



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, upon the commission’s motion pursuant to section 25-8-207(1), C.R.S., of adoption of revisions to the Classifications and Numeric Standards for South Platte River Basin, Laramie River Basin, Republican River Basin, Smoky Hill River Basin, Regulation #38 (5 CCR 1002-38) pertaining to the following segments:

- Upper South Platte Segment 16d (COSPUS16d);
- Upper South Platte Segment 16e (COSPUS16e);
- Upper South Platte Segment 16f (COSPUS16f);
- Middle South Platte Segment 3b (COSPM3b).

Proposed revisions, along with a proposed Statement of Basis, Specific Statutory Authority and Purpose, are attached to this notice as Exhibit 1.

In these attachments, proposed new language is shown with 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	1/3/2024	Additional information below.
Responsive prehearing statements due	1/24/2024	Additional information below.
Rulemaking Hearing	2/12/2023 9:00 am	Sabin Cleere Conference Room Department of Public Health and Environment 4300 Cherry Creek Drive South Denver, CO 80246 Or Remote Via Zoom





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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, or otherwise conveyed to the commission office 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 prehearing statement must be provided as a separate PDF document from any accompanying written testimony or exhibits.

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.

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 February 7, 2024.

SPECIFIC STATUTORY AUTHORITY:

The provisions of sections 25-8-202(1)(a), (b); 25-8-203; 25-8-204; 25-8-207, and 25-8-402, 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.



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**Water Quality
Control Commission**

Department of Public Health & Environment

Dated this 15th day of December 2023 at Denver, Colorado.

WATER QUALITY CONTROL COMMISSION

Jojo La, Administrator

38.101 STATEMENT OF BASIS, SPECIFIC STATUTORY AUTHORITY AND PURPOSE; FEBRUARY 12, 2024 RULEMAKING; FINAL ACTION 13, 2020; FEBRUARY 12, 2024; EFFECTIVE DATE APRIL 30, 2024

The provisions of C.R.S. 25-8-202(1)(a), (b) and (2); 25-8-203; 25-8-204; and 25-8-402; provide the specific statutory authority for adoption of these regulatory amendments. The commission also adopted in compliance with 24-4-103(4) C.R.S. the following statement of basis and purpose.

BASIS AND PURPOSE

The commission initiated this rulemaking hearing upon its own motion pursuant to section 25-8-207, C.R.S. to review the consistency of use classifications and standards for certain segments in the Upper and Middle South Platte Rivers, and specifically to determine whether such classifications and standards were adopted based on material assumptions that were in error or no longer apply (§ 25-8-207(1)(b), C.R.S.; Regulation #31, § 31.6(3)(b)(iii)).

During the Regulation #93 hearing process in 2023, it came to the commission's attention that there was disagreement between the City and County of Denver (Denver) and the division staff concerning the intent behind the descriptions in Regulation #38 (Classifications and Numeric Standards for South Platte River Basin, Laramie River Basin, Republican River Basin, Smoky Hill River Basin) for certain segments in the Upper South Platte and Middle South Platte River basins that flow through Denver International Airport (DEN) property.

In the 2023 Regulation #93 proceeding, the division proposed to include Upper South Platte Segment 16c (COSPUS16c) on Colorado's 303(d) List of Impaired Waters for E. coli and selenium. Segment COSPUS16c is an "all tributaries" segment to the Upper South Platte River to which table value standards apply. The division's Storymap, Colorado's Integrated Water Quality Monitoring and Assessment Report to report on the status of Colorado's streams and lakes, and other division documents indicated that certain small tributaries running through DEN property were included in COSPUS16c. The division's inclusion of these small tributaries in COSPUS16c was based on its reading of segment descriptions adopted during a Regulation #38 rulemaking hearing in 2004, where Denver had proposed resegmentation and site-specific standards for the segments flowing through DEN property.

Denver, on the other hand, had a different understanding of its 2004 proposal, and accordingly sought clarification from the commission in the context of Regulation #93 that the small tributaries at-issue were instead part of Upper South Platte Segments 16d, 16e, and 16f (COSPUS16d, COSPUS16e, and COSPUS16f, respectively), and Middle South Platte Segment 3b (COSPMS03b) — and not the segment proposed for listing, COSPUS16c.

The commission ultimately adopted the division's Regulation #93 proposal for the listing of COSPUS16c as impaired for E. coli and selenium, while noting in the Statement of Basis and Purpose that it agreed with the division's reading that the small tributaries on the DEN property were part of that segment. The commission denied a subsequent motion for reconsideration by Denver but directed the division and Denver to work together for a resolution to the disagreement about the DEN segment descriptions.

