

STATE OF COLORADO

John W. Hickenlooper, Governor
Christopher E. Urbina, MD, MPH
Executive Director and Chief Medical Officer

WATER QUALITY CONTROL COMMISSION

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

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 Water Quality Improvement Fund, Regulation #55 (5 CCR 1002-55). The proposed revisions to Regulation #55, 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, February 13, 2012
TIME: 1:00 p.m.
PLACE: Florence Sabin Conference Room
Department of Public Health and Environment
4300 Cherry Creek Drive South
Denver, Colorado

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, November 29, 2011

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 AND EVIDENCE:

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 Division, as proponent of the revisions proposed in Exhibit 1 attached to this notice**, including written testimony and exhibits providing the basis for the proposal, must be received in the Commission Office no later than **December 6, 2011**; and

(2) an original and 13 copies of a **Responsive Prehearing Statement**, including any exhibits, written testimony, and alternative proposals of the 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 **January 5, 2012**.

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 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 their hard 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., **January 5, 2012**. Copies shall be submitted and distributed in the same manner as noted above for prehearing statements.

PREHEARING CONFERENCE:

DATE: Tuesday, January 10, 2012
TIME: 1:00 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 January 5, 2012 may be submitted by the Division or anyone seeking party status or mailing list status. Any such rebuttal statements must be received in the Commission Office by **February 1, 2012**. An original and 13 copies of written rebuttal statements must be received in the Commission Office by this deadline. This requirement is not satisfied by electronic transmission of a facsimile copy or copies. However, please also email a copy to cdphe.wqcc@state.co.us. 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 documentation, exhibits, or other materials will be accepted following this deadline except for good cause shown.

SPECIFIC STATUTORY AUTHORITY:

The provisions of sections 25-8-202(1), 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 13th day of October 2011 at Denver, Colorado.

WATER QUALITY CONTROL COMMISSION

Paul D. Frohardt, Administrator

EXHIBIT 1

WATER QUALITY CONTROL DIVISION

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Water Quality Control Commission

5 CCR 1002-55

WATER QUALITY IMPROVEMENT FUND

REGULATION NO. 55

55.1 AUTHORITY AND PURPOSE OF THE WATER QUALITY IMPROVEMENT FUND

In House Bill 06-1337, the Colorado General Assembly created the Water Quality Improvement Fund (Fund) codified in section 25-8-608, C.R.S., of the Colorado Water Quality Control Act (Act). The purpose of the Fund is to improve water quality in Colorado by providing grant funds for water quality improvement projects using civil penalties from water quality violations. House Bill 11-1026 amended the statute to authorize grants for stormwater management training and best practices training to prevent or reduce the pollution of state waters. Section 25-8-608(1.7)(c), C.R.S. provides the Water Quality Control Commission (Commission) with the authority to promulgate, implement and administer this regulation.

Funding is dependent upon annual appropriations of the Colorado General Assembly and is based on violations that were committed on or after May 26, 2006. The resulting penalties collected by the Water Quality Control Division (Division) are transmitted to the state treasurer for deposit to the credit of the Fund.

55.2 DEFINITIONS

- (1) "Governmental Agency" – means any municipality, regional commission, county (or county on behalf of unincorporated areas), metropolitan district offering sanitation service, sanitation district, water and sanitation district, water conservancy district, metropolitan sewage disposal district, other special district used for funding a project under this regulation.
- (2) "Impacted Water Body" – A water body in which the designated use(s) of recreation, aquatic life, water supply, agriculture, and/or wetlands have been affected by pollutants associated with a violation of the Act, permit, control regulation, or final cease and desist order or clean-up order.
- (3) "Nonpoint source" – means any activity of a facility other than a point source from which pollutants are or may be discharged. For the purposes of this regulation, nonpoint source includes all runoff that is not subject to the requirements provided under 5 CCR 1002-61 section 61.3(2)(e), (f), or (g), including those designated by the Division under section 61.3(2)(f)(iii), whether sheet flows or collected and conveyed through channels, conduits, pipes or other discrete conveyances.
- (4) "Planning and Design of Domestic Wastewater Treatment Facilities and Stormwater Projects" – means any activity that results in the development of preliminary engineering reports, engineering design documents, and or environmental assessments.

- (5) "Stormwater Project" – includes: stormwater management training, best practices training,
~~means~~ planning, design, construction or repair of a project that improves water quality ~~of from~~
stormwater runoff, snow melt runoff, or surface runoff and drainage.

55.3 ENTITY ELIGIBILITY

Entities eligible for grants include: 1) governmental agencies; 2) publicly owned water systems; 3) private not for profit public water systems; 4) not for profit watershed groups; ~~and~~ 5) not for profit stormwater administrator/training provider and 6) private landowners impacted by a water quality violation.

Entities who pay a Colorado Water Quality Control Act civil penalty are prohibited from receiving a grant from this Fund for a period of 5 years from the date of the payment of the penalty.

