not to impose any substantive requirements, they have no measurable fiscal impact. Although these rules may result in costs or savings in particular cases, these specific results cannot be anticipated.

WATER QUALITY CONTROL COMMISSION Amended: May 15, 1984 Effective: June 30, 1984

21.20 Basis and Purpose

The purpose of this amendment is to remove apparent inconsistencies between two of the regulations recently adopted by the Commission with regard to the Act's provision in Section 204(3) for a hearing on the economic reasonableness of requiring treatment beyond secondary treatment. The amendment additionally extends the opportunity for a rulemaking hearing on stream classifications and/or numeric standards for ammonia and nitrite to all pollutants for which beyond secondary treatment may be required. The latter amendments could help resolve problems of conflicts between the Clean Water Act and State procedures alleged by EPA.

This amendment clarifies that when the Division proposes a permit that would require treatment beyond secondary treatment, the permittee must exercise the statutory right to a hearing given in Section 204(3) by requesting that hearing. In this way, only those permittees who believe that treatment beyond secondary treatment is economically unreasonable for their facilities will have hearings.

The amendment also clarifies that although the conditions requiring beyond secondary treatment will not go into effect during the review process, other permit conditions will go into effect as usual.

This amendment provides that, when a permittee requests a hearing under section 204(3), the Commission, may in its discretion, proceed first with a rulemaking hearing for the purpose of reclassifying, or changing the numeric standards of the stream segment into which the permitted facility discharges. In this manner, if a change in stream standards results that would in turn require a change in the permit conditions, the need for a hearing pursuant to section 204 (3) could be obviated. If, after rulemaking, the permittee was still desirous of proceeding with section 204(3) adjudicatory hearing, that right would still be available.

By adopting this amendment, the Commission intends to avoid two conflicts with the Clean Water Act (CWA) alleged by EPA. One is the granting of variances from stream classifications or standards for individual permittees. EPA contends that the granting of such variances is impermissible under the CWA; whereas, changes in classifications and standards are acceptable with certain limitations. The second alleged conflict is the prohibition in the CWA against a board or body which approves permit applications from having as a member any person who receives a significant portion of his income from a permit holder. The same prohibition does not apply to rulemaking, which affects permits, such as stream classifications.

Finally this amendment deletes from the permit regulations the reference to the "Footnote for Unionized Ammonia and Nitrite". In view of the other changes, this reference would be redundant.

FISCAL IMPACT STATEMENT

These amendments to clarify procedures for hearings pursuant to C.R.S. 1973, 25-8-204(3) (Beyond Secondary Treatment Requirements) have no fiscal impact which can be identified at this time. Any fiscal impacts that could be associated with this action would be more properly attributable to prior actions of the Commission. The Commission believes it has acted in an economically reasonable manner by adopting these amendments.

WATER QUALITY CONTROL COMMISSION Amended: May 8, 1985 Effective: June 30, 1985

21.21 STATEMENT OF BASIS, SPECIFIC STATUTORY AUTHORITY, AND PURPOSE:

This Statement of Basis, Specific Statutory Authority and Purpose is adopted in compliance with Section 24-4-103(4), C.R.S. (1982). The provisions of Sections 24-4-103(4) as amended in 1984; 25-8-202(1) (a), (b), (c), (f), (i) and (2); 25-8-401(2) C.R.S. provide the specific statutory authority for adoption of these regulatory amendments.

These amendments incorporate in the Commission's procedures the recently enacted statutory requirements of Section 24-4-103(4), C.R.S. that statements of basis and purpose and fiscal impact be prepared prior to rather than following rulemaking hearings which had been the practice. This will require the Commission to be specific in its proposals. Once having proposed a regulation, if one is adopted that varies from that which was proposed, parties to the hearing must be afforded an opportunity to comment.

The statutory requirement for triennial review of classification of waters, water quality standards, and control regulations does not specify the manner of such review. Federal regulation requires it to be through public hearing. These amendments provide the triennial review will be through informational hearings and that regional planning agencies will be consulted before making water quality standards and classifications revisions. Responses by regional planning agencies will be voluntary. With the initial stream classification and standard setting in place, requests for changes to them are coming primarily from entities other than the Water Quality Control Division which was the primary developer of the original classifications and standards. These amendments describe the procedure by which the Commission will go to rulemaking on proposals initiated by a permittee which may not be supported by the Division.

The revisions adopted to Sections 2.1.3 and 2.1.4 of the Procedural Regulations will reduce the burden on the Administrator of the Commission to mail prehearing statements to the Commission members.

FISCAL IMPACT STATEMENTS:

These amendments have no fiscal impact beyond that recognized by the General assembly when it adopted their underlying statutory authority.

Amended: April 14, 1986 Effective: May 30, 1986

21.22 Basis and Purpose:

These amendments bring the procedural regulations into compliance with Senate bill 83 which amended the Water Quality Control Act, section 25-8-101 through 703, C.R.S. (1982 & 1985 Supp.), effective June 4, 1985.

S.B. 83 corrects certain deficiencies in the State water quality permit program. EPA specifically identified three areas of the permit program which did not comport with Federal requirements. Each of these problems - inadequate coverage of activities for which criminal penalties could be imposed, variances from water quality standards granted to individual permittees through their permits without sufficient notice or a legitimate concurrent change in the water quality standards through rulemaking, and the Commission acting as an appellate body for reconsideration of decisions made on individual permits in contravention of the Federal law's conflict of interest provision - has been resolved through S.B. 83.

Section 2.1.8 previously titled Hearings Pursuant to Section 204(3) has been retitled to Stream Standards and Classifications Hearings Pursuant to section 25-8-207.

Section 207 of the State water quality act is the core provision of S.B. 83. It replaces the right to variances and/or beyond secondary treatment hearings with a mandatory rulemaking hearing, to be conducted expeditiously for classifications and standards adopted before the date of the enactment of S.B. 83. These hearings are for review of classifications, standards and regulations adopted under sections 203 and 204 of the Act.

