

STATE OF COLORADO

Bill Ritter, Jr., Governor
Martha E. Rudolph, Executive Director

WATER QUALITY CONTROL COMMISSION

<http://www.cdphe.state.co.us/op/wqcc/index.html>

4300 Cherry Creek Dr. South
Denver, Colorado 80246-1530
Phone (303) 692-3463
Fax (303) 691-7702



**Colorado
Department
of Public Health
and Environment**

NOTICE OF PUBLIC RULEMAKING HEARING BEFORE THE COLORADO WATER QUALITY CONTROL COMMISSION

SUBJECT:

For consideration of the adoption of revisions to the Procedural Rules, Regulation #21 (5 CCR 1002-21).

The proposed revisions to Regulation #21 along with a proposed Statement of Basis, Specific Statutory Authority, and Purpose, are attached to this notice as Exhibit 1. Proposed new language is shown with double-underlining and proposed deletions are shown with ~~strikeouts~~. Any alternative proposals related to the revisions proposed in Exhibit 1, and developed in response to those proposed revisions, will also be considered.

HEARING SCHEDULE:

DATE: Monday, January 10, 2011
TIME: 2:00 p.m.
PLACE: Florence Sabin Conference Room
Department of Public Health and Environment
4300 Cherry Creek Drive South
Denver, Colorado 80246

PUBLIC PARTICIPATION ENCOURAGED:

The Commission encourages all interested persons to provide their opinions or recommendations regarding the matters to be addressed in this rulemaking hearing, either orally at the hearing or in writing prior to or at the hearing. Although oral testimony from those with party status (see below) and other interested persons will be received at the hearing, the time available for such oral testimony may be limited. Written submissions prior to the hearing are encouraged, so that they can be distributed to the Commission for review prior to the hearing. Oral testimony at the hearing should primarily summarize written material previously submitted. The hearing will emphasize Commission questioning of parties and other interested persons about their written prehearing submittals. Introduction of written material at the hearing by those with party status or mailing list status (see below) generally will not be permitted. The Commission requests that all interested persons submit to the Commission Office any available information that may be relevant in considering the noticed proposals.

PARTY STATUS/MAILING LIST STATUS:

Participation as a "party" to this hearing or acquisition of "mailing list status," will require compliance with section 21.3(D) of the Procedural Rules, Regulation #21 (5 CCR 1002-21). Mailing list status will allow receipt of all party documents (except individual exhibits more than five pages in length).

It is not necessary to acquire party status or mailing list status in order to testify or comment. **For each request for party status or mailing list status, please provide the organization's name, a contact person, mailing address, phone number, fax number and email address if available.** Written party status or mailing list status requests are due in the Commission Office on or before:

DATE: Tuesday, October 26, 2010
TIME: 5:00 p.m.

A single copy of the party status or mailing list status request may be transmitted as an email attachment to cdphe.wgcc@state.co.us, submitted by fax to 303-691-7702, mailed or otherwise conveyed so as to be received in the Commission Office no later than this deadline. PLEASE NOTE that, as indicated below, parties will have the option of distributing materials to other parties electronically, except in instances where a party has requested receiving hard copies of documents. Therefore, **anyone requesting party or mailing list status that wishes to receive hard copies of documents instead of emailed copies should so indicate in the party status/ mailing list status request so that this information can be included on the list distributed by the Commission Office.**

PREHEARING STATEMENTS:

PLEASE NOTE that for this hearing two separate deadlines for prehearing statements are established: (1) An original and 13 copies of an initial **Prehearing Statement from the Attorney General's Office, as proponent of the revisions proposed in Exhibit 1 attached to this notice**, including written testimony and exhibits providing the basis for the proposals, must be received in the Commission Office no later than **November 2, 2010**; and (2) an original and 13 copies of a **Responsive Prehearing Statement**, including any exhibits, written testimony, and alternative proposals of the Water Quality Control Division or **anyone seeking party status and intending to respond to the proponent's proposals** must be received in the Commission Office no later than **November 23, 2010**.

For each deadline, the required number of hard copies of documents must be received in the Commission office by the specified deadline. These requirements are not satisfied by electronic transmission of a facsimile copy or copies. However, **parties are also strongly encouraged to email a copy of their written documents to the Commission Office**, so that materials received can be posted on the Commission's web site. (Please email to cdphe.wgcc@state.co.us.) In addition, copies of these documents must be mailed or hand-delivered by the specified dates to all persons requesting party status or mailing list status, and to the Attorney General's Office representatives for the Commission and the Division, in accordance with a list provided by the Commission Office following the party status/ mailing list status deadline. **Alternatively, parties may email documents to those with party status or mailing list status by the specified dates**, except to those that the list distributed by the Commission Office identifies as requesting hard copies.

