



COLORADO
Department of Public
Health & Environment

Dedicated to protecting and improving the health and environment of the people of Colorado

To: Larry Wolk, MD, MSP, Executive Director and Chief Medical Officer,
Colorado Department of Public Health and Environment

From: Cary E. Ruble, Regulation Development and Enforcement Coordinator,
Division of Environmental Health and Sustainability

Through: Jeff Lawrence, Director
Division of Environmental Health and Sustainability (jL)

Date: January 12, 2018

Subject: **Rulemaking Hearing**
Proposed Repeal of 5 CCR 1004-1, *Environmental Management System Permit
Program Regulation*, for the rulemaking hearing to occur in February 2018

The Colorado Department of Public Health and Environment (“CDPHE”) is proposing to repeal 5 CCR 1004-1, *Environmental Management System (EMS) Permit Program Regulation*. Rationale for the repeal of 5 CCR 1004-1 is included in the following background information related to the associated statute and regulation, results of the EMS permit pilot program, evaluation of the EMS program by the Colorado Department of Regulatory Affairs (DORA) and CDPHE, and the proposed alternative approach to the continued implementation of 5 CCR 1004-1.

**STATEMENT OF BASIS AND PURPOSE
AND SPECIFIC STATUTORY AUTHORITY
for Repeal of
5 CCR 1004-1, Environmental Management System Permit Program Regulation**

Basis and Purpose.

These rules were promulgated pursuant to the 25-6.6-101-106, Colorado Revised Statute (C.R.S.). Under the 25-6.6-104(2), C.R.S. the Executive Director of the department has the sole authority to promulgate and amend rules, to the extent that such rules and amendment to the rules are consistent with federal law, in order to specify the procedures and other necessary requirements for issuing, implementing, revoking, and enforcing an environmental management system (EMS) permit and to establish alternative methods or procedures for meeting environmental standards. Through review of these regulations it has been determined that the regulations are ineffective due to directives provide by EPA that are in direct conflict with a primary objective of the program; the development and implementation of a consolidated Colorado EMS permit. As EPA was unwilling to provide CDPHE with the authority to approve regulatory flexibility beyond the department's current authority or state-only regulatory requirements, CDPHE's development of a single permit to replace the traditional individual environmental permits (air, water waste), was not feasible. Furthermore, many of the remaining goals of the programs that were to encourage alternative methods or procedures for meeting environmental standards are duplicative of the efforts of CDPHE's Environmental Leadership Program (ELP). For these reasons, it is recommended that the regulation be repealed.

History.

Beginning in 2003, CDPHE engaged in an internal review of its environmental programs with a goal to identify and implement innovative approaches to existing regulatory programs to improve program implementation and environment outcomes. The result was a series of innovative initiatives including the creation of Colorado's EMS permit program. During the 2004 Colorado legislative session, the EMS permit concept was embraced by the Colorado legislature through passage of House Bill 04-1147, entitled *Environmental Management System Permit Pilot Project* [Article 6.6 of Title 25, Colorado Revised Statutes (C.R.S.)]. The resulting regulation, *EMS Permit Program Regulation*, became effective on November 30, 2004, and was designed to provide operational flexibility and to encourage companies from various sectors to voluntarily participate and access opportunities designed to reduce pollution in the state.

More specifically, a primary goal of the EMS pilot program was to consolidate all of a facility's individual and traditional environmental permits into a single permit (Colorado's EMS Permit) that allows for the consideration of cross-media environmental impacts. Currently, environmental protection in Colorado is accomplished through a "single medium" (i.e., air, water, waste) permitting process; that is, facilities must obtain one permit for each medium source. One of the goals of the EMS Program was to change this paradigm, to address cross-media environmental impacts and ultimately mitigate environmental pollutants on a holistic level; thereby, offering participating facilities the opportunity to obtain a single "whole-facility" permit through the EMS Program.

Colorado's EMS permit pilot program was completed under a cooperative agreement between CDPHE and the U.S. Environmental Protection Agency (EPA) during the period of July 1, 2004

to February 28, 2007. During this period in time CDPHE invited five facilities to participate in the EMS Permit Pilot Program. One facility withdrew due to concerns regarding reporting and community participation requirements, which were deemed overly burdensome. The four remaining facilities included two agricultural facilities [one concentrated animal feeding operation (CAFO) facility, one housed commercial swine feeding operation (HCSFO) and two industrial facilities]. . During this same time, the Colorado Department of Regulatory Affairs (DORA) completed their 2006 Sunset Review. DORA evaluation resulted in two recommendations; 1) continue the EMS permit program until July 1, 2018 and, 2) implement a three-tier system to expand membership in the EMS permit program.

DORA's determination and recommendation to extend the EMS Program until 2018, was primarily based on the positive results of the EMS pilot program and the need for additional time for the program to mature and yield more reliable data regarding a facility's overall environmental performance/pollution reduction efforts. However, although each of the four participating facilities implemented a variety of successful continual improvement projects [e.g., erosion control, recycling programs, weed dust control, Spill Prevention Containment and Countermeasures (SPCC) plans, decreases in energy usage, etc.], follow up reports completed by EnviroGroup Limited in 2006, indicate that the data does not necessarily reflect improved environmental performance with respect to cross-media impacts or a quantifiable reduction in pollution.

Additionally, it should be noted that the recommendation to implement a three-tier system with respect to stakeholder membership in the EMS permit program was derived from the existing operation of CDPHE's Environmental Leadership Program (ELP). The ELP was initiated at CDPHE in 1999, integrates the three-tiered system (gold, silver and bronze levels) with respect to membership, and in many ways serves the needs of the qualifying ELP community in the capacity the EMS permit program was intended.

In addition to DORA's October 2006 evaluation of the EMS pilot program, CDPHE completed a Draft Final Project Report in July 2007. In the *Recommendations* section of this report, CDPHE supports DORA's recommendations to extend the program until July 1, 2018, and that the program should implement a three-tiered system to expand membership. However, in the *Lessons Learned* section of the project report, CDPHE indicates that "*...there are several issues to address before the program can be effectively implemented as a permanent program...*" For the EMS permit program to be successful, CDPHE would need to be able to eliminate or put in abeyance the traditional and existing facility permits. For the duration of the pilot period through present time, CDPHE has been unable to eliminate or replace these traditional permits with an EMS permit. EPA will not provide the department with the authority to approve regulatory flexibility beyond the department's current authority or state-only regulatory requirements. This limited the CDPHE's ability to truly test the environmental and public health benefits of the operational or regulatory flexibility originally anticipated and desired under the EMS permit pilot program. The fact that conventional permits had to remain in effect was significantly detrimental to the program participants, stakeholders, and to the success of the pilot project as a whole. As a result of U.S. EPA's decision, the project partners and CDPHE found it too cumbersome to manage and track all permits, thereby resulting in, for all practicable purposes, the dissolution of the program as it was originally conceived.

Over the past decade, the EMS permit pilot program has continued to experience very limited participation from ELP members and no change in the EPA's position regarding the proposed structure of the EMS permit. During this 10-year period CDPHE has not developed a working

version of an EMS permit and subsequently no ELP member has ever been granted an EMS permit. Since 2008, only two facilities/ELP members have requested an EMS permit; Denver International Airport and the United States Air Force Academy. Neither entity requested consideration of cross-media environmental impacts or related mitigation solutions inherent within the structure of the proposed EMS permit. Rather, both facilities were able to work with CDPHE's ELP leadership and the respective CDPHE environmental divisions and develop regulatory solutions compliant with the requirements of their existing traditional permits, with no need for cross-media consideration or an EMS permit.

In 2017, DORA performed a sunset review. The recommendation following the review was:

Sunset the Environmental Management System Permit Program. The Program, while a well-intentioned attempt at regulatory innovation, is unworkable for a variety of reasons. Since it has been more or less defunct since 2007, it has done nothing to protect the health, safety and welfare of the public. Therefore, the General Assembly should sunset the Program.

Because rulemaking is authorized rather than required under 25-6.6-104(2), C.R.S. it is appropriate to repeal the rules for the reasons stated herein. Repeal is consistent with the outcome of the DORA sunset review and the aims of the EO2 rule review.

Basis for Repeal.

Therefore, in accordance with EO2 and state statute, this rulemaking proposes to repeal the *Environmental Management System Permit Program Regulation*. Many of the objectives included in 5 CCR 1004-1 have not been implemented by CDPHE in over a decade, and based on EPA's position on a combined Colorado EMS permit, likely never will. However, the success of the associated ELP program over the past 20 years has allowed much of the intent of the EMS permit program to be realized. The ELP has continued to provide eligible participants in their program with the guidance and solutions necessary to satisfy facility-specific regulatory concerns and inspire their membership, through public recognition, to employ innovative and technically sound pollution prevention methodologies. The repeal of 5 CCR 1004-1 creates efficiencies for staff and stakeholders, eliminates an unessential regulation, and in no apparent way diminishes the overall effort to reduce pollution in Colorado.

Specific Statutory Authority.

These rules were promulgated pursuant to Section 25-6.6-104(2), C.R.S., as amended.

SUPPLEMENTAL QUESTIONS

Is this rulemaking due to a change in state statute?

_____ Yes, the bill number is _____; rules are ___ authorized ___ required.
 X No

Is this rulemaking due to a federal statutory or regulatory change?

_____ Yes
 X No

Does this rule incorporate materials by reference?

_____ Yes

No

Does this rule create or modify fines or fees?

Yes

No

REGULATORY ANALYSIS
for Repeal of
5 CCR 1004-1, Environmental Management System Permit Program Regulation

- 1. A description of the classes of persons who will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.**

Gold level members of CDPHE's Environmental Leadership Program (ELP) will be affected in that these ELP participants will no longer have the option of requesting an EMS permit from the department. However, in the 10-year period since the termination of the pilot program, only two facilities have requested an EMS permit and none have been issued by the department. Furthermore, an EMS permit form was never developed by the department. This regulation was adopted in 2004 and has become ineffective and unessential with respect to consideration of cross-media environmental impacts or significantly reducing pollution in the state.

- 2. To the extent practicable, a description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons.**

There is no quantitative, qualitative or economic impact due to the repeal of 5 CCR 1004-1.