Previously adopted classifications, standards and regulations are now to be re-evaluated, upon petition, for consistency with the legislative policies set forth in section 102 and 104 of the Act, and with section 207 itself. This last provision requires the Commission to determine whether standards for a segment previously classified for aquatic life are more stringent than necessary to protect fish, shellfish and/or wildlife in segments which are reasonably capable of sustaining such life based on physical characteristics. Further, section 207 provides that any previously adopted classification or standard based on material assumptions which were in error of no longer applies is also inconsistent with the section. Inconsistency leads to the Commission's voiding the classification or standard ab initio. On finding a classification or standard void ab initio, the Commission must simultaneously establish an acceptable replacement classification or standard.

Section 2.1.8 also allows the Commission to review and revise standards and classifications pursuant to the Basic Standards and Methodologies Regulation, section 3.1.0 et seq. (5 CCR 1002-8).

Sections 25-8-208 and 25-8-402(5) are new sections that set out the criteria and procedures for emergency rulemaking by the Commission. They differ from the generic emergency rulemaking of the Administrative Procedures Act (APA), C.R.S. 24-4-101 et seq., in two important aspects. First, an emergency rule promulgated by the Commission under these sections may last for an entire year. The rationale for this extended time limit is that, the Commission cannot adopt a new regulation within the APA limit of three months; it takes at least five months to pass a water quality standard or classification. Secondly, under section 207 a petitioner need only show exigent circumstances for the Commission to adopt an emergency rule, whereas under the APA one needs to show an imminent threat to public health, safety or welfare.

Section 25-8-401(5) (b) now applies only to those variances still allowed under the Federal Act which will primarily be limited to variances from control regulations such as variances from the State effluent limitations found in 5 CCR 1002-3, 10.1.1.

Section 25-8-401(5) (b) requires that if a variance is granted before the Division issues the relevant permit, the Division must republish the public notice and the permit in draft, form with the variance. This is necessary to comply with EPA's notice provisions. On the other hand, if a variance is granted after the Division has issued the permit, the variance must be published as a permit modification which also goes to public notice and is also necessary for compliance with EPA's regulations.

For variance from regulations which are not required for compliance with the Federal discharge permit program, in other words from regulations which either go beyond Federal requirements or from regulations which do not apply under Federal law to an NPDES permittee, an appeal from a Division decision regarding the variance can be made to the Commission. For all other variances, a dissatisfied party must appeal to a hearing officer as a part of the general adjudicatory hearing on the permit under the APA.

S.B. 83 modifies the variance provision of the Act of 1981 (S.B. 10) by deleting entirely the right to a variance from water quality standards previously allowed under Section 25-8-503(4). This section now states that water quality based effluent limitations must be based on "appropriate physical, chemical and biological factors reasonable necessary to achieve the levels of protection required by the standards."

Section 25-8-503(9) is a new section added by S.B. 83 which allows for permit variances that are consistent with the Clean Water Act. For the most part, variances under the Federal act can be granted only by EPA's administrator; however, certain variances, such as those from temperature standards, may be granted by a state agency. In addition, this section grandfathers in previously granted variances.

Where the APA does not automatically stay permits once contested, S.B. 83 specifically grants the Division the right to stay its own permit upon challenge.

S.B. 83 modifies 25-8-501(2) to spell out that the terms of a permit govern until that permit is formally changed after public notice. EPA requested this clarification because permittees might otherwise argue that a request for rulemaking before the Commission, or a decision by the Commission with regard to a specific standard would automatically stay enforcement of a permit condition based on the standard.

Senate Bill 83 modifies section 25-8-502(5) (a) (I) to provide that, where the Division cannot meet the 180 day deadline for permit issuance, the Division may automatically extend an existing permit for a renewal permittee, as if provided in the APA, or issue a temporary permit to a new applicant. These regulations provide for an appeal of such temporary permits and also require public notice of a permit extension.

The Senate Bill 83 revision to 25-8-503(1) (b) provides that the Division has Best Professional Judgement (BPJ) authority on a permit-by-permit basis when necessary for compliance with the "Federal Act". The Clean Water Act, in section 402(a) (1), gives EPA's Administrator specific BPJ authority. EPA has interpreted this section also to allow states with delegated programs the ability to exercise BPJ authority, under the same circumstances as the Administrator. It is section 402(a) (1) of the Federal Clean Water Act on which EPA bases its regulations that spell out States' BPJ authority. See 40 CFR 125.3(c).

There is an opinion by EPA's general counsel in which no distinction is made between state and Federal permit writers with regard to the ability to include BPJ provisions in a permit. In re Central Hudson Gas and Electric, OGC, vol. 2, p. 371 (July 29, 1977), NPDES opinion No. 63. Further, there is a case in which the court did not distinguish between State and Federal permit writers in the context of BPJ permits. American Frozen Foods, Inc. v. Train, 539 F. 2d 107 D.C. Cir. (1976). Finally, the legislative history of the 1977 Clean Water Act amendments, vol. III, p. 461, in which Senator Muskie stated, which reference to section 402, that Federal and state permit issuers had the ability to write BPJ permits when no applicable BAT limits existed. At the State level, Senator Allard read into the record immediately before the Senate voted to accept the conference committee versions of Senate Bill 83, a statement that indicated that the legislative interest was to include both Federal statutes and regulations.

For these reasons, it is evident that the Division has been granted the authority to make BPJ determinations as provided by the regulations. Senate Bill 83 modifies subparagraph (c) of section 503(1) to provide for review of a BPJ decision by a hearing officer, as opposed to the Commission, to avoid the conflict of interest prohibited by the Clean Water Act. This review is a part of a general adjudicatory hearing on the permit. In addition, subparagraph (c) now provides that the standard for review is different from what would ordinarily be required, to wit, the Division bears the burden of providing by substantial evidence that its formulation of BPJ permit limits is justified.

Sections 2.1.3.D), 2.1.3.E 2), 2.1.3.E 2)e), 2.1.3.E 4), 2.1.3.E 5), 2.1.3.J 1), 2.1.3.K 6), 2.1.3.L 3), 2.1.4.C 2), 2.1.4.D 2), 2.1.4.E 1), 2.1.4.E 2), 2.1.4.E 2) e), and 2.1.4.E 4), are all procedural changes not necessitated by SB 83. All these changes reflect the commission's desire to reduce confusion and streamline hearing procedures.