To carry out this directive, division and commission staff conducted a comprehensive review of the 2004 Regulation #38 hearing record and discovered documentation indicating that the division had asked Denver, in delineating the upstream point of the proposed new segments, to change the term "headwaters" in its proposal to "from the source." The commission views this as evidence of the parties' intent to include the "sources" (i.e., the small tributaries) for segments COSPUS16d, COSPUS16e, COSPUS16f, and COSPMS03b in those respective segments, rather than including them in the "all tributaries" segment COSPUS16c.

Section 25-8-207(2) instructs the commission to establish appropriate classifications and standards where it finds an existing inconsistency that is based on erroneous "material assumptions." The

commission hereby finds the “material assumption” that the 2004 Regulation #38 rulemaking resulted in the small tributaries at-issue being part of COSPUS16c (including the standards and classifications that are attached to that segment) was in error. Through the current rulemaking, the commission seeks to correct this inconsistency and to clarify Denver and the division’s (and therefore the commission’s) intent behind the 2004 Regulation #38 segment descriptions, as demonstrated through evidence in the 2004 hearing record. This is being accomplished by adding the words “including all tributaries” to the descriptions for segments COSPUS16d, COSPUS16e, COSPUS16f, and COSPMS03b. The commission hereby declares the classifications and standards for COSPUS16c as they previously applied to the small tributaries at-issue void ab initio and simultaneously attaches the standards and classifications for segments COSPUS16d, COSPUS16e, COSPUS16f, and COSPMS03b to those small tributaries, as appropriate.

REGULATION #38 STREAM CLASSIFICATIONS and WATER QUALITY STANDARDS

Upper South Platte River Basin

16d. Second Creek, <u>including all tributaries</u> , from the source to the O'Brian Canal at 39.898789, 104.817661.								
COSPUS16D	Classifications	Physical and Biological			Metals (ug/L)			
Designation	Agriculture			DM	MWAT			
UP	Aq Life Warm 2 Recreation E	Temperature °C	WS-III	WS-III	Arsenic	340	---	
				acute	chronic	Arsenic(T)	---	100
Qualifiers:		D.O. (mg/L)	---	3.3*	Cadmium	TVS	TVS	
Other:		pH	6.5 - 9.0	---	Chromium III	TVS	TVS	
*Phosphorus(chronic) = applies only above the facilities listed at 38.5(4). *Uranium(acute) = See 38.5(3) for details. *Uranium(chronic) = See 38.5(3) for details. *D.O. (mg/L)(chronic) = 15th percentile of D.O. measurements collected between 6:30 a.m. and 6:30 p.m.		chlorophyll a <small>($\mu\text{mol m}^{-2}$)</small>	---	TVS	Chromium III(T)	---	100	
		E. coli (per 100 <small>col.)</small>	---	126	Chromium VI	TVS	TVS	
		Inorganic (mg/L)			Copper	TVS	TVS	
				acute	chronic	Iron(T)	---	1000
		Ammonia	TVS	TVS	Lead	TVS	TVS	
		Boron	---	0.75	Manganese	TVS	TVS	
		Chloride	---	---	Mercury(T)	---	0.01	
		Chlorine	0.019	0.011	Molybdenum(T)	---	150	
		Cyanide	0.005	---	Nickel	TVS	TVS	
		Nitrate	100	---	Selenium	TVS	TVS	
		Nitrite	---	0.5	Silver	TVS	TVS	
		Phosphorus	---	TVS*	Uranium	varies*	varies*	
		Sulfate	---	---	Zinc	TVS	TVS	
		Sulfide	---	0.002				
		16e. Third Creek, <u>including all tributaries</u> , from the source to the O'Brian Canal at 39.917346, -104.784028.						
COSPUS16E	Classifications	Physical and Biological			Metals (ug/L)			
Designation	Agriculture			DM	MWAT			
UP	Aq Life Warm 2 Water Supply Recreation E	Temperature °C	WS-III	WS-III	Arsenic	340	---	
				acute	chronic	Arsenic(T)	---	0.02-10 ^A
Qualifiers:		D.O. (mg/L)	---	4.0*	Cadmium	TVS	TVS	
Other:		pH	6.5 - 9.0	---	Cadmium(T)	5.0	---	
*Uranium(acute) = See 38.5(3) for details. *Uranium(chronic) = See 38.5(3) for details. *D.O. (mg/L)(chronic) = 15th percentile of D.O. measurements collected between 6:30 a.m. and 6:30 p.m.		chlorophyll a <small>($\mu\text{mol m}^{-2}$)</small>	---	TVS	Chromium III	---	TVS	
		E. coli (per 100 <small>col.)</small>	---	126	Chromium III(T)	50	---	
		Inorganic (mg/L)			Chromium VI	TVS	TVS	
				acute	chronic	Copper	TVS	TVS
		Ammonia	TVS	TVS	Iron	---	WS	
		Boron	---	0.75	Iron(T)	---	1000	
		Chloride	---	250	Lead	TVS	TVS	
		Chlorine	0.019	0.011	Lead(T)	50	---	
		Cyanide	0.005	---	Manganese	TVS	TVS/WS	
		Nitrate	10	---	Mercury(T)	---	0.01	
		Nitrite	---	0.5	Molybdenum(T)	---	150	
		Phosphorus	---	---	Nickel	TVS	TVS	
		Sulfate	---	WS	Nickel(T)	---	100	
		Sulfide	---	0.002	Selenium	TVS	TVS	
					Silver	TVS	TVS	
			Uranium	varies*	varies*			
			Zinc	TVS	TVS			