- 3. The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.**

Repeal of 5 CCR 1004-1 would be accomplished with minimal, if any, cost to the department or any other agency.

- 4. A comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction.**

The benefit of the repeal is to eliminate an ineffective and unessential regulation. There is no benefit of inaction.

- 5. A determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.**

The primary purpose of the EMS permit regulation cannot be accomplished due to conflict with the EPA directive preventing the basic intent of the EMS permit.

- 6. Alternative Rules or Alternatives to Rulemaking Considered and Why Rejected.**

There are no other alternative methods for achieving the purpose of the proposed rule repeal.

- 7. To the extent practicable, a quantification of the data used in the analysis; the analysis must take into account both short-term and long-term consequences.**

Not applicable.

STAKEHOLDER COMMENTS
for Repeal of
5 CCR 1004-1, Environmental Management System Permit Program Regulation

The following individuals and/or entities were included in the proposal to repeal 5 CCR 1004-1:

- CDPHE staff
 - Deborah Nelson, Office of Legal and Regulatory Compliance, Board of Health Administrator
 - Jeff Lawrence, Division of Environmental Health and Sustainability, Director
 - Sean Scott, Division of Environmental Health and Sustainability, Deputy Director
 - Cary Ruble, Division of Environmental Health and Sustainability, Regulation Development and Enforcement Coordinator
 - Michael Silverstein, Solid and Hazardous Waste Commission, Commission Administrator and Air Quality Control Commission, Administrator and Technical Secretary
 - Trisha Oeth, Water Quality Control Commission, Commission Administrator
 - Lynette Myers, Division of Environmental Health and Sustainability, Environmental Leadership Program (ELP) Coordinator
 - Rachel Wilson-Roussel, Division of Environmental Health and Sustainability, Sustainability Unit Manager
 - Water Quality Control Division, Permits Section Manager

The following individuals and/or entities were notified that this rule-making was proposed for consideration by the Executive Director: DEHS staff informed and discussed the proposed repeal of the subject regulation with the individuals and organizations listed below. No objections were voiced.

- Air, Water, Waste Divisions within CDPHE.
- EPA
- ELP members
- CDPHE staff
 - Deborah Nelson, Office of Legal and Regulatory Compliance, Board of Health Administrator
 - Jeff Lawrence, Division of Environmental Health and Sustainability, Director
 - Sean Scott, Division of Environmental Health and Sustainability, Deputy Director
 - Cary Ruble, Division of Environmental Health and Sustainability, Regulation Development and Enforcement Coordinator
 - Michael Silverstein, Solid and Hazardous Waste Commission, Commission Administrator and Air Quality Control Commission, Administrator and Technical Secretary
 - Trish Oeth, Water Quality Control Commission, Commission Administrator
 - Lynette Myers, Division of Environmental Health and Sustainability, Environmental Leadership Program (ELP) Coordinator
 - Rachel Wilson-Roussel, Division of Environmental Health and Sustainability, Sustainability Unit Manager
- This proposal was also posted on the Department's website.

Summarize Major Factual and Policy Issues Encountered and the Stakeholder Feedback Received. If there is a lack of consensus regarding the proposed rule, please also identify the Department's efforts to address stakeholder feedback or why the Department was unable to accommodate the request.

No major factual or policy issues have been encountered.

Please identify health equity and environmental justice impacts. Does this proposal impact Coloradoans equally or equitably? Does this proposal provide an opportunity to advance HEEJ? Are there other factors that influenced these rules?

The repeal of 5 CCR 1004-1 has no health equity and environmental justice impacts.

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Executive Director of Department of Public Health and Environment

ENVIRONMENTAL MANAGEMENT SYSTEM PERMIT PROGRAM REGULATIONS

5 CCR 1004-1

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

1. APPLICABILITY AND DEFINITIONS

1.1 Applicability

The provisions of this regulation shall apply statewide to all facilities participating in the Environmental Management System (EMS) Permit Pilot Program (Program). Voluntary participation by a facility in the Program must be approved by the Director of the Colorado Department of Public Health and Environment (the Department) or his or her designee. This regulation is promulgated to establish the EMS Permit Pilot Program pursuant to Title 25, Colorado Revised Statutes (C.R.S.), Article 6.6. This regulation implements the EMS Program as a pilot program and is not sufficient for a permanent program.

The facilities that have been approved by the Department to participate in this Program are subject to conventional environmental permits issued by the Department, local agencies, and/or the federal government or will be obtaining such permits. For the duration of this pilot Program, the facilities are required to comply with this regulation and the EMS Permit issued pursuant to this regulation. All existing conventional environmental permits issued by the Department and local agency and held by that facility shall remain in effect and are incorporated into the EMS Permit. All conventional environmental permits will be enforceable unless no conventional environmental permit exists, then the EMS Permit is enforceable. The Department and local agency shall ensure that the EMS Permit is at least as protective to the environment and public health as the facility's conventional environmental permit and any applicable environmental requirements. The Department shall modify both the conventional environmental permit and the EMS Permit to ensure both remain consistent throughout the Program. Any operational flexibility approved into the EMS Permit and conventional environmental permit(s) during the Program, shall be eliminated from the conventional environmental permits upon revocation of the EMS Permit unless the facility requests and the Department and local agency approve maintaining the operational flexibility in the conventional environmental permit(s). If operational flexibility remains in a conventional environmental permit after the EMS Permit is revoked, the Department and local agency shall ensure that applicable environmental requirements associated with the operational flexibility that are required to be federally enforceable within an EMS Permit are submitted to the Administrator for review and approvals are obtained as required by federal law.

Nothing herein shall modify the Administrator's, Department's or the local agency's existing authority over environmental requirements under federal law. Use of the phrase "Department or local agency" does not expand or modify Department or local agency authority over environmental programs. Local agency authority over any environmental programs delegated to the local agency is maintained.

Pursuant to section 24-4-103(12.5), C.R.S., materials incorporated by reference are available for public inspection during normal business hours, or copies may be obtained at a reasonable cost from the Director of the Office of Environmental Programs, Colorado Department of Public Health and Environment, 4300 Cherry Creek Drive South, Denver, Colorado 80246-1530, or may be examined at the State Publications Depository Library. Materials incorporated by reference are those editions in existence as of the date this regulation is promulgated or revised by the Director and references do not include later amendments to or editions of the incorporated materials.

1.2 Definitions

- 1.2.1 ~~“Administrator” means the regional administrator of the U.S. Environmental Protection Agency Region VIII (U.S. EPA).~~
- 1.2.2 ~~“Applicable environmental requirement” means:~~
- 1.2.2.1 ~~Any environmental requirement required to be included in any of the facility’s conventional environmental permits pursuant to federal or state law or regulation;~~
~~or~~
 - 1.2.2.2 ~~Any other environmental requirement which the Department, local agency, and the participating facility agree to incorporate in the EMS Permit, provided that such incorporation is not inconsistent with federal or state law or regulation.~~
- 1.2.3 ~~“Cross media” means the transfer of pollution from a single environmental medium (e.g., air, groundwater, surface water, hazardous waste, solid waste) to one or more other media.~~
- 1.2.4 ~~“Department” means the Colorado Department of Public Health and Environment.~~
- 1.2.5 ~~“Director” means the executive director of the Colorado Department of Public Health and Environment.~~
- 1.2.6 ~~“Environmental aspects” are those processes, products or activities over which an entity has control and that can, or have the potential to, interact with the environment in a positive or negative way.~~
- 1.2.7 ~~“Environmental compliance audit” or “compliance audit” means a systematic evaluation, review, or assessment of compliance with the EMS Permit of a facility or operation subject to an EMS Permit conducted by an environmental compliance auditor.~~
- 1.2.8 ~~“Environmental compliance auditor” means an independent person that does not have direct involvement with compliance or management issues at the facility being audited and is qualified, as determined by the Department, to audit the facility for compliance with applicable environmental requirements.~~
- 1.2.9 ~~“Environmental impacts” are changes in the environment as a result of the processes, products or activities over which an entity has control and that interact with the environment.~~
- 1.2.10 ~~“Environmental leader,” for purposes of this Program, means any entity that the Department determines to be adequately committed to environmental improvement, ongoing compliance, and the community.~~
- 1.2.11 ~~“Environmental management system” or “EMS” means an overall management system as approved by the Department, but that at a minimum identifies and addresses environmental concerns through the allocation of resources, assignment of responsibilities and ongoing evaluation of practices, processes and procedures to achieve sound environmental performance.~~
- 1.2.12 ~~“Environmental management system auditor” or “EMS auditor” means an independent person that did not have a substantive role in developing the EMS at the facility being audited and is qualified, as determined by the Department, to conduct an EMS conformance audit at the facility.~~

- 1.2.13 ~~“Environmental management system conformance audit” or “EMS conformance audit” means a systematic, independent, and documented verification process, conducted by an EMS auditor, which objectively obtains and evaluates evidence to determine whether a facility’s EMS conforms to the requirements of an EMS as defined by the Department.~~
- 1.2.14 ~~“Environmental management system permit” or “EMS Permit” means a permit issued pursuant to Title 25, Article 6.6, C.R.S., and this regulation.~~
- 1.2.15 ~~“Environmental permit” or “conventional environmental permit” means a permit or license issued pursuant to Article 20.5 of Title 8, C.R.S., Articles 7, 8, 11, and 15 of Title 25 or Article 20 of Title 30, C.R.S., or rules promulgated under such provisions, and may also include permits issued pursuant to local government authority, with the consent of such local government authority.~~
- 1.2.16 ~~“Environmental requirement” means a requirement in a federal, state or local law or regulation administered by the Department or local agency, a rule adopted by a statutorily designated state board or commission or local authority, a permit or order issued by the Administrator, Department or local agency, or an agreement entered into with the Administrator, Department or local agency.~~
- 1.2.17 ~~“Facility” means the activity, facility, structure, process, or person subject to an EMS Permit.~~
- 1.2.18 ~~“Local government authority” or “local agency” means local or municipal entity with authority over an environmental permit program, which has agreed to participate in the EMS Permit Program.~~
- 1.2.19 ~~“Measurable environmental benefits” means a resulting positive change in environmental conditions (e.g., emission reductions, improvements in water quality and quantity, reduction in the generation of hazardous waste) from process changes, pollution prevention activities or environmental improvement goals.~~
- 1.2.20 ~~“Pollutant” means, but is not limited to, any of the following:~~
- 1.2.20.1 ~~Any dredged spoil, dirt, slurry, solid or liquid waste, incinerator residue, sewage, garbage, trash, refuse, oil, sewage sludge, munitions, chemical wastes, fly ash, biological nutrients or materials, radioactive substance or materials, wrecked or discarded equipment, rock, sand, or any industrial, municipal or agricultural waste discharged into air or water or onto land; or~~
 - 1.2.20.2 ~~Air pollutant, including, but is not limited to, any dust, fumes, mist, liquid, smoke, other particulate matter, vapor, gas, heat, odorous and odorless substances or any combination thereof which is emitted into or otherwise enters the atmosphere (i.e., any physical, chemical, biological, radioactive [including source material, special nuclear material, and by-product material] substance or matter).~~
- 1.2.21 ~~“Preliminary analysis” means a decision process and document that evaluates a determination of source classification, of applicable emission and effluent sources and throughput and consumption, emission factors, monitoring plans and a determination of compliance with applicable environmental requirements within the EMS Permit application being proposed.~~
- 1.2.22 ~~“Program” or “EMS Permit Program” means the Environmental Management System Permit Pilot Program created pursuant to Title 25, Article 6.6, C.R.S.~~