Fiscal Impact Statement

The changes to these regulations that are necessitated by Senate Bill 83 have no fiscal impact not considered in the legislative action that brought about the amendments to the Colorado Water Quality Control Act.

The procedural changes to these regulations will have negligible, if any, negative fiscal impact. By streamlining procedures and reducing confusion, there will be a positive fiscal impact to hearing participants, the Commission, the State, and the taxpayer.

21.23 STATEMENT OF BASIS, SPECIFIC STATUTORY AUTHORITY, AND PURPOSE: BASIS AND PURPOSE:

Section 2.1.8 of these regulations has contained both procedural and substantive provisions regarding hearings pursuant to section 25-8-207, C.R.S. In response to a recommendation at a triennial review hearing regarding the Basic Standards and Methodologies, the Commission has added the substantive provisions relating to "section 207 hearings" to the Basic Standards and Methodologies, and has simultaneously deleted the corresponding provisions from these regulations. No substantive changes have been made in these provisions. The Commission simply felt that the provisions in question would be more logically located in the Basic Standards and Methodologies.

FISCAL IMPACT:

No fiscal impact is expected from these changes.

PARTIES TO MARCH, 1988 HEARING

1. AMAX Inc.
2. Colorado Water Congress
3. Metropolitan Denver Sewage Disposal District No. 1
4. Eastman Kodak Company
5. Colorado Mining Association
6. City of Colorado Springs
7. North Front Range Water Quality Planning Association
8. Metropolitan Water Providers'
9. Rocky Mountain Oil and Gas Association (RMOGA)
10. Amoco Production Company
11. Environmental Defense Fund
12. Northwest Colorado Council of Governments (NWCCOG)
13. City & County of Denver Board of Water Commissioners
14. Adolph Coors Company (Coors)
15. Northern Colorado Water Conservancy District and Municipal Subdistrict
16. Sierra Club and The Wilderness Society
17. Southeastern Colorado Water Conservancy District (Southeastern District)
18. CF&I Steel Corporation (CF&I)
19. Umetco Minerals Corp. (Umetco)
20. Martin Marietta Corp.
21. Shell Oil Company
22. Cotter Corporation
23. Division of Wildlife
24. Union Oil of California
25. City of Broomfield
26. Trout Unlimited

21.24 Statement of Basis, Specific Statutory Authority, Purpose and Fiscal Impact (1988 Revisions)

The provisions of 25-8-202(1) (i); and 25-8-401(2) C.R.S. provide the specific statutory authority for the amendments to this regulation adopted by the Commission. The Commission also has adopted in compliance with 24-4-103(4) and 24-4-103(8) (d) C.R.S., the following statements of Basis and Purpose and Fiscal Impact.

Basis and Purpose:

Three changes are made to the introductory material of the regulation. First, the name of the regulation has been shortened to "Procedural Rules" for convenience of reference. Second, the regulation has been renumbered "2.1.0" for consistency with the remainder of the Commission's regulations. Third, a Table of Contents has been added to make the regulation easier to use. Throughout the regulation, numerous non-substantive editorial changes have been made, such as modifying the form of statutory references.

A number of changes have been made in section 2.1.3, regarding Commission rulemaking procedures. These changes generally are aimed at making those procedures clearer and more efficient in a number of respects. The changes to section 2.1.3(B) are intended to (1) encourage informal discussion regarding important issues prior to initiation of formal rulemaking, (2) provide for a written explanation if the Commission declines to initiate rulemaking in response to a petition, (3) clarify rulemaking petition requirements, and (4) assure 208 agency review of Division recommendations for water quality classifications and standards amendments.

The change in section 2.1.3(C) (1) conforms this regulation with a recent statutory change. Section 2.1.3(C) (4) has been revised to clarify that normal notice requirements do not apply to emergency hearings. The revisions to section 2.1.3(C) (5) add flexibility to hearing notice publication requirements while assuring public access to information regarding rulemaking proposals. The Commission intends that the proposed statement of basis, specific statutory authority and purpose, prepared in connection with the hearing notice are to be based on the best information available at that time, recognizing that additional or different information may be developed in the rulemaking process.

Section 2.1.3(D) has been revised to specify the number of copies of party status requests needed by the Commission Office. In addition, an incorrect cross-reference in this section has been corrected.

The changes in section 2.1.3(E) conform this regulation more explicitly with current Commission practice regarding prehearing procedures. The procedures set forth are intended to focus and resolve issues to the maximum extent feasible prior to the hearing, so that the hearing itself can be conducted more quickly and efficiently. In addition, provisions have been added to revise the number of document copies needed by the Commission, and to specify that copies of all documents submitted must be sent to other party status applicants.

One change has been made in section 2.1.3(F) to provide flexibility for the consideration of motions that cannot reasonably be submitted prior to a hearing.

A new section 2.1.3(J) has been added to address “regulatory analysis” requirements established by amendments to the Colorado Administrative Procedures Act (APA) in HB1069, recently adopted by the Colorado Legislature. These new requirements have been paraphrased in the regulation to make them more understandable in the Commission's process. Correspondingly, because HB1069 deleted requirements regarding “fiscal impact statements”, references to such statements have been deleted throughout the regulation.

Section 2.1.3(K) (1) (formerly (J) (1)) has been revised to clarify that written submissions may be required prior to rulemaking hearings. Language has been added to section 2.1.3(K) (2) (formerly (J) (2)) to provide the option of limiting cross-examination at hearings, to assure that hearings can be completed in a timely manner. Three subsections of section 2.1.3(L) (formerly (K)) have been revised to assure consistency with the provisions of HB1069. In addition, the Commission has added a discretionary option to circulate a proposed final rule for additional comment, even though this is no longer required by the APA.

Section 2.1.3(M) (3) (formerly (L) (3)) has been revised to change the number of copies required and to clarify alternative proposal submission requirements for nonparties. Section 2.1.3(M) (7) (formerly (L) (7)) has been revised to clarify which types of hearings the section 208 agency review requirement applies to.