55.4 PROJECT ELIGIBILITY

As provided for under section 25-8-608 (1.7)(a), C.R.S., the Fund will provide grants to the following project categories:

Category 1 - Stormwater management training and best practices training to reduce the pollution of state waters.

~~(1)~~ —Category ~~42~~ – Projects that improve the water quality in the community or water body which has been impacted by a water quality violation that resulted in a penalty being imposed.

~~(2)~~ —Category ~~23~~ – Planning, design, construction, or repair of stormwater projects and domestic wastewater treatment works, based on the current fiscal year's Water Pollution Control Revolving Fund and State Domestic Wastewater Treatment Grant Program Intended Use Plan.

~~(3)~~ —Category ~~34~~ - Nonfederal match funding for the current fiscal year's nonpoint source projects as approved by the Commission.

55.5 FUNDING ALLOCATION

All civil penalties collected by the Division shall be transmitted to the State Treasurer for deposit to the credit of the Fund created by section 25-8-502, C.R.S., for violations occurring after May 26, 2006 and shall be subject to annual appropriations by the Colorado General Assembly. The Division will post on its web page a list of violators that have paid into the Water Quality Improvement Fund. By July 1 of each year, the Division will post on the Division's website the available funds for each of the project categories. The following allocations will be made:

Category 1 – Up to \$50,000 of available funds

Category ~~42~~ – ~~41~~0% of available funds following allocations to Category 1 projects

Category ~~23~~ – ~~36~~0% of available funds following allocations to Category 1 projects

Category ~~34~~ – 30% of available funds following allocations to Category 1 projects

Any funds not utilized in one category will be redistributed between the remaining categories based on their relative percentage of funding. The Division will retain five percent (5%) of the moneys allocated annually to the Fund to cover the cost of administering the Fund. Funds may be carried over from previous years' appropriations and reallocated based upon the above distribution on an annual basis.

55.6 PROJECT PRIORITIZATION CRITERIA

Criteria for funding project proposals within each category as described in Section 55.4 are as follows:

Category 1 - Stormwater management training and best practices training to reduce the pollution of state waters.

Priority 1 – Projects that implement new stormwater management and best practices training not previously available in Colorado.

Priority 2 – Projects that will expand the content or availability of existing stormwater management and best practices training.

Category ~~4~~2 - {Projects that improve the water quality in the community or water body which has been impacted by a water quality violation.}

Priority 1 – Projects that address impacts to a water supply designated use.

Priority 2 – Projects that address impacts to a recreation designated use.

Priority 3 – Projects that address impacts to an aquatic life designated use.

Priority 4 – Projects that address impacts to an agricultural or wetlands designated use.

Category ~~23~~ - {Stormwater projects or planning, design, construction, or repair of domestic wastewater treatment works.}

Priority 1 – Projects that improve water quality in the community or water body impacted by a violation.

Priority 2 – Planning, design, construction, or repair of stormwater projects.

Priority 3 – Projects in the current year's Water Pollution Control Revolving Fund and State Domestic Wastewater Treatment Grant Program Intended Use Plan.

Category ~~34~~ - {Nonfederal match funding for nonpoint source projects.}

Priority 1 – Projects that reduce or eliminate water quality impairments identified in Regulation # 93 (5 CCR 1002-93), Colorado's Section 303(d) List.

Priority 2 – Projects that protect any established designated water quality use.

If the Fund lacks sufficient funds to cover all requests within each category, Priority 1 projects will be funded prior to Priority 2 projects, which will be funded prior to Priority 3 projects, which will be funded prior to Priority 4 projects. If insufficient requests for funding are received and determined eligible, the Division may reallocate funding allocation between categories based on demand.

55.7 NOTIFICATION AND REPORTING

~~The Division will periodically identify violations that have resulted in penalties paid into the Fund. Applications for Category 1, 2 and 32 projects will be accepted by the Division through March 15 through August 1 of each year. Applicants will be responsible for demonstrating the impacts of the violation on the affected water body or community, and the related water quality improvement project benefits. The Division will accept applications for Category 43 projects in accordance with the annual Nonpoint Source Project solicitation schedule.~~

The Division will evaluate all applications and determine the grant award(s) for each category based on the criteria in sections 55.3, 55.4, 55.5, and 55.6.

Grant recipients will provide a annually report on the project status by December 30 of each year or as applicable with established grant or Water Pollution Control Revolving Loan Fund reporting requirements. A final project report ~~will be submitted~~ within 60 days of completion of the project. Final project reports shall include a detailed description of the project as implemented, all problems encountered and the solutions thereto, itemized project costs, a declaration that the project has been fully implemented as

approved, and a description of the environmental and public health benefits resulting from implementation of the project. Information on the grant recipients, including project description and grant award, will be reported in the Division's Annual Report to the Commission, in accordance with section 25-8-305, C.R.S.

