



COLORADO

Water Quality
Control Commission

Department of Public Health & 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) and the Graywater Control Regulation, Regulation #86 (5 CCR 1002-86). Revisions to Regulation #21 and Regulation #86 proposed by the Water Quality Control Division, along with a proposed Statements of Basis, Specific Statutory Authority and Purpose, are attached to this notice as Exhibits 1 and 2 respectively.

In these attachments, proposed new language is shown with double-underlining and proposed deletions are shown with ~~strikeouts~~. Any alternative proposals related to the subject of this hearing will also be considered.

SCHEDULE OF IMPORTANT DATES

Party status requests due	02/22/2017 5 pm	Additional information below.
Proponent's prehearing statement due	03/01/2017 5 pm	Additional information below.
Responsive prehearing statement due	03/29/2017 5 pm	Additional information below.
Rebuttal statements due	04/18/2017 5 pm	Additional information below.
Last date for submittal of motions	04/21/2017 5 pm	Additional information below.
Notify commission office if participating in prehearing conference by phone	03/24/2017 noon	Send email to cdphe.wqcc@state.co.us with participant(s) name(s).
Prehearing conference (mandatory for parties)	04/25/2017 2:00 pm	Florence Sabin Conference Room Department of Public Health and Environment 4300 Cherry Creek Drive South Denver, CO 80246
Rulemaking Hearing	05/8/2017 10:30 am	Florence Sabin Conference Room Department of Public Health and Environment 4300 Cherry Creek Drive South Denver, CO 80246

HEARING SUBMITTALS:

For this hearing, the commission will receive all submittals electronically. Submittals must be provided as PDF documents, except for raw data exhibits which may be provided as Excel workbooks. Submittals may be emailed to cdphe.wqcc@state.co.us, provided via an FTP site, CD or flash drive, or otherwise conveyed to the commission office so as to be received no later than the specified date.

PARTY STATUS:

Party status requests must be in writing and must provide:

- the organization's name,
- one contact person,
- a mailing address,
- a phone number, and
- email addresses of all individuals associated with the party who wish to be notified when new submittals are available on the commission's website for review.

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, along with an explanation of the alleged harm, in their party status request.

PREHEARING AND REBUTTAL STATEMENTS:

Each party must submit a prehearing statement: parties that have proposed revisions attached as exhibits to the notice must submit a proponent's prehearing statement; all other parties must submit a responsive prehearing statement. Proponents may also submit responsive prehearing statements when there are multiple proposals attached to the notice. Any party may submit a rebuttal statement. Each prehearing and rebuttal statement must be provided as a separate PDF document from any accompanying written testimony or exhibits.

Following the rebuttal statement due date, no other written materials will be accepted from parties except for good cause shown.

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 will not be permitted unless authorized by the commission.

PREHEARING CONFERENCE:

Attendance at the prehearing conference is mandatory for all persons requesting party status. Parties needing to participate by telephone can call 1-857-216-6700 and enter the conference code 543213.

Following the cut-off date for motions, no motions will be accepted, except for good cause shown.

PUBLIC PARTICIPATION ENCOURAGED:

The commission encourages input from non-parties, either orally at the hearing or in writing prior to the hearing. Written submissions should be emailed to cdphe.wqcc@state.co.us by April 26, 2017.

SPECIFIC STATUTORY AUTHORITY:

The provisions of sections 25-8-202(1)(m) and (2), and 25-10-101 through 113, 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.

Dated this 10th day of January 2017 at Denver, Colorado.

WATER QUALITY CONTROL COMMISSION

Trisha Oeth, Administrator

EXHIBIT 1
WATER QUALITY CONTROL DIVISION

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Water Quality Control Commission

REGULATION NO. 21 - PROCEDURAL RULES

5 CCR 1002-21

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21.4 Adjudicatory Procedures

A. Applicability

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

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(l) [Appeals of final decisions by the Water Quality Control Division pursuant to Regulation 86, 5 CCR 1002-86 for graywater research variance projects.](#)

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21.42 Statement of Basis, Specific Statutory Authority and Purpose (May 8, 2017 Rulemaking, Effective July 30, 2017)

The provisions of sections 25-8-202 and 401, C.R.S. provide the specific statutory authority for the amendments to this regulation adopted by the Water Quality Control Commission (commission). The commission has also adopted, in compliance with section 24-4-103(4) C.R.S., the following statement of basis and purpose.