Section 2.1.3(N) (formerly (M)) has been revised to conform with provisions of HB1069 and to provide additional flexibility regarding the period during which certain emergency rules may remain in effect, in accordance with the provisions of section 25-8-402(5), C.R.S.

Section 2.1.4(A) (2) and (3) have been revised to conform with recent changes to the Colorado Water Quality Control Act, in HB1010, expanding the Commission's responsibilities to hear appeals of Division actions. Corresponding changes have been made in section 2.1.10 and 2.1.11. Section 2.1.4(A) (3) has been revised to insert a provision previously located in section 2.1.5 (and the corresponding provision has been deleted from section 2.1.5), because the Commission determined that this provision now relates to adjudicatory hearings and is more appropriately located in section 2.1.4. Sections 2.1.4(D) and 2.1.4(E) have been revised to change the number of document copies required for adjudicatory hearings before the Commission.

Section 2.1.9(A) has been revised to clarify an ambiguity regarding hearings on variance requests and to be consistent with provisions of HB1010. The previous language was confusing and apparently resulted in part from a typographical error in connection with the last set of amendments to this regulation.

A new section 2.1.16 has been added to the regulation, to establish intergovernmental coordination and public participation requirements with respect to antidegradation reviews. In June of this year, the Commission substantially revised the antidegradation provisions in section 3.1.8 of the Basic Standards and Methodologies for Surface Water. The provisions now added to this regulation establish notice and comment procedures which are intended to assure that antidegradation reviews will be conducted with adequate input from the public and other governmental entities.

The Commission's general goal in structuring section 2.1.16 was to provide a meaningful opportunity for input into antidegradation determinations without creating new, unnecessary procedural hoops. The Commission declined to require the Division to respond specifically to all comments received, since this step may not always be practical or necessary. A general response to comments is desirable whenever feasible, and the desirability of avoiding appeals should provide a strong incentive for the division to fully address concerns when formulating its final determinations.

Finally, a new section 2.1.17 is added to address potential conflicts of interest of Commission members. The purpose of these provisions is to provide clear guidelines for the Commission members, other agencies, and members of the public to determine when a potential conflict of interest warrants disqualification of a Commission member with respect to a particular matter under consideration.

Consistent with current common law principles, these provisions require disqualification in the case of a direct and substantial financial interest of a Commission member or his/her employer in the outcome of a Commission action. These provisions also are intended to be consistent with HB1209, recently adopted by the Colorado Legislature. When no such direct and substantial financial interest is present, the new section provides for a case-by-case determination whether an "apparent conflict of interest" exists. If such a conflict exists, only disclosure is required, unless a Commission member voluntarily disqualifies himself/herself. Because the Colorado Water Quality Control Act requires that Commission members reflect a variety of interests in water in the State, and because knowledgeable Commission members necessarily will have established views on various issues, this provision clarifies that such preestablished policy positions of a Commission member or his/her employer do not, in and of themselves, constitute an apparent conflict of interest. In addition, a list of factors is set forth in section 2.1.17(D) (3) to guide the Commission in making case-by-case determinations regarding apparent conflicts of interest.

The Commission believes that this new section strikes a reasonable balance between the need to establish clear and predictable rules by which it intends to operate and the need to retain flexibility to handle appropriately the wide variety of circumstances that may arise. If experience under this new provision indicates that more specific rules are necessary, those can be considered at a later date. In the meantime, the Commission believes that these provisions provide more guidance regarding potential conflicts of interest than often is provided by state regulatory bodies of this type.

Finally, one general issue raised in the hearing warrants additional comment. Throughout the regulation, both as previously existing and in the new revision, there are instances where some statutory language from the State APA is repeated. After consideration of this issue, the Commission has determined that this duplication cannot and should not be entirely eliminated. The Commission believes that providing one document that sets forth a complete and integrated description of its rulemaking process is beneficial to the public. Merely attaching a copy of the APA to the Commission rules, or selectively reprinting portions of the statute would not serve the same purpose. In order to make APA requirements more understandable in the context of the Commission's rulemaking procedures, relevant provisions of the APA have been paraphrased, excerpted and translated into a more useable form to assist those that are involved in Commission proceedings.

Fiscal Impact:

No significant new public or private costs are anticipated as a result of the adoption of these revisions. Because the revisions are intended to make Commission rulemaking procedures more efficient, and the new conflict of interest provisions may minimize the time required to resolve potential conflict issues, both state agencies and members of the public should benefit from these changes. These benefits would consist of the reduced time and resources required for proceedings before the Commission.

PARTIES TO THE AUGUST 2, 1988 HEARING

1. Colorado Mining Association
2. City of Colorado Springs

21.25 Statement of Basis, Specific Statutory Authority, and Purpose (1994 Revisions)

The provisions of 25-8-202(1)(l); and 25-8-401(2) C.R.S. provide the specific statutory authority for the amendments to this regulation adopted by the Commission. The Commission has also adopted the following statement of basis and purpose.

Basis and Purpose:

The revisions adopted in this rulemaking proceeding address several suggestions for improvements to the Procedural Rules that have come to the Commission's attention since the last revisions of this regulation in 1988.

A. Distribution of Copies

Provisions regarding the required number of copies, and the distribution of copies, of party status requests, prehearing statements, and other documents submitted in Commission rulemaking proceedings have been revised in accordance with what the Commission has determined to be a more efficient process.

B. Written-Comment-Only Proceedings

The Commission has adopted new provisions, in section 2.1.3 C, to more explicitly provide for written-comment-only rulemaking proceedings. At the recommendation of the Water Quality Forum and other members of the public, the Commission has decided to provide for such proceedings as a more efficient mechanism for completing some noncontroversial rulemakings.

C. Mailing List Status

The Commission has adopted revisions to section 2.1.3 D to allow interested persons to acquire "mailing list status" for rulemaking proceedings. This status explicitly provides for an intermediate level of participation in rulemaking proceedings, as an alternative to participation as a formal party or merely as an interested member of the public. This provision formally acknowledges what has essentially become an informal practice of the Commission over the last few years.