Also **note** that the Commission has prepared a document entitled **Information for Parties to Water Quality Control Commission Rulemaking Hearings**. A copy of this document will be mailed or emailed to all persons requesting party status or mailing list status. It is also posted on the Commission's web site at <http://www.cdphe.state.co.us/op/wqcc/PublicParticipation/HBappC.pdf>. Following the suggestions set forth in this document will enhance the effectiveness of parties' input for this proceeding. **Please note the request that all parties submit two-sided copies of all hearing documents on three-hole punch paper.**

MAILING LIST STATUS COMMENTS:

Those requesting mailing list status shall provide written testimony, if any testimony is to be offered for the hearing, by the above deadline for responsive prehearing statements – i.e., **November 23, 2010**. Copies shall be submitted and distributed in the same manner as noted above for prehearing statements.

PREHEARING CONFERENCE:

DATE: Tuesday, November 30, 2010
TIME: 4:00 p.m.
PLACE: Sabin Room, Department of Public Health and Environment
4300 Cherry Creek Drive South
Denver, Colorado

Attendance at the prehearing conference is mandatory for all persons requesting party status. An opportunity may be available to participate in this prehearing conference by telephone. Persons wishing to participate by telephone should notify the Commission Office as early as possible.

REBUTTAL STATEMENTS:

Written rebuttal statements responding to the prehearing statements due on November 23, 2010 may be submitted by anyone seeking party status or mailing list status. Any such rebuttal statements must be received in the Commission Office by **December 28, 2010**. An original and 13 copies of written rebuttal statements must be received in the Commission Office by this deadline, and submission of an emailed copy as noted above is strongly encouraged. In addition, copies of these documents must be mailed or hand-delivered by that date to all those requesting party status or mailing list status, and to the Attorney General's Office representatives for the Commission and Division. **Alternatively, parties may email documents to those with party status or mailing list status by this deadline**, except to those that the list distributed by the Commission Office identifies as requesting hard copies. No other written materials will be accepted following this deadline except for good cause shown.

SPECIFIC STATUTORY AUTHORITY:

The provisions of sections 25-8-202 and 25-8-401 C.R.S. provide the specific statutory authority for consideration of the regulatory amendments proposed by this notice. Should the Commission adopt the regulatory language as proposed in this notice or alternative amendments, it will also adopt, in compliance with section 24-4-103(4) C.R.S., an appropriate Statement of Basis, Specific Statutory Authority, and Purpose.

NOTIFICATION OF POTENTIAL MATERIAL INJURY TO WATER RIGHTS:

In accordance with section 25-8-104(2)(d), C.R.S., any person who believes that the actions proposed in this notice have the potential to cause material injury to his or her water rights is requested to so indicate in the party status request submitted. In order for this potential to be considered fully by the Commission and the other agencies listed in the statute, persons must fully explain the basis for their claim in their prehearing statement which is due in the Commission Office on the date specified above. This explanation should identify and describe the water right(s), and explain how and to what degree the material injury will be incurred.

Dated this 23rd day of September 2010 at Denver, Colorado.

WATER QUALITY CONTROL COMMISSION



Paul D. Frohardt, Administrator

EXHIBIT 1
COLORADO ATTORNEY GENERAL'S OFFICE

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Water Quality Control Commission

PROCEDURAL RULES

5 CCR 1002-21

.....

21.3 Rulemaking Procedures

.....

C. Notice

.....

- 3) Except as specified in section 21.3(M) with respect to classifying state waters, setting water quality standards, or promulgating control regulations, and in section 21.3(N) with respect to temporary or emergency rules, public rulemaking proceedings shall not be held less than twenty days after publication of notice as provided in this section. Publication shall be by ~~the delivery or mailing of the Colorado Register to persons on the mailing list maintained~~ electronic publication pursuant to section 24-4-103(11)(h), C.R.S.

.....

21.4 Adjudicatory Procedures

A. Applicability

.....

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

.....

- b) Appeals of the determination of civil penalties for violations of the Act or any control regulation promulgated pursuant to the Act by the Executive Director or his/her designee pursuant to section 25-8-608, C.R.S., except for penalties:

(i) for violations of ~~dealing with~~ surface water discharge permits or portions thereof;

(ii) for discharging to surface waters without a permit; or

(iii) for engaging in activities without a surface water discharge permit when such a permit is required.

.....

e) Appeals of final determinations by the Division on notices of alleged violations, pursuant to section 21.11(D) of these rules, except for alleged violations: which do not deal with

(i) of surface water discharge permits or portions thereof;

(ii) for discharging to surface waters without a permit; or

(iii) for engaging in activities without a surface water discharge permit when such a permit is required., pursuant to section 21.11(D) of these rules, including appeals of notices of alleged violations for discharging without a permit, and appeals of penalties associated therewith.

.....

j) Hearings concerning Division determinations regarding self-evaluation disclosures pursuant to section 25-1-114.5(5), C.R.S.

3) The Division shall provide the opportunity for a formal public adjudicatory hearing in the following cases:

.....

b) Appeals of the ~~determination~~ Division's assessment of civil penalties shall be heard by the Executive Director or his/her designee, pursuant to section 25-8-608, C.R.S. for:

(i) violations of any surface water discharge permit or portions thereof;

(ii) discharging to surface waters without a permit; or

(iii) engaging in activities without a surface water discharge permit when such a permit is required.