~~1.2.23 “Responsible official” means a president, secretary, treasurer, or vice president in charge of a principal business function, or any other person who performs similar policy or decision-making functions for a facility, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities and has the authority to sign and certify on behalf of an applicant to the EMS Permit Program the truth, accuracy and completeness of the application or any compliance forms.~~

~~1.2.24 “Serious environmental civil noncompliance” means a violation that may cause significant impact to human health, to the environment, or to treatment plants such as publicly owned treatment works, that are designed to protect the environment; violations that are unresolved or not addressed at the facility; or on-going EPA, state, or local agency-initiated litigation at the facility.~~

~~1.2.25 “Stakeholders” means citizens in the communities near the facility, facility workers, the regulated entity, government representatives, business groups, educational groups, environmental groups, or other Colorado citizens or public interest groups.~~

~~2 ELIGIBILITY AND GENERAL REQUIREMENTS FOR EMS PERMITS~~

~~2.1 Eligibility~~

~~For a facility to be eligible to participate in the EMS Permit Program the Department must establish and determine that the facility meets the following minimum criteria:~~

~~2.1.1 An identified number of years with no serious environmental civil noncompliance, as defined in the Department’s Environmental Leadership Policy for Gold level members or as approved by the Director;~~

~~2.1.2 An identified number of years without any environmental criminal noncompliance, as defined in the Department’s Environmental Leadership Policy for Gold level members or as approved by the Director;~~

~~2.1.3 That the participating entity is an environmental leader in Colorado, as defined in the Department’s Environmental Leadership Policy for Gold level members or as approved by the Director; and~~

~~2.1.4 That the facility has implemented a Department-approved EMS, as defined in the Department’s Environmental Leadership Policy for Gold level members.~~

~~2.2 The following elements are required to be in any EMS Permit:~~

~~2.2.1 The elements of a Department-approved EMS;~~

~~2.2.2 A requirement and criteria for EMS conformance audits consistent with Section 8.1.1 of this regulation;~~

~~2.2.3 A requirement and criteria for environmental compliance audits consistent with Section 8.1.2 of this regulation;~~

~~2.2.4 A requirement and criteria for reporting a summary of the results of the environmental compliance audits consistent with Section 8.1.2 of this regulation;~~

~~2.2.5 Environmental performance standards and limits and all other applicable environmental requirements, including:~~

~~2.2.5.1 Environmental limitations and standards and operational requirements and limitations that assure compliance with all applicable environmental requirements at the time of EMS Permit issuance, and~~

~~2.2.5.2 Operational flexibility that complies with Section 7.1 of this regulation;~~

~~2.2.6 A requirement that Program participants commit to measurable environmental benefits and continual environmental improvement;~~

~~2.2.7 Monitoring, reporting, record-keeping, and testing requirements consistent with Section 8.2 of this regulation;~~

~~2.2.8 The ability for an analysis and consideration of all environmental impacts in developing environmental requirements if the facility requests operational flexibility as set forth in Section 7.1;~~

~~2.2.9 A requirement for a community involvement and communications plan (CICP) that incorporates the elements of Section 6.2; and~~

~~2.2.10 Procedures that reduce otherwise required permit modification procedural requirements.~~

~~2.3 Of the required elements of an EMS Permit listed in Section 2.2:~~

~~2.3.1 The following are enforceable by the Department, local agency, or the Administrator: Sections 2.2.5 and 2.2.7;~~

~~2.3.2 The following are not enforceable, but compliance with these elements of the EMS Permit by the facility is required to obtain an EMS Permit and shall be considered by the Department and local agency in issuance, modification, or revocation of the EMS Permit: Sections 2.2.1, 2.2.2, 2.2.6, 2.2.8, and 2.2.9; and~~

~~2.3.3 Sections 2.2.3 and 2.2.4 are not enforceable, but compliance with these elements of the EMS Permit can be considered by the Department in issuance, modification, or revocation of the EMS Permit, unless the facility elects to conduct environmental compliance audits and receive a reduction of regular state inspections (with Administrator approval if regular inspections are specifically required by federal law), in which case Sections 2.2.3 and 2.2.4 shall be enforceable by the Department, local agency, or the Administrator.~~

~~2.4 All terms and conditions in the EMS Permit that are federally enforceable under conventional environmental permits are enforceable by the Administrator or local agency pursuant to federal law.~~

~~2.5 Facilities subject to an EMS Permit shall be subject to the same fee provisions as other existing permits, unless the Department reduces the fee as an operational flexibility incentive. The Department is authorized to exercise such flexibility.~~

~~2.6 Transfer or Assignment of Ownership~~

~~If transfer or assignment of ownership or operation of a facility permitted pursuant to this regulation is anticipated, the prospective owner or operator shall apply to the Department and local agency, on Department supplied major permit modification forms, for re-issuance of the existing EMS Permit or for revocation of the EMS Permit and reinstatement of the conventional environmental permits. Section 5.2.2 of this regulation governs the major permit modification procedures required for transfer or assignment of ownership of a facility subject to EMS Permit requirements. No application for transfer or assignment of~~

ownership shall be complete until a written agreement containing a specific date for transfer of permit, responsibility, coverage and liability between the current and new owner or operator has been submitted to the Department and local agency.

3. EMS PERMIT APPLICATION REQUIREMENTS

3.1 Pre-application Meeting

Prior to submitting an EMS Permit application an applicant may request, and if so requested, the Department shall grant, a pre-application meeting with the applicant. At such meeting, the Department shall advise the applicant of the applicable environmental requirements for the EMS Permit, including the information, plans, specifications, and the data required to be furnished with the permit application, based on the best information available from the applicant at the time. Failure of the Department and local agency to identify all requirements and information does not exempt the facility from compliance with any applicable environmental requirement or the requirements of this regulation.

3.2 An application for an EMS Permit shall be prepared on forms supplied by the Department that meet all the requirements of federal law and submitted to the Department and local agency electronically. The Department and local agency shall ensure that the application for an EMS Permit is also an application for modification to the conventional environmental permits.

3.3 A compliance certification shall be submitted with the application and shall include:

3.3.1 A certification of compliance with all applicable environmental requirements and a statement of methods used for determining compliance; and

3.3.2 A statement indicating the facility's compliance status with any applicable compliance plan and schedule.

3.4 The applicant shall furnish all information and data required by the Department and local agency to evaluate the permit application and to make its preliminary analysis, including, but not limited to:

3.4.1 Identifying information, including company name and address, owner's name and agent, and telephone number and name of the plant site manager;

3.4.2 Identification of requirements from existing conventional environmental permits and other applicable environmental requirements the applicant is requesting to be included within the EMS Permit;

3.4.3 Identification of operational flexibility being requested and any relevant data to allow the Department and local agency to review and make an equivalency determination required by Part 4 of this regulation;

3.4.4 Additional information as determined to be necessary by the Department and local agency to define alternative or flexible operational scenarios and requirements;

3.4.5 Identification of continual improvement projects; and

3.4.6 Community involvement and communications plan (CICP) developed in compliance with Part 6 of this regulation.

~~3.5 EMS Permit applications and compliance certifications, as set forth in Sections 3.2, 3.3 and 3.4, shall be signed by a responsible official for the facility. Each application form, report and compliance certification submitted pursuant to this regulation shall contain a certification by a responsible official of the truth, accuracy and completeness of such form, report or certification stating that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate and complete.~~

4. PROCESSING OF EMS PERMIT APPLICATIONS

~~4.1 Completeness Determination~~

~~4.1.1 The Department and local agency shall not deem an EMS Permit application to be complete until all information and data required to evaluate the application have been submitted to the Department and local agency. Within 30 days after receipt of an application or any supplemental information requested by the Department or local agency, the Department and local agency will give notice to the applicant if and in what respect the application is incomplete. If the Department or local agency fails to notify an applicant that the application is incomplete within that time period, the application shall be deemed to be complete as of the day of receipt by the Department and local agency of the application or last submitted supplemental information, whichever is later. Nothing herein precludes the Department or local agency from requesting further information about the facility in order to process the permit application.~~

~~4.1.2 No completeness determination shall be required for applications for minor permit modification procedures under this regulation.~~

~~4.1.3 The Department and local agency shall review each application submitted to determine whether it is complete. An application shall be deemed to be complete when it contains information required by Parts 2, 3, 7, and 8 of this regulation in sufficient detail for the Department and local agency to evaluate the facility and permit application.~~

~~4.2 Equivalency Determination~~

~~4.2.1 Equivalency determination means an analysis and decision made by the Department or local agency that any operational flexibility as set forth in Section 7.1 provides, at a minimum, the same degree of protection as existing environmental requirements. The Department and local agency shall evaluate the EMS Permit application and shall determine: whether compliance with the EMS Permit will ensure that the facility will not exceed any applicable water standards or ambient air standards; that the EMS Permit requirements are consistent with federal laws and regulations; and that any resulting environmental requirement is measurable, accountable, enforceable, and based upon replicable procedures.~~