D. Ex Parte Communications

The Commission has added a new subsection to section 2.1.3 K regarding the conduct of hearings to more directly address the issue of ex parte communications during rulemaking hearings. The Commission does not believe that such ex parte communications should be encouraged. However, the Commission believes that the new provision may provide useful guidance regarding this matter to Commission members and participants in rulemaking proceedings. The new provisions establish certain constraints on such communications during a rulemaking proceeding, and prohibit such communication once a rulemaking is closed.

E. Cross-Examination Provisions

The Commission also amended section 2.1.3 K to provide additional clarification regarding the requirement to have witnesses present for cross-examination, and regarding potential restrictions on the time allowed for cross-examination. These revisions explicitly recognize what has become standard Commission practice.

F. Publication Date Clarification

The Commission has revised section 2.1.3 L(7) to eliminate a potential confusion regarding the publication date of adopted rules for purposes of determining the effective date of rules.

G. Antidegradation Review Appeals

The Commission has revised section 2.1.4 A, and 2.1.16, to recognize in this regulation the Commission's role in hearing appeals of antidegradation review determinations by the Division. The Commission's role in this regard was previously established by provisions in section 3.1.8(3)(b) of the Basic Standards and Methodologies for Surface Water. No changes to the Commission's role or the nature of the antidegradation review determination appeal process result from these revisions.

21.26 Statement of Basis, Specific Statutory Authority, and Purpose (1997 Revisions)

The provisions of 25-8-202(1)(i) C.R.S. provide the specific statutory authority for the amendments to this regulation adopted by the Commission. The Commission has also adopted the following statement of basis and purpose.

Basis and Purpose:

The revisions adopted in this rulemaking proceeding address several suggestions for improvements to the Procedural Rules that have come to the Commission's attention since the last revisions of this regulation in 1994.

Section 2.1.6 has been revised to conform with separate but parallel revisions recently adopted to the Regulations for the Site Application Process, 2.2.0.

The prehearing procedures for adjudicatory hearings in section 2.1.4(E) have been revised to more closely conform with the procedures used in the last several adjudicatory hearing proceedings.

Section 2.1.4(J)(1), regarding the conduct of adjudicatory hearings, has been revised to conform with the most recent version of the Colorado Administrative Procedures Act.

In addition, several typographical errors in the regulation have been corrected and references to the Colorado Revised Statutes have been put into a consistent form.

**21.27 STATEMENT OF BASIS, SPECIFIC STATUTORY AUTHORITY AND PURPOSE; JULY, 1997
RULEMAKING)**

The provisions of sections 25-8-202 and 25-8-401, C.R.S., provide the specific statutory authority for adoption of the attached regulatory amendments. The Commission also adopted, in compliance with section 24-4-103(4) C.R.S., the following statement of basis and purpose.

BASIS AND PURPOSE

The Commission has adopted a revised numbering system for this regulation, as a part of an overall renumbering of all Water Quality Control Commission rules and regulations. The goals of the renumbering are: (1) to achieve a more logical organization and numbering of the regulations, with a system that provides flexibility for future modifications, and (2) to make the Commission's internal numbering system and that of the Colorado Code of Regulations (CCR) consistent. The CCR references for the regulations will also be revised as a result of this hearing.

**21.28. STATEMENT OF BASIS, SPECIFIC STATUTORY AUTHORITY AND PURPOSE (1997
REVISIONS)**

The provisions of 25-8-202(1)(i) and 25-8-401(2), C.R.S. provide the specific statutory authority for adoption of these regulatory amendments. The Commission also adopted the following statement of basis and purpose.

Basis and Purpose

The revisions adopted in this rulemaking proceeding reflect and conform to concurrent revisions to the Cherry Creek Reservoir Control Regulation. New section 21.4(A)(2)(g) provides that the Commission shall provide the opportunity for formal public adjudicatory hearings to consider appeals of final decisions by the Cherry Creek Basin Water Quality Authority pursuant to section 72.4(9), 5 CCR 1002-72.

PARTIES TO THE RULEMAKING HEARING

1. Cherry Creek Basin Water Quality Authority
2. City of Westminster
3. Chatfield Watershed Authority
4. Happy Canyon Partnership

21.29 STATEMENT OF BASIS, SPECIFIC STATUTORY AUTHORITY AND PURPOSE

The provisions of 25-8-202 (1)(i) and 25-8-401(2), C.R.S. provide the specific statutory authority for adoption of these regulatory amendments. The Commission also adopted, in compliance with section 24-4-103(4) C.R.S., the following statement of basis and purpose.

Basis and Purpose

Changes to Section 21.16, Antidegradation Review Procedures--Public Participation and Intergovernmental Coordination, were adopted by the Commission in association with changes to the 401 Certification Regulation, Regulation No. 82 (5 CCR 1002-82). The changes provide for a more streamlined public notice process, and improved opportunities for public comment on Division certification determinations.

Subsection 21.16 (B) (1) (d) was changed to reflect a new process for public notice of preliminary antidegradation determinations. In the past, preliminary antidegradation determinations were noticed independent of any certification determinations. The changes to the regulation establish a new process for a draft 401 certification determination. The preliminary antidegradation determination will be noticed as a portion of the draft certification. The rules no longer call for the preliminary antidegradation determination for Army Corps of Engineers 404 permits to be included in the Corps public notice.

Subsections 21.16 (B) (1) (a), (b), and (c), were changed to reflect the addition of the word "antidegradation" in reference to preliminary determinations, and to change the name of the "monthly newsletter" to the "Water Quality Information Bulletin".

PARTIES TO THE RULEMAKING HEARING

1. Colorado Ski Country USA
2. Trout Unlimited
3. The City of Colorado Springs, including Colorado Springs Utilities
4. The Northern Colorado Water Conservancy District and its municipal Subdistrict
- *5. The Northwest Colorado Council of Governments

21.30 FINDINGS IN SUPPORT OF ADOPTION OF EMERGENCY REVISIONS TO REGULATION NO. 31, THE BASIC STANDARDS AND METHODOLOGIES FOR SURFACE WATER (5 CCR 1002-31) AND REGULATION NO. 21, PROCEDURAL RULES (5 CCR 1002-21)

The Commission adopted revisions to Regulation No. 31, *The Basic Standards and Methodologies for Surface Water*, on August 15, 2000.