Basis and Purpose

The commission adopted a new subsection 21.4(A)(2)(l) to explicitly reflect that appeals of graywater research variance determinations are to be heard by the commission. Such appeals may be filed with the commission after a determination is made by the Water Quality Control Division. C.R.S. § 25-8-202(1)(k) states: "The Commission shall...act as an appellate body to review all determinations by the division except those determinations dealing with surface water discharge permits or portions thereof." If an appeal is timely filed, it shall be heard in accordance with section 24-4-105, C.R.S. of the Administrative Procedures Act and section 21.4 of this regulation, except that notice of any adjudicatory hearing shall also be provided to the city, city and county, or county that has authorized the research through their local graywater control program.

EXHIBIT 2
WATER QUALITY CONTROL DIVISION

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Water Quality Control Commission

REGULATION NO. 86 - GRAYWATER CONTROL REGULATION

5 CCR 1002-86

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86.16 Research Variance

- A. Upon application by a Colorado “private college or university” or “state college or university”, as defined in §23-2-102(11) and (15), C.R.S., the division may grant a variance from the following sections of Regulation 86 for each graywater treatment works involved in a research project:
1. local graywater control program requirements in 86.9(B)(2)(a) and 86.9(B)(2)(e);
 2. uses of graywater in 86.10;
 3. design criteria in 86.12(B) and 86.12 (C);
 4. operations and maintenance manual requirements in 86.13; and
 5. control measure requirements in 86.14(A), 86.14 (B)(3), 86.14(B)(6), 86.14 (C)(1) , 86.14 (D).
- B. A research variance may only be granted if:
1. The division determines that the graywater treatment works will protect public health and the environment; and
 2. All remaining sections of Regulation 86 from which a variance is not granted are met.
- C. A private or state university that is granted a research variance shall only conduct the graywater research as permitted by the variance, the remaining applicable sections of Regulation 86, the statutory requirements of §25-8-205(1)(g), C.R.S., and any other applicable statutes pertaining to graywater. A new use of graywater beyond the uses permitted in section 86.10 and approved by variance must be further authorized by a city, city and county, or county pursuant to §25-8-205(1)(g), C.R.S.
- D. Research variances reviews shall be conducted by the division in accordance with policies established by the division and commission. The application for a variance must include:
1. A description of the technical or framework goals to be accomplished through the research;

2. A description of the method by which the proposed research project will be periodically and representatively monitored to ensure protection of public health and the environment and the proper functioning of the graywater treatment works involved in the proposed research project;
 3. A description of how individuals exposed to graywater during the research will be informed and made aware of health risks and the actions to be followed if health and/or environmental risks are identified during the investigation;
 4. A description of the graywater treatment works and supporting technical documentation including design parameters to ensure safety to public health and the environment through a multi-barrier approach;
 5. A description of how the graywater treatment works will operate, including control measures to ensure safety to public health and the environment; and
 6. Any other information needed/requested by the division to determine if the variance is justified.
- E. The division will act expeditiously on all complete applications that have been submitted with a goal to complete the final review in a total of sixty days from the date of receipt of the application. The burden is on the applicant to supply the information necessary for the division to make an adequate review.
- F. An approved research variance shall be limited to a period of time to be justified by the applicant and approved by the division, but not to exceed five years. To permanently utilize the graywater treatment works at the conclusion of the research variance, the legally responsible party must have the graywater treatment works authorized under a local graywater control program and in compliance with Regulation 86 and all the statutory requirements of 25-8-205(1)(g), C.R.S.
- G. The division's decision to approve, conditionally approve, or deny an application for a research variance may be appealed to the commission pursuant to 5 CCR 1002-21.4.
- H. The division may withdraw approval of a research variance based on a determination that the periodic monitoring demonstrates that the research graywater treatment works is not properly functioning or the research is being implemented in a manner that may be harmful to public health or the environment. The division may also withdraw its approval based on a determination that the research graywater treatment works is not in compliance with any of the requirements set forth in the division's approval of the research variance. The division's decision to withdraw approval of a research variance may be appealed to the commission pursuant to 5 CCR 1002-21.4.

86.16-17 – 86.20

Reserved

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86.23 STATEMENT OF BASIS, SPECIFIC STATUTORY AUTHORITY, AND PURPOSE; MAY 8, 2017, RULEMAKING, FINAL ACTION JUNE 12, 2017, EFFECTIVE JULY 30, 2017

The provisions of sections 25-8-202(1)(c) and 25-8-205(1)(g), C.R.S., provide the specific statutory authority for the Graywater Control Regulation adopted by the Water Quality Control Commission (commission). The commission has also adopted, in compliance with section 24-4-103(4), C.R.S., the following statement of basis, specific statutory authority, and purpose.

BASIS AND PURPOSE

The commission recognizes that research is routinely regulated and finds that the proposed requirements are reasonable and necessary for the protection of public health and environment. The commission finds that nothing in the current Regulation #86 prevents research involving water quality and treatment technology effectiveness. Graywater treatment works for research can operate and be used to collect water quality data and evaluate treatment technologies either as pretreatment to a graywater treatment system that satisfies the requirements of Regulation #86 or may discharge treated graywater to the sewer. Regulation #86 does not currently allow graywater research systems that involve exposure to human subjects.