~~4.2.2 Prior to making the equivalency determination required in Section 4.2.1, the Department shall identify all terms and conditions of conventional environmental permits applicable to the participating facility which are utilizing operational flexibility in the proposed EMS Permit, and shall describe how compliance with water standards and ambient air standards and applicable federal laws and regulations will be achieved in light of such operational flexibility. The Department's analysis shall be made available to the public and shall be provided to the EMS Pilot Project Advisory Group, described in Section 6.2 of these regulations, as soon as practicable.~~

~~4.3 The Department and local agency shall request additional information as necessary to issue a complete EMS Permit.~~

~~4.4 The Department and local agency shall prepare a preliminary analysis, equivalency determination, and draft EMS Permit after the EMS Permit application has been deemed complete.~~

~~4.5 If a facility requests operational flexibility in the EMS Permit application, the Department and local agency shall process that request pursuant to Section 7.1 of this regulation.~~

~~5. EMS PERMIT ISSUANCE, MODIFICATION, REVOCATION, AND REOPENING FOR CAUSE~~

~~5.1 EMS Permit Issuance~~

~~5.1.1 During the period of time a facility holds an EMS Permit, all existing conventional environmental permits issued by the Department and local agency and held by that facility shall remain in effect and are incorporated into the EMS Permit. The Department and local agency shall ensure that both the conventional environmental permit and EMS Permit are modified to incorporate any operational flexibility and remain consistent throughout the Program. Any operational flexibility approved into the EMS Permit and conventional environmental permit(s) during the Program, shall be eliminated from the conventional environmental permits upon revocation of the EMS Permit unless the facility requests and the Department and local agency approves maintaining the operational flexibility in the conventional environmental permit(s).~~

~~Any environmental requirements incorporated in the EMS Permit, shall be enforceable as part of the EMS Permit.~~

~~During the period of time a facility holds an EMS Permit, the facility shall remain responsible for maintaining its underlying conventional environmental permits by applying for renewals, including any necessary modifications or amendments, and paying applicable fees. The Department and local agency shall provide the facility a single application form that will allow the facility to request a modification or amendment to the conventional environmental permit and EMS Permit. Once the facility ceases to hold an EMS Permit for any reason, the conventional environmental permits shall continue to remain in effect.~~

~~5.1.2 All monitoring and related record keeping reporting, and testing requirements shall be specifically identified in the EMS Permit.~~

~~5.1.3 A severability clause which demands the continued validity of the various permit requirements in the event of a challenge to any portion of the permit shall be included in the EMS Permit.~~

~~5.1.4 The permit does not convey any property rights of any sort, or any exclusive privilege.~~

~~5.1.5 A requirement that the permittee shall pay to the appropriate division all applicable fees required by the State Act and regulations shall be included in the EMS Permit.~~

~~5.1.6 Terms and conditions of an EMS Permit may be subject to review and approval by the Administrator pursuant to federal laws and regulations.~~

~~5.2 EMS Permit Modification~~

~~5.2.1 Minor Modification~~

~~An EMS Permit modification shall be considered a minor modification if it would be a minor modification under a conventional permit program. Public notice and comment and a completeness determination are required only to the extent that they would be required under a~~

~~conventional permit program. A minor permit modification shall be prepared on forms supplied by the Department and local agency. Minor permit modification procedures may be used only for those permit modifications that:~~

~~5.2.1.1 Do not violate any applicable environmental requirement;~~

~~5.2.1.2 Do not involve significant changes to existing monitoring, reporting, or record keeping requirements in an EMS Permit;~~

~~5.2.1.3 Do not change a case-by-case determination of a standard or limitation; and~~

~~5.2.1.4 Are not otherwise required by the Department or local agency to be processed as a major modification.~~

~~5.2.2 Major Modification~~

~~A major modification shall be prepared on forms supplied by the Department and local agency. Major permit modification procedures shall be used for those permit modifications that are not considered to be a minor modification and require the public comment process in Part 6 to occur prior to the Department and local agency issuing the modified EMS Permit.~~

~~5.3 An EMS Permit or permit modification shall be issued only upon a determination by the Department and local agency that the following criteria have been met:~~

~~5.3.1 The Department and local agency have received a complete application for an EMS Permit or permit modification;~~

~~5.3.2 Public participation comment and hearing requirements as required by Part 6 of this regulation (except for modifications qualifying as a minor permit modification);~~

~~5.3.3 Permit conditions provide for compliance with all applicable environmental requirements and requirements of this regulation;~~

~~5.3.4 Operational flexibility requests by the facility comply with Section 7.1 of this regulation; and~~

~~5.3.5 The Administrator has received a copy of the EMS Permit for the facility, if it is otherwise required by federal law that the Administrator receive a copy of the permit for the facility, and has approved or not objected to the modification by the end of the public comment period of the EMS Permit; any objection by the Administrator to permit issuance shall be done in accordance with the applicable federal statutes and regulations.~~

~~5.4 Revocation~~

~~5.4.1 The Department and local agency shall revoke an EMS Permit if requested by the facility or may revoke an EMS Permit if the Department or local agency, as appropriate, determines on a case-by-case basis that:~~

~~5.4.1.1 The facility to be in serious environmental civil noncompliance with the EMS Permit or applicable law;~~

~~5.4.1.2 The facility is not able, or has shown a lack of willingness, to comply with continual environmental improvement goals and targets in the EMS Permit;~~

~~5.4.1.3 The permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or revocation;~~

~~5.4.1.4 Upon transfer of ownership or operation of the facility, the new owner or operator is not eligible for an EMS Permit; or~~

~~5.4.1.5 The facility fails to comply with the requirements of Sections 2.2.1, 2.2.2, 2.2.6, 2.2.8, or 2.2.9 of this regulation.~~

~~5.4.2 The facility may at any time notify the Department and local agency in writing that the facility is giving up eligibility for the EMS Permit and will operate under the conventional environmental permits. This change of status is effective immediately upon revocation of the EMS Permit and reinstatement of the conventional environmental permits.~~

~~5.4.3 Whenever a facility wishes to cancel an EMS Permit, the facility shall notify the Department and local agency, in writing.~~

~~5.4.4 Upon Department and local agency revocation of an EMS Permit and after public notice and comment (only to the extent that it would be required under a conventional permit program), the Department or local agency shall in the revocation order, include the following:~~

~~5.4.4.1 A compliance schedule to facilitate transition from the EMS Permit to the conventional permits, not to exceed one year in duration, if operational flexibility is eliminated from the facility's conventional permits or a conventional permit has not been obtained, and the Department and local agency determine that a compliance schedule is necessary to provide the facility a reasonable amount of time to either conform with the conventional environmental permits in effect at the time of revocation of the EMS Permit or to obtain the necessary conventional environmental permits. A compliance schedule does not replace or modify any other regulatory authority of the local agency; and~~

~~5.4.4.2 Practical interim requirements to replace any requirements of the EMS Permit that the Department and local agency determine the facility will not be able to comply with during the duration of the compliance schedule, provided that such interim requirements shall not allow pollution from the facility in excess of that allowed by applicable law at the time the EMS Permit is proposed to be revoked.~~

~~5.4.5 The facility shall comply with the Department's or local agency's order and with all requirements of the EMS Permit for which alternative interim requirements have not been established in the Department's or local agency's order, until the conventional environmental permits are in effect.~~

~~5.5 Reopening for Cause of EMS Permits~~

~~5.5.1 An EMS Permit issued pursuant to this regulation shall be reopened and revised in accordance with the State Act under any of the following circumstances:~~

~~5.5.1.1 The Department and local agency determines that the EMS Permit contains a material mistake or that inaccurate statements were made in establishing the terms or conditions of the EMS Permit; or~~

~~5.5.1.2 The Department and local agency determines that the EMS Permit must be revised or revoked to assure compliance with the applicable environmental requirements.~~

~~5.5.2 EMS Permit re-openings shall be processed using the procedures set forth in Section 5.1 of this regulation.~~

~~5.5.2.1 Proceedings to reopen EMS Permits affect only those parts of the EMS Permit for which a cause to reopen exists.~~

~~5.5.2.2 Re-openings under this Section 5.5 of this regulation shall not be initiated by the Department and local agency before notice of such intent is provided to the permitted facility by the Department and local agency at least 30 days in advance of the date that the EMS Permit is to be reopened.~~

6. PUBLIC PARTICIPATION REQUIREMENTS

6.1 Applicability

~~The following provisions shall govern public participation procedures concerning the EMS Permit Program.~~

6.2 EMS Permit Program Advisory Groups

~~The primary vehicle for public participation and stakeholder involvement for purposes of this regulation is provided through the EMS Permit Program Advisory Groups (EMS Permit PAGs) composed of interested parties, EMS Permit applicant(s), and representatives of the Department. Participation in EMS Permit PAGs does not waive any public participation and appeals rights that exist under other applicable environmental laws and regulations.~~

~~6.2.1 Interested parties shall be initially identified in the community involvement and communications plan (CICP) to be submitted by the facility as required in Section 3.4.6. Additional interested parties may be identified by the facility during any stage of development, issuance and implementation of the EMS Permit and included in the facility's CICP.~~

~~6.2.2 The EMS Permit PAG shall establish its own ground rules, procedures, and protocols for transfer of information and meeting schedule. The EMS Permit PAG is an advisory group and does not have authority to modify any public notice, public participation, or appeal requirements under the Colorado Administrative Procedure Act or any applicable air, water and land disposal laws and regulations. All meetings of the EMS Permit PAG shall be open to the public.~~

~~6.2.3 Through the EMS Permit PAGs, the interested parties shall be given an opportunity to take an advisory role in the evaluation, analysis and discussion of a facility's EMS, EMS Permit, CICP, and the EMS Permit Pilot Program. It is intended that the EMS Permit PAGs will be a forum for education and open communication between industry, regulatory agencies, environmental and community interest groups, and academics.~~