The Commission submitted the entire regulation to the Secretary of State for republication and to the Office of Legislative Legal Services for review in accordance with section 24-4-103(8)(d), C.R.S. The Legislative Legal Services staff raised a concern that section 31.6(3)(b) of the Basic Standards, concerning "Section 25-8-207 Reviews," did not incorporate all provisions of section 25-8-207, C.R.S. That statutory section includes water quality designations among the matters subject to review, while the regulation did not. The Commission agrees that Regulation 31 should include appropriate references to water quality designations. In addition, the Commission concludes that conforming changes to the Procedural Rules will be necessary.

If the Commission does not adopt revisions to Regulation 31 and the Procedural Rules on an emergency basis, the General Assembly Committee on Legal Services will need to address this issue. In view of the Commission's conclusion that its regulations should be modified to address this provision of section 25-8-207, C.R.S., the public interest will be best served by a prompt resolution with minimum expenditure of resources. Compliance with the procedures and notice requirements in section 24-4-103, C.R.S., would engender unnecessary delay in achieving conformance of the Commission regulations to Colorado statute. The Commission finds that immediate adoption of these revisions to Regulation 31 and the Procedural Rules is imperatively necessary to comply with state law and that compliance with the requirements of section 24-4-103, C.R.S., would be contrary to the public interest.

21.31 STATEMENT OF BASIS, SPECIFIC STATUTORY AUTHORITY AND PURPOSE; FEBRUARY, 2001 RULEMAKING

The provisions of 25-8-202, 25-8-401 and 25-8-402 C.R.S. 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:

In October, 2000, the Office of Legislative Legal Services identified a deficiency in section 31.6(3)(b) of the Basic Standards and Methodologies for Surface Water, Regulation #31, which addresses "Section 25-8-207 Reviews". The language in section 31.6(3)(b) at that time did not fully track the provisions of section 25-8-207 of the Colorado Water Quality Control Act. The Commission corrected this deficiency in an emergency rulemaking hearing on November 7, 2000, by adding language including "water quality designations" among the matters subject to review under section 25-8-207, C.R.S. At the same time, the Commission adopted on an emergency basis corresponding revisions to the corresponding provisions of the Procedural Rules, Regulation #21, regarding section 25-8-207 hearings. The action taken in this rulemaking adopts these same revisions to both sets of regulations on a permanent, non-emergency basis.

21.32 STATEMENT OF BASIS, SPECIFIC STATUTORY AUTHORITY AND PURPOSE (NOVEMBER, 2001 REVISIONS)

The provisions of 25-8-202(1) and 25-8-401(2), C.R.S. provide the specific statutory authority for adoption of these regulatory amendments. The Commission also adopted the following statement of basis and purpose.

Basis and Purpose

As a result of this rulemaking the Commission adopted revisions to subsection 21.3(L)(2) that add references to providing to the state publications depository libraries copies of material incorporated by reference in Commission regulations. The purpose of these revisions is to assure that the Commission's practice is consistent with the State Administrative Procedure Act. In addition, subsection 21.3(L)(8) was revised to provide a correct reference to the Office of Legislative Legal Services.

21.33 STATEMENT OF BASIS, SPECIFIC STATUTORY AUTHORITY AND PURPOSE (OCTOBER, 2002 RULEMAKING)

The provisions of section 25-8-202(1) and 25-8-401(2), C.R.S. provide the specific statutory authority for adoption of these regulatory amendments. The Commission also adopted the following statement of basis and purpose.

Basis and Purpose

Numerous revisions to the Procedural Rules were adopted in this hearing, with the overall goal making corrections and clarifications to the rules, and implementing refinements to assure that the rules are consistent with the Commission's evolving practice. The majority of the revisions adopted are corrections of clerical errors or editorial refinements of existing provisions. Other principal changes are described below.

A. Rulemaking Hearing Process Refinements

In 2000, the Commission adopted a new process and schedule for triennial reviews of surface water quality classifications and standards. In addition, after receiving input from a Water Quality Forum work group, the Commission has implemented a number of refinements to its rulemaking process for water quality classifications and standards hearings. Several revisions to the rulemaking process provisions in this regulation are being adopted to facilitate these changes. In particular:

- The revised regulation explicitly provides an option for the Commission to require sequential, rather than simultaneous, submission of prehearing statements;

- Provisions regarding written comments from those with mailing list status have been revised to provide greater flexibility as to the due date for such comments;
- Provisions regarding rebuttal statements have been revised to recognize that they may now sometimes be required prior to the prehearing conference;
- The prohibition on submitting party status requests by fax has been eliminated; and
- Additional contact information is requested from party status and mailing list status applicants.

B. Adjudicatory Hearing Process Refinements

Several changes are being adopted to the adjudicatory hearing procedures in this regulation. In particular:

- Revisions are adopted to subsection 21.4(A) to clarify when civil penalty appeal hearings are conducted by the Commission and by the Division. The Procedural Rules previously provided that civil penalty appeals are to be heard by the Commission. However, the current interpretation of the Attorney General's Office is that, pursuant to C.R.S. section 25-8-202(1)(k), where civil penalty assessments are "determinations dealing with surface water discharge permits or portions thereof" they are not subject to appeal to the Commission;
- Section 21.7(B) is revised to clarify who may appeal Division determinations regarding the issuance of discharge permits; and
- The provisions of section 21.9 regarding variances have been re-written to provide greater clarity.

C. Conflict of Interest Provisions

To date, the Commission's practice has been that when members recuse themselves and choose not to participate in a Commission hearing, those non-participating members are still counted for purposes of determining a quorum, so long as they are still present in the room. In one instance last year, this practice was challenged as inconsistent with the provisions of subsection 21.17(C)(3) of the Procedural Rules. Because this provision stated that members with an actual conflict may participate in an action to avoid the loss of a quorum, it implied that those with such a conflict normally would not be counted as part of a quorum. This section of the regulation has been revised in a manner to clarify the Commission's intent to continue its established practice described above.