The commission supports adding a graywater research category to Regulation #86 that would allow human subject exposure, added uses and environmental applications provided the research is conducted according to rigorous academic standards by an accredited university and involving a high bar for human health and environmental protection through a multi-barrier approach. The support for the variance concept is contingent on any applicable university or college protocols for research involving human exposure to pathogens and/or human test subjects being stringently followed. The commission believes that it is critical that any persons exposed during the research and/or test subjects be aware of the research by being notified in plain language outlining potential health risks and steps to take if they believe they are ill due to the exposure. This public notice should also be available in other languages if the research location is frequented by non-English speakers.

The commission believes that graywater research will benefit from the multi-disciplinary approach that universities can bring to bear on such efforts. Specifically, the commission believes that research involving engineering evaluations of treatment technology effectiveness (which are often more akin to drinking water treatment techniques) for removing various viral, bacterial and protozoan pathogens will enhance understanding of how best to move forward in Colorado with utilizing this resource and deploying adequate safeguards to protect public health and the environment. Similarly, involving epidemiology evaluations into the research will help broaden the understanding of how to manage health risks and consider vulnerable populations as well. The commission directs the division and stakeholders to consider these items as work moves forward on a research variance policy following adoption of the regulation. The commission is directing the division to develop a policy to describe the submittal and review process for a research variance application. The policy should provide expectations on the submittal process, minimum requirements, and any required forms. The commission feels that identifying the policy within the regulation is consistent with other commission regulations and important for transparency. The policy should clarify to submitting parties any requirements and helps expedite the review process.

The statutory language indicates that the commission may promulgate control regulations to describe requirements, prohibitions, and standards for the use of graywater for nondrinking purposes, to encourage the use of graywater, and to protect public health and the environment. The commission has authorized each research variance for a maximum of five years to encourage research, but expects that each research application will minimize the number of persons exposed for the shortest period time necessary to test the research hypothesis. The intent of the research variance is to provide the flexibility to perform research projects that solve current unknowns and will lead to improved statewide implementation through future regulatory rulemaking changes.

The division's granting of a research variance from the graywater control regulations in this Regulation #86 does not remove the applicability of any other statutory requirements that must be met in order to be authorized to use graywater in a specific location. House Bill 13-1044 requires compliance with other local, state and federal requirements including plumbing codes, water rights, etc. and local city, city and county, or county regulatory oversight for graywater use via an ordinance or resolution. The proposed graywater research variance allows for local control by requiring that the local jurisdiction authorize any research graywater treatment works located in their city, city and county or county. Additionally, if a variance allows for another use not provided for in the regulations, the city, city and county, or county will need to amend or create an ordinance or resolution to allow for the use. Similarly, the graywater statute established an opt-in framework for graywater where the state provides the minimum requirements and each local county, city and county, or city has the opportunity to implement a local graywater control program. The commission determined that the division's approval of a research variance should not be used to force graywater research into an area without the local city, city and county, or county opting to create a local graywater program. Each local graywater control program has exclusive enforcement authority and must have the oversight, fee setting requirements, and control responsibilities should the locals opt-in. A local graywater control program must be in place before research project can operate.

The research variance will be limited to: local graywater control program requirements in 86.9(B)(2)(a) and 86.9(B)(2)(e); uses of graywater in 86.10; design criteria in 86.12(B) and 86.12 (C); operations and maintenance manual requirements in 86.13; and control measure requirements in 86.14(A), 86.14 (B)(3), 86.14(B)(6), 86.14 (C)(1) , 86.14 (D). Due to the statutory limitations, the commission could not extend the research variance for new sources. New sources of graywater must be authorized through the routine commission rulemaking processes.

While the statute allows for up to ninety days for the division to review a variance, the commission finds it is appropriate to state a general expectation for the review of research variances and included a goal for the division to complete review of research variances in sixty days considering that the division carries a backlog due to limited resources. Additionally, the commission recognizes that not all applications may be complete upon initial submittal to the Division, and that the sixty day goal does not include time during which the applicant is developing responses to Division comments.

The commission also proposes modifying Regulation #21 which describes the commission's procedural rules. An appeal of the division's research variance decision will follow the existing processes described within Regulation #21. The process allows for testimony and the introduction of expert witnesses by all parties.

The division did not receive funding for the original Regulation #86 development or for this research variance regulation modification. The division has been redirecting personnel from other core work duties for this project. The commission is cognizant of the division's resource constraints with respect to graywater and expects that research variances will be limited in number.