~~6.2.4 The Department, local agency or the participating facility shall provide the EMS Permit PAGs with timely information, and shall address comments with respect to a participating facility's environmental footprint, significant environmental aspects and impacts, objectives and targets, continual improvement plan, monitoring data and reports that are required to be submitted to the Department and local agency under conventional permits or the EMS Permit, the Department's and local agency's equivalency determination required in Section 4.2 of these regulations, and pollution prevention opportunities. The timing and frequency of actions necessary for the facility to comply with this requirement shall be specified in the facility's EMS Permit, except that the Department's and local agency's equivalency determination required in Section 4.2 of this regulation shall be available as soon as practicable prior to the issuance of the EMS Permit.~~

~~6.2.5 Pursuant to section 25-6.6-102(j), C.R.S., the Department will use best efforts to seek and provide resources for the activities of the EMS Permit PAGs.~~

~~6.3 Public Notice of Permit Application~~

~~Upon receipt of an EMS Permit application, the Department shall provide a general public notice in a manner intended to reach a broad audience and shall provide individual notice to the members of the interested parties identified in the facility's CIGP and members of any applicable EMS Permit PAG. The individual notices shall be sent via U.S. mail and, where appropriate, via electronic mail.~~

~~6.3.1 Such general and individual notices shall inform the public of the EMS Permit application and its contents and of the opportunity to participate through an EMS Permit PAG.~~

~~6.3.2 The individual notices shall provide a description of the EMS Permit Program, and shall invite the members of the interested parties to comment on whether the permit applicant should be admitted to the Program and to participate in the development and evaluation of the EMS Permit through membership on the EMS Permit PAG. The individual notices shall include the address of the Department's EMS Internet website where information regarding the application can be obtained.~~

~~6.4 Public Participation Requirements for EMS Permit Issuance, Modification and Revocation~~

~~The Department shall comply with the following public participation requirements and afford at least as much public notice and as many opportunities for public participation, hearings and appeals as are available under the Colorado Administrative Procedure Act, and applicable federal air, water and land disposal laws and regulations governing the participating facility.~~

~~6.4.1 Except for modifications qualifying as minor permit modifications, as described in Section 5.2.1 of this regulation, and elements of the EMS Permit that are not enforceable as defined by Sections 2.3.2 and 2.3.3, all permit proceedings, including initial permit issuance, major modifications, re-openings and revocations, to the extent required by federal law or regulations, are subject to public notice, comment and opportunity for public hearing requirements.~~

~~6.4.2 The Department shall, within fifteen days after completion of the draft EMS Permit, cause public notice of the availability of the draft EMS Permit and the equivalency determination required in Section 4.2 of this regulation to be published in a newspaper of general distribution in the area in which the proposed project or activity is or will be located, and by such other means if necessary to assure notice to the affected public. The newspaper notice shall contain the name and address of the facility, contact information for Department staff, notification that public comment will be received for 30 days, and the website address for additional information regarding: the EMS Permit application; draft EMS Permit; the Department's preliminary analysis; the equivalency determination; and the procedures for public comment. The Department shall cause a copy of the application, preliminary analysis, equivalency determination, and draft EMS Permit to be filed with the county clerk for each county in which the facility is or will be located. The Department shall send written or electronic notice to the applicant, to persons requesting notice of EMS Permit applications for the type of facility or geographic area, to the parties identified in the CIGP, to the applicable EMS Permit PAG, and to affected states. The Department's website notice shall contain the information listed below in Sections 6.4.2.1 through 6.4.2.9:~~

~~6.4.2.1 The name and address of the facility and affected facility, the Department's name and address, and contact information for a Department staff;~~

- ~~6.4.2.2 The activity or activities proposed in the permit application and the changes involved in any permit modification;~~
- ~~6.4.2.3 Information regarding scheduling of any public comment hearing if one is requested and that the Department will receive and consider public comments for at least 30 days after such publication and the deadline for filing public comments;~~
- ~~6.4.2.4 The application, Department's preliminary determination, draft EMS Permit, and equivalency determination as required by Section 4.2 of this regulation;~~
- ~~6.4.2.5 That any interested person may submit a written request for a public comment hearing to be held by the Director to receive comments regarding the draft EMS Permit except for permit conditions approved in conventional permits. Any written request for a public comment hearing must be submitted to the Department within 30 days of publication;~~
- ~~6.4.2.6 A statement that written requests for a public comment hearing shall be directed to the Department's Office of Environmental Programs at 4300 Cherry Creek Drive South, Denver, Colorado 80246-1530;~~
- ~~6.4.2.7 A statement that requests shall: (i) identify the person or group requesting a public hearing; (ii) state the person's address and phone number; (iii) state the reasons for the request; and (iv) state the manner in which the person is affected by the proceedings;~~
- ~~6.4.2.8 That comments concerning the ability of the proposed activity to comply with applicable environmental requirements are solicited from any interested person; and~~
- ~~6.4.2.9 That comments are solicited on the environmental impacts of the facility or modification, on proposed alternatives to or modification of, required control technology, and any other appropriate environmental considerations.~~
- ~~6.4.3 The Director shall hold a public comment hearing within 60 days of receipt of the request for a hearing, unless such greater time is agreed to by the person requesting a public hearing and the Department. The Department shall appear at the public comment hearing in order to present the permit application. At least 30 days prior to such hearing, notice thereof shall be mailed by the Director to the applicant, and to any interested person who submitted a request for a public hearing, printed in a newspaper of general distribution in the area the facility is or will be located, and submitted for public review with the county clerk for each county in which the facility is or will be located. The Department may extend public comment for up to 15 days following a public comment hearing.~~
- ~~6.4.4 The Department shall maintain a record of the commenters and of the issues raised during the public comment and public hearing process for a period of five years.~~
- ~~6.4.5 The Department shall notify the Administrator and any affected state, in writing, of any decision not to accept all recommendations for the proposed EMS Permit that the affected state submitted during the public or affected state review period, as well as reasons for such decision.~~
- ~~6.4.6 A petition for review as is provided in Section 6.4.5 does not stay the effectiveness of an EMS Permit or its requirements if the EMS Permit was issued after the end of the 45-day review period and prior to an objection by the Administrator.~~

~~6.4.7 If, pursuant to a petition filed under this Section 6.4, the Administrator objects to the issuance of an EMS Permit prior to its issuance, the Department shall not issue the EMS Permit until the Administrator's objection has been resolved.~~

~~6.4.8 If, pursuant to a petition filed under this Section 6.4 the Administrator objects to the issuance of an EMS Permit after it has been issued by the Department, the Administrator may modify, terminate, or revoke such EMS Permit if such authority exists in federal law and the Department may thereafter issue only a revised permit that satisfies the Administrator's objection if required by federal law.~~

~~6.4.9 In no event will any proceeding under this Section 6.4, cause a facility to be in violation of the requirement to have submitted a timely and complete application.~~

~~6.5 Public Participation Requirements for Rulemaking~~

~~When a revision to this regulation is contemplated, the Department shall make a public announcement at such time and in such manner as the Director determines, and opportunity shall be afforded interested persons to submit views or otherwise participate informally in conferences on the proposals under consideration.~~

~~6.5.1 Prior to amending or modifying any provision in this regulation, the Director shall conduct a public hearing as provided in section 24-4-103, C.R.S. Notice of any such hearing shall conform to the requirements of section 24-4-103, C.R.S., and such notice shall be given at least 60 days prior to the hearing, shall include each proposed revision, and shall be made available to all persons who have filed with the Director a written request to receive such notices.~~

~~6.5.2 Any person desiring to propose revisions to this regulation shall file such other proposal with the Director not less than 30 days prior to the hearing, and, when on file, such proposal shall be open for public inspection.~~

~~6.5.3 Promulgated rules and regulations shall not take effect until after they have been published in accordance with section 24-4-103, C.R.S., or on such later date as is stated in such rules and regulations.~~

~~6.5.4 Appeal of this regulation shall be as provided in the Colorado Administrative Procedure Act.~~

~~6.6 Facility information~~

~~The Department shall establish and maintain a website containing information about each EMS Permit issued. At a minimum, the website shall contain the facility description, a copy of the EMS Permit, the CIGP, including the facility's responses to community concerns, commitments to continual improvement projects and goals and performance of these commitments. The website shall also contain a summary of the facility's compliance audit results, activities undertaken to remedy any nonconformance or noncompliance, facility changes, an analysis of the facility's participation in the EMS Permit program if the facility's EMS Permit is revoked, and other pertinent information.~~

7. OPERATIONAL FLEXIBILITY, MEASUREABLE ENVIRONMENTAL BENEFITS AND CONTINUAL ENVIRONMENTAL IMPROVEMENT PROJECTS

7.1 Operational Flexibility

~~7.1.1 The purpose of operational flexibility is to allow a facility to implement alternative pollution prevention, source reduction and pollution reduction strategies and environmental monitoring, record keeping and reporting methods or procedures for the facility. The~~

~~EMS Permit shall allow facilities to meet existing environmental standards of a law, rule, order, or conventional permit related to the control or abatement of pollution through the use of alternative methods and procedures while ensuring compliance with an established ambient air or water standard. Nothing in this regulation shall be construed to authorize a facility to exceed an established ambient air or water standard. The operational flexibility that is provided for under this section is not intended to limit the flexibility provided under other environmental programs.~~

~~7.1.2 The facility shall include any requests for operational flexibility in the EMS Permit application.~~

~~7.1.3 The Department and local agency shall provide operational flexibility if the following requirements are met:~~

~~7.1.3.1 The operational flexibility does not result in an exceedance of an established applicable water or ambient air standard;~~

~~7.1.3.2 The operational flexibility is at least as protective as applicable environmental requirements;~~

~~7.1.3.3 The EMS Permit contains an equivalency determination as required by Section 4.2 of this regulation; and~~

~~7.1.3.4 The Department and local agency will submit any permit condition that includes operational flexibility to the Administrator for review and approval as required by federal law (nothing herein expands the Administrator's authority over permit conditions beyond what is currently required by federal law).~~

~~7.1.4 The Department, local agency, and facility shall conduct a cross media assessment of any operational flexibility requested by the facility. Based upon that assessment the Department and local agency shall incorporate the most environmentally beneficial compliance alternative into the EMS Permit, so long as the facility agrees. If the facility does not agree, the environmental requirement in the conventional permit shall apply to the facility.~~