D. Miscellaneous Issues

Section 21.3(K)(8) relates to ex parte communications during rulemaking proceedings. The interpretation of the phrase "if to be relied upon in final decision making", could be difficult to interpret in practice. This language is now changed to: "if materially related to issues raised in the rulemaking". The Commission believes that the revised language provides an easier and cleaner formulation to identify instances where disclosure is appropriate.

A second miscellaneous issue relates to the incorporation by reference provisions in section 21.3(L)(2). To assure conformance with the Administrative Procedure Act, the following changes are adopted: The initial sentence of subsection section 21.3(L)(2)(a) is revised to read "... rules without publishing the incorporated material in full only if the material has been properly identified in the notice of proposed rulemaking." Subsection 21.3(L)(2)(b) is revised to read: "... available to the public no later than the date of publication of the notice of proposed rulemaking."

21.34 Statement of Basis, Specific Statutory Authority and Purpose (May 14, 2007 Rulemaking, Effective date of July 30, 2007)

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

Basis and Purpose

In past years changes have been made to state statutes and regulations regarding appeals of certain Division determinations. The Commission has amended the procedural rules to clarify which appeals should go to the Commission, and which should go to the Division.

Colorado's Water Quality Control Act (the Act) provides that the Commission shall hear appeals of "all determinations by the Division except those determinations dealing with surface water discharge permits or portions thereof." §25-8-202(1)(k), C.R.S. Section 603 of the Act provides that the Division shall provide an opportunity for an adjudicatory hearing regarding appeals of notices of alleged violation for violations of orders, permits or control regulations. Section 608 of the Act provides that the Division's final decision regarding penalties may be appealed to the Commission.

The Commission has amended sections 21.4, 21.11 and 21.12 in order to clarify that the Commission does not hear appeals of Division determinations that deal with surface water permits or portions thereof.

The Commission has also amended section 21.4(A)(2)(e) to clarify that appeals relating to discharging without a permit are to be heard by the Commission. Such violations and penalties are not determinations "dealing with surface water discharge permits or portions thereof," and thus should properly be heard by the Commission.

The Chatfield Reservoir Control Regulation, Regulation #73, was previously amended to include procedures for appealing final Division determinations on trades and other changes in point source phosphorus allocations to the Commission. For consistency, the Commission adopted new language in section 21.4(A)(2)(g) to address such appeals. The language is broad enough to include other reservoir control regulations which may later be amended to specifically provide for such appeals.

The Commission has also amended section 21.11(D) regarding Commission hearings on final Division determinations regarding notices of alleged violations. The Commission has clarified that such hearings are appellate hearings limited to record review. A party is not entitled to two full agency adjudicatory hearings under section 105 of the Administrative Procedures Act (one before the Division, and one before the Commission), prior to seeking judicial review.

PARTIES TO THE RULEMAKING HEARING

1. Northern Colorado Water Conservancy District, Trout Unlimited and the City of Boulder

**21.35 STATEMENT OF BASIS, SPECIFIC STATUTORY AUTHORITY AND PURPOSE; MAY, 2008
RULEMAKING, EFFECTIVE DATE OF JUNE 30, 2008**

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

Basis and Purpose

As a result of this rulemaking, the Commission corrected the following four references:

- In section 23.3 (M)(5), the reference to section 21.3 (C)(6) was changed to 21.3 (C)(5);

- In section 21.12 (B), the reference to section 21.4 (3)(b) was changed to 21.4 (A)(3)(b);
- In section 21.14 (A)(3), the reference to section 21.4 (L)(6) was changed to 21.4 (K)(6);
- In section 21.16 (B)(1)(c), the reference to section 25-6-601, C.R.S. was changed to 25-8-501, C.R.S.

The Commission reduced the required number of copies of requests for party status. Because multiple copies of the party status requests are rarely needed, the Commission determined that a single original, email attachment or fax would suffice.

The Commission amended the language in section 21.12 to clarify that civil penalty appeals to the Division have the same requirements and deadlines as appeals to the Commission.

21.36 Statement of Basis, Specific Statutory Authority and Purpose (February 9, 2009 Rulemaking, Effective March 30, 2009)

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

Basis and Purpose

Effective August 8, 2008, HB 08-1099 moved the responsibility for hearing appeals of drinking water penalties from the Colorado Board of Health to the Water Quality Control Commission. This change is now reflected in section 25-1-114.1, C.R.S.

The Commission has amended the procedural rules to specify that drinking water penalty appeals now go to the Commission. The Commission has also amended the procedural rules to clarify that appeals of other determinations under the Colorado Primary Drinking Water Regulations would first go to the Division. The Commission has further clarified that any subsequent hearings before the Commission would be appellate hearings limited to record review. A party is not entitled to two full agency adjudicatory hearings under section 105 of the Administrative Procedures Act (one before the Division, and one before the Commission), prior to seeking judicial review. Finally, the Commission corrected a typo and added references to the drinking water statutes throughout Regulation #21, to clarify the applicability of this regulation to drinking water matters.

21.37 Statement of Basis, Specific Statutory Authority and Purpose (January 10, 2011 Rulemaking, Effective March 2, 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 2007 the Commission adopted new procedural rules regarding appeals of certain Division determinations. The revised rules reflected an attempt to reconcile conflicting statutory provisions within the Colorado Water Quality Control Act. While the amended rules did address the statutory conflict, the current interpretation of the statutory provisions has led to additional confusion regarding appeals procedures, including unwieldy bifurcation of appeals proceedings. Accordingly, the Commission is adopting revisions to the procedural regulations to clarify, improve and streamline the appeals process.

There are three key statutory provisions that have created the current state of affairs. First, 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.” Second, C.R.S. § 25-8-603 provides that appeals of notices of violation (NOVs) for violations of orders, permits or control regulations shall be heard by the Division. Third, C.R.S. § 25-8-608 provides that the Division makes a final decision regarding penalties, and such decisions may be appealed to the Commission, without making a distinction for penalties associated with permit violations. Together, these provisions create a conflict and in some instances provide for two administrative hearings, and in other instances they may result in bifurcated proceedings.

