

**38.105 STATEMENT OF BASIS, SPECIFIC STATUTORY AUTHORITY AND PURPOSE;
SEPTEMBER 12-13, 2022 RULEMAKING FOR REVIEW AND MODIFICATION OF THE
ANTIDegradation DESIGNATIONS FOR SEGMENTS COSPUS15, COSPMS01A, AND
COSPCL15; FINAL ACTION OCTOBER 11, 2022**

The provisions of C.R.S. 25-8-202(2); 25-8-207(1); 25-8-209; and 24-4-103, C.R.S. provide the specific statutory authority for adoption of these regulatory amendments. The commission also adopted in compliance with C.R.S. 24-4-103(4) the following statement of basis and purpose.

BASIS AND PURPOSE

On November 5, 2021, the Environmental Justice and Conservation Coalition (Coalition) filed a petition for rulemaking pursuant to Section 25-8-207 of the Colorado Water Quality Control Act and Section 24-4-103(7) of the Colorado Administrative Procedures Act for the commission to review the antidegradation designations for three segments: Upper South Platte Segment 15 (COSPUS15), Middle South Platte Segment 1a (COSPMS01a), and Clear Creek Segment 15 (COSPCL15). The commission noted that rulemaking hearings conducted under Section 25-8-207 are rare, and that this particular petition involves a unique situation that is not likely to occur with frequency in the future. On December 13, 2021, the commission granted the petition. On February 22, 2022, the commission issued a Notice of Proposed Rulemaking Hearing for consideration of the petition to review the antidegradation designations for these three segments pursuant to Section 25-8-207(1) and (1)(c), C.R.S. A supplemental notice of rulemaking was emailed to all dischargers to the segments on July 19, 2022 in accordance with Regulation 21.8(D). Prior to the hearing, the commission hosted three outreach meetings pursuant to the “Environmental Justice Act” (Environmental Justice Disproportionately Impacted Community, HB21-1266), on July 7, July 30, and August 15, 2022.

Review of Antidegradation Designations

As an initial matter, the commission acknowledged the numerous public comments received from community members who recreate in and around the three segments. These streams are socially important to the communities surrounding them, and provide a local opportunity for residents in urban North Denver to access Colorado’s natural environment. The commission recognizes it has a responsibility for adoption of water quality standards and classifications to protect water quality for all Coloradoans, including members of disproportionately impacted communities who experience an increased pollution burden.

In performing its review, the commission considered water quality data from these three segments collected between 2017 and 2022 and other pertinent analyses and information provided by the Coalition and the other parties. Specifically, the commission considered whether the prior Use Protected designations for these segments conformed with the description of “Use Protected waters” in Section 25-8-209(4) by applying the criteria established by the commission in Regulation 31.8(2). Upon considering all the evidence in the record, the commission found that the Coalition met its burden to prove that the Use Protected designations for the three segments at-issue did not conform with the description of Use

Protected waters in Section 25-8-209 because the segments did not qualify under any of the three tests/criteria established by the commission in Regulation 31.8(2), that is: (1) the Aquatic Life use classification test in 31.8(2)(b)(i)(A) (all three segments carry Aquatic Life Warm 1 use classifications); (2) the 12-parameter test in 31.8(2)(b)(i)(B); or (3) the discretionary “substantial pollution” test in 31.8(2)(b)(ii).

For all three segments, the commission found that existing quality for only one relevant parameter – *E. coli* – was worse than table value standards for the protection of Aquatic Life Class 1 and Recreation Class P uses, and thus the 12-parameter test, which requires that at least three parameters do not attain table value standards, was not met. The commission further found, based on the weight of the evidence in the record, that these segments did not meet the discretionary “substantial pollution” test because existing pollution is not natural or irreversible, and is not substantial because recreation activities are demonstrated to occur and a wide variety of species, including sensitive fish species, are present; thus, existing pollution on these segments does not qualify as “substantial natural or irreversible human induced pollution.” The commission noted that this discretionary test in subsection 31.8(2)(b)(ii) (which is to sunset at the end of 2031) is to be applied only in limited circumstances, and that the existing quality in all three segments is not sufficiently poor to meet the intent of the test.

The commission accordingly found that the segments’ Use Protected designations were inconsistent with the established criteria for Use Protected waters and therefore not in conformance with Section 25-8-209.

The commission therefore declared the prior Use Protected designations for Upper South Platte Segment 15 (COSPUS15), Middle South Platte Segment 1a (COSPMS01a), and Clear Creek Segment 15 (COSPCL15) void, and determined that the Reviewable designation was appropriate for these segments.