55.8 - 55.10 RESERVED

55.11 STATEMENT OF BASIS AND PURPOSE

The provisions of Sections 25-8-202, 25-8-308, and 25-8-608, C.R.S. provide the specific statutory authority for adoption of the attached regulations. The Commission, in compliance with section 24-4-103(4), C.R.S., has adopted the following statement of basis and purpose.

Basis and Purpose

The purpose of this new regulation is to implement the Fund as established by House Bill 06-1337. This regulation provides a format for identifying eligible grant recipients and projects, Fund allocation, and prioritization criteria that will be used to award grants from the Fund.

The General Assembly appropriated \$292,990 for the Fund for state fiscal year 2007. However, the statute did not take effect until the passage of the Bill on May 26, 2006 and applies only to violations committed on or after this date. Only those penalties collected after May 26, 2006 and appropriated by the General Assembly will be available for grants.

The Fund will be administered by the Division, which also administers the Water Pollution Control Revolving Fund loans, State Domestic Wastewater grants and the Clean Water Act Section 319 nonpoint source grants. When compared to Water Pollution Control Revolving Fund loans, State Domestic Wastewater Grants, and the Section 319 nonpoint source grants, the initial amount of funding provided for the Fund is considerably less. No additional Division staff is included in the legislation to administer grants associated with this regulation. The goals of this regulation are similar to those for the Water Pollution Control Revolving Fund, State Domestic Wastewater Grant and the Section 319 nonpoint source grants. The grant amounts of the Fund are expected to be relatively small compared to the overall cost of such projects, and in most cases will not cover the entire cost of the project. Therefore, the Commission has determined that the most efficient and effective process to implement the Fund is to use, where established, the criteria already established by the three existing funding mechanisms.

An established process did not exist for projects identified under Category 1, projects that improve the water quality in the community or water body, which has been impacted by a water quality violation that resulted in a penalty being imposed. The Commission determined that a separate application process, with the criteria of project eligibility, Fund allocation, and project prioritization criteria being specifically developed, should be established to provide funding. This process will be compatible with existing Division loan and grant funding opportunities.

The Commission determined that entity eligibility for receipt of funding should be consistent with existing loan and grant opportunity processes and criteria. Ineligible entities are specifically identified to eliminate the potential for a party issued an enforcement action to apply for and receive grant funding. Project eligibility was determined to be consistent with the requirements specified in HB-06-1337. Funding allocation was determined by considering the legislative intent of the bill, which resulted in giving a slightly higher proportion to improving water quality in the community or water body that has been impacted by a water quality violation, to address effects from discharge violations. Categories 2 and 3 are given an equal funding allocation so that projects in these categories would receive funding over time. Project prioritization is established within each category because of the unique aspects of the project types. Category 1 and 2 priorities are to first address public health impacts to communities or impacted water bodies, and environmental impacts second. Category 3 priorities are to address more historic water quality impairments first, and protection of existing water quality designated uses and standards second.

This regulation will be implemented beginning in the fiscal year for which funds are appropriated and available. The Commission determined that implementation of this new Fund should be in conjunction with existing loan and grant opportunities currently administered by the Division, so as to minimize additional solicitation activities and associated staff workload.

WATER QUALITY CONTROL DIVISION PROPOSED

55.12 STATEMENT OF BASIS, SPECIFIC STATUTORY AUTHORITY, AND PURPOSE; FEBRUARY 13 2012 RULEMAKING, EFFECTIVE APRIL 30, 2012

House Bill 11-1026 amended the statute to authorize grants for stormwater management training and best practices training to prevent or reduce the pollution of state waters. The rules have been amended to include stormwater and best practices training as eligible projects to receive grant funding from the Water Quality Improvement Fund. In addition, the funding categories were changed as well as the funding allocation with these categories were modified. Specifically,

Section 55.4 Project Eligibility was amended to make Stormwater Management training a Category 1 type project and renumber the existing categories to account for this addition.

Section 55.5.Funding Allocation was amended to provide for \$50,000 of available funds to Category 1 projects, reduce the funding to Category 2 projects from 40% to 10%, Category 3 projects from 60% to 30%. In addition, provisions were added that if any funds were not utilized in one category they would be redistributed between the remaining categories. In order to inform potential applicants of their eligibility to receive funding under the new Category 2 projects the Division will post a list of violators who paid penalties into the WQIF. If the applicant can demonstrate their project will improve the water quality in the community or water body which has been impacted by the violation they may be eligible to receive funding.

Section 55.6 Project Prioritization Criteria was amended to include the prioritization of grant requests with each category. Specifically, within Category 1 priority will be given to projects that implement new stormwater management and best practices training not previously available in Colorado above those projects that will just expand the content or availability of existing stormwater management and best practices training. A provision was also added that if sufficient requests for funding are received and determined eligible, the Division has the ability to reallocate funding between categories based on demand.

Section 55.7 Notification and Reporting was amended to require grant recipients to provide a final project report instead of an annual report.