Prior to 2007, the phrase “dealing with permits” from Section 202(1)(k) was interpreted to include not only the issuance of permits (and any renewals, modifications or appeals thereof), but also violations of a surface water discharge permit and violations for discharging without a permit. Under that interpretation, the Commission was essentially prevented from hearing appeals of all enforcement proceedings, whether the alleged violator had a permit or not.

Since 2007, the phrase “dealing with permits” has been interpreted to exclude violations for discharging without a permit. In 2007, the Commission amended its procedural regulations (21.4(A)(2) and (3), 21.11, and 21.12) to reflect this interpretation. Appeals of recent enforcement cases have revealed unanticipated complications with this approach. When the Division takes enforcement action against a party both for discharging without a permit as well as violations of a permit, and the party appeals violations and/or penalties associated with both, the current regulations result in the matter being bifurcated. The portion “dealing with” violations of a surface water discharge permit is subject to hearing by the Division, and the portion not dealing with a permit (i.e., failure to have a permit) is subject to hearing by the Commission. In addition to the bifurcation issue, the current regulations create the questionable result that a party with a permit is entitled to only one administrative hearing while a party which has failed to obtain a permit is entitled to two administrative hearings.

Both interpretations of the phrase “dealing with permits” are defensible. In order to clarify and streamline the appeals process, the Commission is adopting new procedural regulations essentially reverting back to the interpretation that existed prior to 2007, wherein the phrase “dealing with permits” is interpreted broadly such that the Commission is prohibited from hearing an appeal of an enforcement action for discharges to surface water or for penalties associated therewith. The Commission is also adopting regulations specifying that appeals of enforcement actions for the failure to obtain a stormwater permit when one is required are heard by the Division. See 21.4.A(2)(b)(iii), 21.4.A(2)(e)(iii), 21.4.A(3)(b)(iii), and 21.4.A(3)(d)(iii). These regulatory amendments are not intended to change the appeals process for any other type of Division determinations that are heard by the Commission, such as notices of violation and/or penalties for discharges to groundwater with or without a permit.

The Commission is also adopting regulations specifying that hearings concerning Division determinations regarding self-evaluation disclosures are heard by the Commission, pursuant to C.R.S. § 25-1-114.5(5).

The regulation was amended to reduce the number of copies required to be submitted of a request for party status in an adjudicatory hearing.

The Commission also amended the provisions regarding publication of notices of rulemaking to be consistent with legislative changes made to the Administrative Procedures Act.

PARTIES TO THE RULEMAKING HEARING

1. City and County of Denver
2. Colorado River Water Conservation District

21.38 Statement of Basis, Specific Statutory Authority and Purpose (November 14, 2011 Rulemaking, Effective January 31, 2012)

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 include 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. These changes are not intended to modify the Division's obligation to provide actual notice to an alleged violator of a notice of violation pursuant to section 25-8-602(1), C.R.S., and notice of a Division determination that is appealable to the Commission pursuant to section 24-4-105(16), C.R.S.

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. Notice is typically published in the monthly Water Quality Information Bulletin and on the Commission's web site, and is often mailed to a list of persons interested in the particular topic.

PARTIES TO THE RULEMAKING HEARING

1. Colorado Mining Association
2. Northern Colorado Water Conservancy District

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 or governmental entity’s position or proposal is based in part on analysis of water quality data, the party or governmental entity 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 or governmental entity 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 or governmental entity 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) and section 21.18 to explicitly reflect that appeals of final TMDLs are to be heard by the Commission. Such appeals may be filed with the Commission after a 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 final 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. If an appeal is timely filed, it shall be heard in accordance with section 105 of the APA and section 21.4 of this regulation, except that notice of any adjudicatory hearing shall also be provided to all dischargers with Waste Load Allocations in the TMDL and to the proponent of a third-party TMDL. The Division will not submit the final TMDL to EPA until 30 days after the Commission’s decision regarding any appeal.

PARTIES TO THE RULEMAKING HEARING

1. Centennial Water and Sanitation District
2. Northern Colorado Water Conservancy District
3. Metro Wastewater Reclamation District

21.40 Statement of Basis, Specific Statutory Authority and Purpose (March 13, 2015 Rulemaking, Effective April 30, 2015)

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 amended section 21.3(E)(2)(b)(ii) to allow more flexibility in the format in which raw data can be submitted into the hearing record. The requirement that data exhibits be provided to the Commission office in PDF format was modified to allow data exhibits in any electronic format, in accordance with a list maintained by the Commission Office.

In addition, the Commission amended provisions regarding the format in which material must be submitted to the Commission office. The Commission revised language to allow the hearing notice to specify whether or not a paper copy of material must be submitted.

21.41 Statement of Basis, Specific Statutory Authority and Purpose (March 13, 2017 Rulemaking, Effective April 30, 2017)

The provisions of sections 25-8-202 and 401, C.R.S., 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

The commission heard testimony from the Attorney General's Office that, under Colorado Revised Statutes §24-18-110, it is not mandatory for a commissioner to send written disclosures to the Secretary of State regarding apparent conflicts of interest, but rather that it is optional for individual commissioners. Therefore, the commission revised section 21.17(D)(2) to reflect that disclosure of an apparent conflict of interest to the Secretary of State is optional.

Editor's Notes

History

Sections 21.4, 21.11, 21.12 eff. 07/30/2007.

Entire rule eff. 06/30/2008.

Sections 21.1-21.5, 21.12, 21.14, 21.15, 21.36 eff. 03/30/2009.

Sections 21.3.C.3, 21.4.A, D.2; 21.11.D, 21.12 B, 21.37 eff. 03/02/2011.

Sections 21.2.B, 21.3.F, 21.4.A(3)(d), 21.4.F, 21.5.B, 21.6, 21.11.D, 21.12.B, 21.38 eff. 01/31/2012.

Sections 21.1, 21.2.D, 21.3-21.4, 21.18, 21.39 eff. 07/30/2013.

Sections 21.3.E.2, 21.3.M.3, 21.4.E.2, 21.40 eff. 04/30/2015.

Sections 21.17.D.2), 21.41 eff. 04/30/2017.