~~7.1.5 The Department and local agency shall develop and make available to the public information concerning any permit condition that incorporates or allows operational flexibility as set forth in Section 7.1.1 of this regulation and any other incentive provided to the applicant within the EMS Permit, pursuant to Sections 6.2.4, 6.3 and 6.4 of this regulation.~~

~~7.2 Measurable Environmental Benefits and Continual Environmental Improvement Projects~~

~~7.2.1 Continual environmental improvement or continual improvement means any prevention or reduction of an environmental impact. The facility shall commit to conducting continual improvement projects by:~~

~~7.2.1.1 Identifying and committing to continual improvement projects in the EMS Permit application;~~

~~7.2.1.2 Conducting annual reviews of the facility's aspects and impacts assessment for feasible continual improvement projects; and~~

~~7.2.1.3 Committing to propose and implement additional continual improvement projects.~~

~~7.2.2 Continual improvement projects can include, but are not limited to:~~

~~7.2.2.1 Waste reduction goals, energy and water conservation goals, odor reduction goals, and pollutant emissions reduction goals;~~

~~7.2.2.2 Pollution prevention projects such as source reduction and other practices that reduce or eliminate creation of pollutants through increased efficiency in the use of raw materials, energy, water, or other resources and protection of natural resources by conservation;~~

~~7.2.2.3 Pollution prevention training for employees and an employee recognition program;~~

~~7.2.2.4 Description of major waste and emission sources or processes at the facility and existing and new process pollution prevention review procedures;~~

~~7.2.2.5 Community outreach efforts and goals; and~~

~~7.2.2.6 Product stewardship and customer and supplier outreach and recognition programs.~~

~~7.2.3 The facility agrees to measure the outcomes and outputs of the continual improvement projects by benchmarking and selecting key performance indicators or other verifiable, quantitative and qualitative measures or methods that document all performance goals, including resource conservation and pollution prevention goals.~~

8 AUDITING, COMPLIANCE ASSURANCE MONITORING, REPORTING, RECORD KEEPING AND TESTING

8.1 Auditing Requirements

8.1.1 EMS Conformance Audit

~~8.1.1.1 A facility with an EMS Permit must comply with the following EMS conformance audit requirements:~~

~~8.1.1.1.1 Ensure an EMS conformance audit is conducted at least every two years by a date specified in the EMS Permit. The EMS conformance audit shall be conducted by an EMS auditor. The EMS conformance audit shall ensure at a minimum that the EMS meets the criteria for an EMS established by the Department.~~

~~8.1.1.1.2 Maintain on-site and available for Department and local agency review, an electronic summary of the EMS conformance audit results, signed by an EMS auditor, describing conformance, minor nonconformance, or any major nonconformance found in the course of an EMS conformance audit. For major nonconformance, the summary of EMS conformance audit results shall summarize the objective evidence found by the EMS auditor, describe corrective actions planned by the facility, and detail follow-up audit activity planned by the EMS auditor.~~

~~8.1.1.2 The Department or local agency may request the owner or operator of the facility to allow the Department or local agency access to the EMS auditor's documentation of findings when making the following determinations about a facility's eligibility for the EMS Program:~~

~~8.1.1.2.1 Eligibility for facilities under Section 2.1;~~

~~8.1.1.2.2 Loss of eligibility or revocation of the EMS Permit under Section 5.5; or~~

~~8.1.1.2.3 Change of ownership under Section 2.6.~~

~~The facility may request the Department and local agency treat the information in the EMS auditor's documentation of findings as confidential and only review the documents on-site.~~

~~8.1.2 Environmental Compliance Audit~~

~~A facility with an EMS Permit must comply with the following environmental compliance audit requirements:~~

~~8.1.2.1 Ensure an environmental compliance audit is conducted at least every two years by a date specified in the EMS Permit. The environmental compliance audit shall be conducted by an environmental compliance auditor. The environmental compliance audit shall review the facility's compliance with the environmental requirements within the EMS Permit.~~

~~8.1.2.2 Maintain on-site and submit to the Department and local agency review, an electronic summary of the environmental compliance audit results, signed by a responsible official of the facility, describing any noncompliance found in the course of an environmental compliance audit. For serious noncompliance issues, the summary of the environmental compliance audit results shall summarize the objective evidence found in the environmental compliance audit, describe corrective actions planned by the facility including compliance dates, and detail follow-up audit activity planned by the facility. The Department shall place the summary of the environmental compliance audits on the Department's website pursuant to Section 6.6 of this regulation.~~

~~8.1.2.3 If the facility opts to seek self-audit law penalty immunity pursuant to sections 25-1-114.5 and 25-1-114.6, C.R.S., the facility shall submit to the Department the required documentation to qualify for immunity within the time frame allowed by the self-audit law program. The Department shall review and approve or deny the facility's self-audit submittal as if the environmental compliance audit was not required by the EMS Permit.~~

~~8.2 Monitoring, Reporting, Record Keeping, and Testing~~

~~8.2.1 The Department and local agency shall require the facilities to conduct monitoring, reporting, record keeping and testing as required under the conventional permits.~~

~~8.2.2 All required monitoring, reporting, record keeping and testing must be performed in accordance with the law.~~

~~8.2.3 A facility may submit alternative monitoring, reporting, record keeping or testing programs or requirements to what is required in any conventional environmental permit for a facility to the Department and local agency for review as part of an operational flexibility request as set forth in Section 7.1 of this regulation. The Department and local agency shall use best efforts to approve, specify changes necessary for approval, or deny the requested alternative monitoring, reporting, record keeping or testing program or requirements in an expeditious manner.~~

9. APPEAL OF AN EMS PERMIT

9.1 Permit Adjudicatory Hearings

The applicant or any other person with standing pursuant to state or federal law may request an adjudicatory hearing with the Director or designated hearing officer within 30 days of the issuance of the final permit determination concerning the conditions of the EMS Permit that would otherwise be found in a conventional environmental permit or that are considered operational flexibility.

9.2 All requests for adjudicatory hearings shall contain the following information:

9.2.1 Identification of the person(s) requesting the hearing and subject matter of the request;

9.2.2 The statutory and regulatory authority that forms the basis for the request;

9.2.3 The basis upon which the appellant believes the Department or local agency has committed error with respect to the subject matter of the request; and

9.2.4 An estimate of the time that will be required for the hearing.

10. SEVERABILITY CLAUSE

If any provision of this regulation is found to be invalid by a court of competent jurisdiction, the remaining provisions of the regulation are valid, unless it appears to the court that the valid provisions of the regulation are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the Director would have enacted the valid provisions without the void one; or unless the court determines that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the statutory provisions.

11. CONFIDENTIAL INFORMATION OR DATA CONTAINED IN PERMIT APPLICATIONS OR REPORTS SUBMITTED PURSUANT TO THIS REGULATION

11.1 Upon written request to the Department, any person filing a permit application or submitting reports pursuant to this regulation may request that information contained in such a permit application or report relating to secret processes or methods of manufacture or production be kept confidential. The written request must identify the basis for the claim that the information relates to secret processes or methods of manufacture or production. All information claimed as confidential must be segregated from the rest of the permit application or report when submitted, with each page clearly marked as "Confidential," "Trade Secret," or other similar marking.

11.2 The Department and local agency will evaluate confidentiality claims based on the written request. The burden of establishing that the information relates to secret processes or methods of manufacture or production is on the claimant. If information which is determined by any Colorado or federal statute or regulation not to be entitled to confidential treatment, it shall not be entitled to confidential treatment notwithstanding this Part 11, or any other law to the contrary. If the Department or local agency determines that information a facility has requested to be kept confidential is not entitled to confidential treatment, it shall provide written notice, or otherwise communicate, this determination at least three working days prior to making such information available to the public.

~~11.3 A request for confidential treatment of information or data submitted to the Department or local agency shall be deemed a limited waiver by the applicant of the time constraints contained in Parts 4, 5, 6 and 7 of this regulation. Therefore, any delay in the processing of a permit application resulting from the Department's or local agency's being required to give notice under this Part 11, shall not be considered in determining whether the time constraints set forth in this regulation have been met.~~

~~12. STATEMENTS OF BASIS, SPECIFIC STATUTORY AUTHORITY AND PURPOSE~~

~~12.1 August 23, 2004—Environmental Management System Permit Program (EMS Permit Program)~~

~~This Statement of Basis, Specific Statutory Authority and Purpose complies with the requirements of the Colorado Administrative Procedures Act of the Colorado Revised Statutes, sections 24-4-103(4) and (12.5) for new regulations.~~

~~12.2 Basis~~

~~The Environmental Management System Permit Program Regulation implements a new regulatory approach authorized by the Colorado General Assembly in Title 25, Article 6.6 titled the Colorado Environmental Management System Permit Program (EMS Permit Program). This new regulatory approach was proposed by the Colorado Department of Public Health and Environment (the Department) as a voluntary pilot program to test the practicality and efficiency of the EMS Permit Program to provide a basis for determining if such a program would be beneficial as a permanent part of the Department's regulatory process. The development of the proposal and the ensuing regulation has involved considerable input from interested stakeholders and has been developed in collaboration with these interested parties.~~

~~The EMS Permit Program regulation sets forth the requirements implementing a multi- and cross media permitting system that meets the requirements of the following environmental permitting programs, where applicable: air quality, water quality, hazardous and solid waste, and radiation control. Whereas an environmental management system (EMS) is a formal set of procedures and policies that define how an organization will continually identify, prioritize, mitigate and manage its environmental impacts, the EMS Permit Program will expand the EMS to include all applicable environmental requirements through the traditional procedures, work practices, monitoring, record keeping, and other elements of an EMS. For purposes of the EMS Permit Program, the Department will enforce the EMS Permit as if it is both an EMS and applicable environment permit, with the understanding that the conventional permits remain in effect. During the pilot, all conventional environmental permits will be enforceable unless no conventional environmental permits exists, then the EMS Permit is enforceable.~~

~~The Director and Department support an EMS Permit approach because the single-media technology-based standards that are designed to protect the environment could be further advanced by new regulatory methods and approaches if provided the opportunity to demonstrate success through implementation. In addition, the EMS Permit Program provides the Department with an opportunity to consider the impact of single-media regulatory requirements on other media and promotes the analysis and mitigation of adverse impacts across various media through alternative methods and technologies while providing equivalent or greater public health and environmental protection. This EMS Permit Program pilots the expansion of a superior management tool, the EMS, to include applicable air, water, radiation, hazardous and solid waste requirements in one comprehensive EMS permit. The EMS Permit allows facilities to assess environmental impacts on a cross media basis and in turn provides operational flexibility in the permitting of pollution sources. The Department believes that by making these cross media assessments and providing operational flexibility, sources will be able to implement the most effective pollution prevention, source reduction or other pollution prevention strategies to meet enforceable pollution limits and to go beyond conventional compliance requirements. By allowing facilities to use an EMS to routinely gauge, monitor and check compliance, facilities will gain greater overall environmental improvement by focusing and addressing real environmental issues instead of spending valuable time and resources on completing paperwork and other administrative tasks that do not benefit the environment.~~

12.3 Specific Statutory Authority

Title 25, Article 6.6, Sections 101 through 105 authorize the Executive Director (Director) of the Department to establish and implement an EMS Permit regulation and program. Based on this authority, the Department will implement, on a pilot basis, a voluntary EMS Permit Program. The pilot program sunsets on June 30, 2007, unless the General Assembly acts to make it a permanent program. The regulation is intended to implement only the EMS Permit Program as a pilot and is not considered sufficient to implement a permanent program.