.....

d) Notices of alleged violations, pursuant to sections 25-8-602 and 603, C.R.S., for:

(i) violation of an order, permit, or control regulation;

(ii) discharging without a permit; or

(iii) engaging in activities without a surface water discharge permit when such a permit is required.

.....

D. Party Status

.....

- 2) A person who may be affected or aggrieved by the agency action shall be admitted as a party to the proceeding upon filing a timely written request ~~therefor and 15 copies~~, One original, email attachment or fax of each party status request shall be submitted in accordance with the requirements of this subsection.

.....

21.11 Hearings on Notice of Alleged Violations

.....

- D. ~~Final~~ All determinations by the Division concerning notices of alleged violations, except alleged violations of which do not deal with surface water discharge permits or portions thereof, operating without a permit, or for engaging in activities without a surface water discharge permit when such a permit is required, must be appealed to the Commission by any person adversely aggrieved or affected as a prerequisite to the right of judicial review pursuant to sections 24-4-105 and 106, C.R.S. the APA. The appeal shall be made in writing to the office of the Administrator of the Commission and must be postmarked no later than 30 days after the date of the mailing of the Water Quality Information Bulletin sent to those persons on the mailing list maintained by the Division pursuant to section 25-8-302(1)(e), C.R.S. Within 60 days of the filing of the appeal the Commission shall commence a hearing to consider such appeals in accordance with section 24-4-105, C.R.S. of the APA and section 21.4 of this regulation; provided, that, if the Division has previously held a hearing regarding the alleged violations under section 24-4-105, C.R.S. of the APA, the Commission's review will be limited to record review of the Division's final determination.

.....

21.12 Civil Penalty Appeals

.....

- B. Penalties shall be ~~determined~~ assessed by the Division, and may be appealed to the Executive Director in accordance with section 21.4 or his/her designee without a hearing. Such ~~p~~Penalty determinations of the Executive Director may be appealed to the Commission, except for:

- 1) penalties for violating a surface water discharge permit or portions thereof;
- 2) discharging without a permit; or
- 3) engaging in activities without a surface water discharge permit when such a permit is required.

In cases involving one of these exceptions, the penalty determination, which may be appealed to the Division in accordance with section 21.4(A)(3)(b) District Court pursuant to section 24-4-106, C.R.S.

The An appeal to the Executive Director or his/her designee shall be made in writing to the office of the Administrator of the Commission or the Director of the Water Quality Control Division, as appropriate, and shall be postmarked no later than 30 days after the issuance of the Division's assessment of the penalty. The Division shall then apply to the Executive Director or his/her designee for a penalty determination. An appeal to the Commission shall be made in writing to the office of the Administrator of the Commission and shall be postmarked no later than 30 days after the issuance of the decision of the Executive Director or his/her designee. In his/her written

appeal the appellant shall also state those mitigating factors which the appellant desires to raise before the Commission or ~~Division~~ the Executive Director or his/her designee. In any written appeal of a penalty assessed under section 25-8-608, C.R.S. ~~of the Act~~, the appellant shall also admit or deny each allegation set forth in the Division's ~~application for~~ assessment of a civil penalty filed with the Executive Director or his/her designee.

COLORADO ATTORNEY GENERAL'S OFFICE PROPOSED

21.37 Statement of Basis, Specific Statutory Authority and Purpose (January 10, 2011 Rulemaking, Effective February 28, 2011)

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

Basis and Purpose

In 2007 the Commission adopted new procedural rules regarding appeals of certain Division determinations. The revised rules reflected an attempt to reconcile conflicting statutory provisions within the Colorado Water Quality Control Act. While the amended rules did address the statutory conflict, the current interpretation of the statutory provisions has led to additional confusion regarding appeals procedures, including unwieldy bifurcation of appeals proceedings. Accordingly, the Commission is adopting revisions to the procedural regulations to clarify, improve and streamline the appeals process.

There are three key statutory provisions that have created the current state of affairs. First, C.R.S. § 25-8-202(1)(k) states: "The commission shall...act as an appellate body to review all determinations by the division except those determinations dealing with surface water discharge permits or portions thereof." Second, C.R.S. § 25-8-603 provides that appeals of notices of violation (NOVs) for violations of orders, permits or control regulations shall be heard by the Division. Third, C.R.S. § 25-8-608 provides that the Division makes a final decision regarding penalties, and such decisions may be appealed to the Commission, without making a distinction for penalties associated with permit violations. Together, these provisions create a conflict and in some instances provide for two administrative hearings, and in other instances they may result in bifurcated proceedings.

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

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

Both interpretations of the phrase "dealing with permits" are defensible. In order to clarify and streamline the appeals process, the Commission is adopting new procedural regulations essentially reverting back to the interpretation that existed prior to 2007, wherein the phrase "dealing with permits" is interpreted broadly such that the Commission is prohibited from hearing an appeal of an enforcement action for discharges to surface water or for penalties associated therewith. The Commission is also adopting regulations specifying that appeals of enforcement actions for the failure to obtain a stormwater permit when one is required are heard by the Division.

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

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

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