12.4 Purpose

The purpose of this action is to create a regulatory framework that effectively establishes requirements to implement, on a pilot basis, a new permitting program that considers the cross media impacts of the environmental requirements placed on air, water, hazardous and solid waste, and radiation. Where appropriate, the regulation is intended to provide flexibility in the permitting process to the regulated community. It is not the intent of the program to create an additional or undue burden on any regulated entity that voluntarily chooses to participate in the program, but to find more effective and innovative ways to achieve superior environmental protection within the regulated community than afforded by conventional permitting and compliance assurance approaches. Existing laws play an important role in protecting the environment, but limit some regulated entities from realizing enhanced environmental protection by locking entities into prescriptive single medium regulations and solutions that do not account for cross media impacts and comprehensive management systems that are already in place. The EMS Permit Program provides an opportunity to test a new method and regulatory approach that allows for a systematic, multi-media outcome-based approach that uses an approved permit enhanced EMS as the vehicle.

Developing this program as a pilot provides an opportunity for state regulatory agencies, the U.S. EPA, the regulated community, and other interested persons to examine the benefits this approach to environmental management might have in protecting and enhancing public health and the environment. The EMS Permit provides the regulated community and the public an opportunity to participate in a project that begins to move outside of the conventional single media regime and begin to test new areas of operational flexibility, reporting, auditing, and record-keeping. The EMS Permit Program encourages facilities and communities to work together to reduce pollution, and places an increased emphasis on public participation and the achievement of stakeholder consensus during the EMS Permit Program. By increasing the understanding and transparency of environmental laws and by communicating more effectively among agencies, the regulated community and the public, the Director and Department hope to build a new level of awareness and trust among these groups.

This EMS Permit regulation is not intended to modify any of the local agency's, the Department's or Administrator's existing authority under federal law or regulations. Use of the phrase "Department and local agency" does not expand or modify Department or local agency authority over environmental programs. The Director's intent is to ensure local agency authority over any environmental programs delegated to the local agency is maintained. The regulation requires the Department to request and receive the Administrator's approval prior to modifying any federal law or regulation, beyond what is currently allowed under federal law. The regulation is intended to implement a pilot program and it is not to be utilized for any permanent program ultimately developed and implemented by the Department. In particular, for any permanent program, the eligibility provisions should be reviewed and revised as necessary and a renewal process for EMS Permits developed. If the Department and interested parties request the General Assembly act to make the program permanent, the Department will request that the General Assembly to extend the Department's authority to operate the pilot program until the permanent program can be developed and implemented.

12.4.1 Applicability and Definitions

Applicability

The EMS Permit Program is a voluntary pilot program that applies statewide to a limited number of facilities as determined by the Department in consultation with stakeholders. Compliance is baseline, in that the participating project partners must comply with all applicable environmental regulations, the requirements of the regulation and the EMS Permit issued pursuant to the regulation. The Department is confident of the ability of the project partners to demonstrate ongoing compliance with the requirements of this regulation and the EMS Permit issued pursuant to this regulation. All existing conventional environmental permits issued by the Department and local agency and held by that facility shall remain in effect and are incorporated into the EMS Permit. All conventional environmental permits will be enforceable unless no conventional environmental permits exists, then the EMS Permit is enforceable. Local agency's authority shall remain in effect and will not be superseded by the EMS Permit.

Definitions

The regulation includes the definitions found in the Colorado Revised Statutes, section 25-6-6-103. The Director has also added other pertinent definitions to the regulation specific to the EMS Permit in an attempt to provide clarity and guidance to the requirements set forth in the regulation.

The definition of "Pollutant" is only intended for use in the continual environmental improvement provisions in Section 7.2 of the regulation.

12.4.2 Eligibility and General Requirements of the EMS Permit

Eligibility

Part 2 of the regulation sets forth two important requirements: (1) minimum eligibility requirements for the Department to select facilities willing to participate in the EMS Permit Program; and (2) minimum requirements that must be included in an EMS Permit. Partners in the EMS Permit Program must be determined by the Department to be eligible to participate in the EMS Permit Program. For the purposes of the EMS Permit Program, the requirements included in the regulation and in the Department's criteria and guidance for the Environmental Leadership Program and the Water Quality Control Division's Notice of Intent are being used to determine eligibility, including for the determination of serious environmental civil noncompliance. For example, facilities that do not have applicable permits due to the existence of self-implementing regulations, the Department accepts a signed Notice of Intent to obtain all applicable permits as sufficiently addressing and resolving the issue. Other eligibility requirements include three years of no serious environmental civil noncompliance and five years with no criminal violations, as set forth in the Department's Environmental Leadership Program Guidance or as approved by the Director.

The Department, local agencies, and other partners participating in the development of this program, have agreed that the following facilities are able to participate in the EMS Permit Program, so long as the facilities continue to meet the eligibility requirements in the regulation or voluntarily withdraw from the Program: Aeroflex Colorado Springs; Ball Aerospace & Technology Corp.'s Boulder facility; Magnum Feedyard, a cattle feeding operation; Badger Creek Farms, a dairy; and Murphy Brown of Yuma, a swine operation. The Department has determined these facilities are environmental leaders in Colorado as a result of either currently being members of the state's Environmental Leadership Program or having demonstrated a leadership commitment to the environment for that business sector. The Department can approve other facilities to participate in this program consistent with the regulation and with approval by the Director in consultation with pilot project stakeholders.

General Requirements

~~Participating facilities shall continue to comply with the Program requirements for the duration of the EMS Permit for that facility. If the facility does not continue to comply with all of the Program requirements, the Department or local agency can revoke the EMS Permit pursuant to Section 5.4.~~

~~The required elements for any EMS Permit were taken from the enabling legislation for the EMS Permit Program. Section 2.2.8 requires the Department and local agency to include in any EMS Permit a condition that allows a facility to conduct an analysis and to consider all environmental impacts in developing environmental requirements for the facility. It is completely within the facility's discretion whether to utilize this condition, unless it is necessary for operational flexibility analysis.~~

~~Section 2.3 is intended to detail (1) the elements required in an EMS Permit and operational flexibility included in the conventional environmental permits and are enforceable, and (2) the elements that can be considered by the Department and local agency for a facility's eligibility for the program.~~

~~12.4.3 EMS Permit Application Requirements~~

~~Pre-application Meeting~~

~~The purpose of this section of the regulation is to set forth specific criteria for submitting an EMS permit to the Department. The regulation does not require, but allows for a pre-application meeting between the applicants, the Department and applicable local agency. The purpose of the pre-application meeting is to assist in the mutual understanding of the application requirements and to provide for better communication about the process. Regardless of the discussions at the pre-application meeting, the applicant is responsible for the submission of all materials necessary to fulfill the requirements of the EMS Permit. If the Department fails to identify all the requirements and information with respect to any applicable federal, state or local environmental requirements or EMS Permit requirements, the facility is not exempt from those requirements. Program partners must certify compliance and furnish all information and data to the Department that is required to evaluate the permit application and to make an equivalency determination of the EMS Permit to the requirements of conventional permits and Department-approved EMS Permit requirements.~~

~~The facility has the option of including environmental requirements in the EMS Permit that otherwise do not require a permit, either because the requirement is a part of requested operational flexibility or for any other reason.~~

~~Compliance Certifications~~

~~Relative to compliance certifications, the Department intends that the responsible official at the facility certify that the facility is in compliance with the terms and conditions of all existing conventional permits and that the facility is capable of demonstrating compliance with the terms and conditions of the EMS Permit. The responsible official shall also have the authority to commit the facility to a course of compliance with the requirements of the EMS Permit.~~

~~There were issues raised about the role of the Department and interested parties with respect to the equivalency determination. It is the intent of the Director to allow for full public disclosure of the Department's determination on the completeness of the EMS Permit as compared with the terms and conditions of a facility's conventional environmental permits and of the requirements of the EMS Permit. Interested parties, members of the CICP, and members of any applicable EMS Permit PAG will be informed and provided a copy of the Department's equivalency determination as expeditiously as possible and will be invited to provide comment on the equivalency determination prior to the Department issuing the EMS Permit to the participating facilities.~~

12.4.4 Processing of Applications

Completeness Determination

The Department will conduct a completeness determination of the EMS Permit application. The purpose of the completeness determination is to set forth a timeline for determining completeness of the EMS Permit application. The Department will not take longer than 30 days to make such determination. If additional information is needed from the facility to complete the determination process, the Department can request that additional information be submitted by the facility. If the requested information is not forthcoming, the application may be deemed incomplete and the application denied.

Equivalency Determination

Once the application is deemed complete, the Department will conduct an equivalency determination to ensure that the facility will not exceed any applicable ambient air quality standards, radiation controls or water standards, in addition to demonstrating compliance with federal laws and regulations. It is the intent of the Director that the regulation is inclusive with respect to the applicability of environmental standards and nothing in the regulation is intended to be exclusive and thereby limit ambient air and water standards to applicable federal standards such as National Ambient Air Quality Standards. In addition to the protections described above, the equivalency determination is required to ensure that the EMS Permit provides as least as much public health and environmental protection as could be expected from conventional permits. It is the intent of the Director to allow for full public disclosure of the Department's determination of the equivalency of the EMS Permit application to that of the facility's conventional permit(s). Interested parties, or applicable EMS Permit Public Advisory Groups (EMS Permit PAGs), will be informed and provided a copy of the Department's equivalency determination as expeditiously as possible. Interested parties will be invited to provide comment on the equivalency determination prior to the Department issuing a draft EMS Permit to participating facilities.

12.4.5 EMS Permit Issuance, Modification, Revocations, and Reopening for Cause

The Department and any participating local agency is responsible for issuing the EMS Permit, reviewing and approving permit modification, revocations and re-opening of the permit for cause. Appeal of decisions made by the Department will be heard by the Director as set forth in the procedures of the Colorado Administrative Procedures Act. Appeal of decisions made by the local agency will follow the local agency's legal process.

During the development of the EMS Permit regulation, there was considerable discussion about the status of existing permits held by participating Program partners. All conventional environmental permits shall continue in full force for the duration of the Program. Prior to issuing the EMS Permit, the Department shall make a determination that compliance with the EMS Permit is equivalent to compliance with any conventional environmental permit. This equivalency determination shall be provided to all interested parties for review and comment prior to issuing the final EMS Permit. During the period of time a facility holds an EMS Permit, the EMS Permit shall incorporate all existing conventional environmental permits held by that facility.

Any local agency with authority over an environmental permit program that opts to participate in the EMS Permit Program, will, where the local agency has authority to do so, determine whether the EMS Permit will supersede or operate in conjunction with the conventional environmental permit. If the local agency determines the EMS Permit will operate in conjunction with the conventional environmental permit, then any operational flexibility approved for the affected facility shall be approved for the duration of the pilot EMS Permit Program, unless the facility requests and local agency approves the flexibility be continued past the pilot program.

EMS Permits issued under this pilot program are intended to be effective for the period of the EMS Permit Program unless the Department has the intention of allowing the facility to renew the EMS Permit if the EMS Permit Program becomes a permanent program prior to the statutory June 30, 2007 sunset date. Each EMS Permit issued by the Department and local agency shall include a statement that specifies the conventional environmental permits included within the EMS Permit and shall clearly state the provisions enforceable by the Department, the provisions enforceable by the local agency, the provisions enforceable by the Administrator, and the provisions that are not enforceable but can be considered for continued involvement in the EMS Permit Program.

If an EMS Permit is revoked by the Department and local agency or the pilot program is not approved as a permanent program, the Department and local agency shall determine whether a compliance schedule is required, as detailed in Section 5.4 of the regulation. The intent is that any compliance schedule not exceed 12 months in duration or extend beyond June 30, 2008.

Fees

The EMS Permit Program does not alleviate participating facilities from the requirement to pay fees as set forth in the media specific programs. The Department intends that participating facilities will continue to pay fees in the same manner as prescribed in media specific regulations.

12.4.6 Public Participation Requirements

The goals and objectives of the EMS Permit Program authorized in Colorado Revised Statute, section 25-6.6-101, et. seq., include those of increased public participation and better public information than that required in the existing regulatory programs of the Department. To achieve these objectives, the Department will involve the public throughout the process, and will be responsive to issues and concerns raised by the interested parties. Interested parties are provided an opportunity to review and comment upon the development, issuance and implementation of a participating facility's EMS Permit, including the environmental footprint, compliance history, community involvement and communications plan, and continual improvement plan and goals, as more specifically described in the EMS Permit regulation. The interested parties are also given the opportunity to review and comment upon the performance of the participating facilities' EMS Permits and of the EMS Permit Program in general.

EMS Permit Program Advisory Groups (EMS Permit PAGs)

The primary vehicle for achieving public participation and stakeholder involvement is through the development of EMS Permit PAGs as set forth in Part 6 of the regulation. It is the intent of the Director that the EMS Permit PAGs will function in a manner that maximizes resources and minimizes duplication while ensuring adequate representation. For example, an EMS Permit PAG that focuses on a category of sources (e.g., concentrated animal feeding operations) should be relied upon to the maximum extent possible for all participating facilities within that category.

During the development of the EMS Permit regulation, there was discussion about what entity is responsible for providing information and data to the EMS Permit PAG(s). In Section 6.2.4 of the regulation, the Department and the participating facilities are both listed as responsible for providing timely information to the EMS Permit PAG(s). It is the intent of the Director to not unduly burden participating facilities with informational requests, but to provide information in a manner that is as expeditious as possible depending on the type of information or data being requested by the EMS Permit PAG. Participation in the EMS Permit PAG is open to all interested citizens and groups. Initially, and as necessary, the Department will convene the EMS Permit PAG meetings and administer these groups. It is the intent of the Director that the EMS Permit PAGs are the primary vehicle for receiving public input on the EMS Permit and the EMS Permit Program. At any time, however, the Department may seek additional input outside the EMS Permit PAGs. Public participation in the EMS Permit PAGs is voluntary and the Department will

~~not compensate any individual or groups, other than Department employees, for participation in the EMS Permit PAG meetings.~~

~~In an effort to keep the EMS Permit PAGs active during the EMS Permit Program, Section 6.2.5 of the regulation is intended to assist the PAGs with technical assistance, logistical support and resources, such as, finding locations for meeting, setting up conference call lines, providing written materials and photo copies, etc., but does not mean providing for salaries, mileage or time and effort of PAG participants.~~

~~The public participation provisions of the regulation are not intended to create any additional rights to appeal applicable environmental requirement beyond what is currently created by local, state, or federal law or regulation.~~

EMS Permit Issuance, Modification & Revocation

~~The Department's EMS Permit website shall be accessible through the Department's website as well as through links from the Department's Air Pollution Control, Water Quality Control, and Hazardous Materials and Waste Management Divisions' web pages, as appropriate.~~

~~12.4.7 Public comment hearings held by the Director will be held with the express purpose of receiving additional public comment on the permit action before the Department. The hearing will be held to accept only additional comments to those not made during the public comment period or to provide additional information to supplement those comments made during the public comment period. The Director will not provide response to public comments made at such public comment hearings. Operational Flexibility, Continual Improvement Projects, and Measurable Improvements~~

~~These provisions are intended to focus facilities to look across all environmental impacts and facility discharges of pollution on a cross media basis and to develop an integrated media approach to environmental management versus medium-by-medium practices at the "end-of-the-pipe".~~

~~The provisions for operational flexibility are intended to provide the participating facilities with an ability to implement the most effective pollution prevention techniques, source reduction technologies or other pollution reduction practices and strategies while still complying with verifiable and enforceable pollution limits. Requests for operational flexibility may be considered by the Department after the initial permit application. Provisions for operational flexibility may be suggested by the Department and will only be included in the permit with the agreement of the participating facility.~~

~~The requirements for continual environmental improvement projects are intended to allow the participating facility to select goals that are tied to either regulated or non-regulated environmental impacts. The Department believes that establishing continual environmental goals will help move participating facilities towards more sustainable levels of resource management and minimize levels of pollution discharges and releases of emissions.~~

~~The provisions for measurable environmental benefits are intended to focus participating facilities on outcome based performance measures that identify whether or not the implementation of the EMS Permit is having a greater environmental benefit than the implementation of single-media programs. The intent of the program is to achieve greater environmental benefit, but the program does not require the achievement of greater environmental benefit.~~

~~12.4.8 Auditing, Compliance Assurance Monitoring, Reporting, Record Keeping, and Testing~~

~~The regulation requires that both the elements of the EMS and the compliance-related elements of the EMS Permit be periodically audited by the facility. An independent auditor that is external~~

~~to the facility must periodically conduct audits. The independent external auditor cannot be an employee at the facility or someone that was intimately involved in the development or implementation of the EMS or the EMS Permit.~~

~~There are two different types of audits that a participating facility is required to have conducted by an independent auditor. These audits are an audit of the facility's EMS or a "conformance audit" and an audit of the facility's compliance with the requirements within the EMS Permit or a "compliance audit". Information gathered during the conformance audit is not considered public information, unless it is also included as part of the compliance audit or the facility reports the information to the Department and does not request confidentiality. If the auditor during the compliance audit determines the facility has potential noncompliance with applicable environmental requirements, the auditor shall include the determinations in the required audit summary. The facility can use the Colorado self-audit law for penalty immunity, if the facility is otherwise eligible for the self-audit law. The Department has retained all existing rights to request and review information and data concerning noncompliance or potential noncompliance discovered during compliance audits.~~

~~Section 8.2 allows a facility to request alternative monitoring, reporting, record keeping, or testing programs or requirements through the operational flexibility provisions in Section 7.1. The Department and local agency will submit any permit condition that includes operational flexibility to the Administrator for review and approval as required by federal law (nothing herein expands the Administrator's authority over permit conditions beyond what is currently required by federal law).~~

~~12.4.9 Appeal of an EMS Permit~~

~~The public participation and appeal provisions of the regulation are not intended to create any additional rights to appeal applicable environmental requirement beyond what is currently available under federal law or regulation for conventional environmental permits or applicable environmental requirements.~~

~~12.4.10 Severability Clause~~

~~The EMS Permit Program regulation includes a severability clause to provide legal protections in the event that any provision of the regulation is found to be invalid by a court of competent jurisdiction the remaining provisions of the regulation are valid. This finding of validity holds unless it appears to the court that the valid provisions of the regulation are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the Director would have enacted the valid provisions without the void one; or unless the court determines that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the statutory provisions.~~

~~12.4.11 Confidential Information or Data Contained in Permit Applications and Reports Submitted Pursuant to this Regulation~~

~~The intent of the Director is to recognize and provide the EMS Permit Program partners that are voluntarily participating in the EMS Permit, certain protections when submitting confidential or trade secrets in the EMS Permit application or in subsequent reports as required by the regulation.~~