REGULATION #38 STREAM CLASSIFICATIONS and WATER QUALITY STANDARDS Upper South Platte River Basin

16f. Barr Lake Tributary, <u>including all tributaries</u> , from the source to the Denver Hudson Canal at 39.941142, -104.748387.							
COSPUS16F	Classifications	Physical and Biological			Metals (ug/L)		
Designation			DM	MWAT		acute	chronic
UP	Agriculture Aq Life Warm 2 Recreation E	Temperature °C	WS-III	WS-III	Arsenic	340	---
			acute	chronic	Arsenic(T)	---	100
Qualifiers:		D.O. (mg/L)	---	narrative*	Cadmium	TVS	TVS
Other:		pH	6.5 - 9.0	---	Chromium III	TVS	TVS
		chlorophyll a	---	TVS	Chromium III(T)	---	100
*Phosphorus(chronic) = applies only above the facilities listed at 38.5(4).		E. coli (per 100 mL)	---	126	Chromium VI	TVS	TVS
*Uranium(acute) = See 38.5(3) for details.			Inorganic (mg/L)		Copper	TVS	TVS
*Uranium(chronic) = See 38.5(3) for details.			acute	chronic	Iron(T)	---	1000
*D.O. (mg/L)(chronic) = When water is present, D.O. concentrations shall be maintained at levels that protect classified uses.		Ammonia	TVS	TVS	Lead	TVS	TVS
		Boron	---	0.75	Manganese	TVS	TVS
		Chloride	---	---	Mercury(T)	---	0.01
		Chlorine	0.019	0.011	Molybdenum(T)	---	150
		Cyanide	0.005	---	Nickel	TVS	TVS
		Nitrate	100	---	Selenium	TVS	TVS
		Nitrite	---	0.5	Silver	TVS	TVS
		Phosphorus	---	TVS*	Uranium	varies*	varies*
		Sulfate	---	---	Zinc	TVS	TVS
		Sulfide	---	0.002			

REGULATION #38 STREAM CLASSIFICATIONS and WATER QUALITY STANDARDS Middle South Platte River Basin

3b. Hayesmount Tributaries, including all tributaries, including the Upper Hayesmount Tributary from the source to the confluence with Box Elder Creek and the Lower Hayesmount Tributaries from the source to the Denver Hudson Canal.

COSPMS03B	Classifications	Physical and Biological			Metals (ug/L)			
Designation		DM	MWAT		acute	chronic		
UP	Agriculture							
	Aq Life Warm 2	Temperature °C	WS-III	WS-III	Arsenic	340	---	
	Recreation E							
			acute	chronic	Arsenic(T)	---	100	
Qualifiers:		D.O. (mg/L)	---	narrative*	Cadmium	TVS	TVS	
Other: *Uranium(acute) = See 38.5(3) for details. *Uranium(chronic) = See 38.5(3) for details. *D.O. (mg/L)(chronic) = When water is present, D.O. concentrations shall be maintained at levels that protect classified uses.		pH	6.5 - 9.0	---	Chromium III	TVS	TVS	
		chlorophyll a (mg/m ²)	---	TVS	Chromium III(T)	---	100	
		E. coli (per 100 mL)	---	126	Chromium VI	TVS	TVS	
			Inorganic (mg/L)		Copper	TVS	TVS	
				acute	chronic	Iron(T)	---	1000
		Ammonia	TVS	TVS	Lead	TVS	TVS	
		Boron	---	0.75	Manganese	TVS	TVS	
		Chloride	---	---	Mercury(T)	---	0.01	
		Chlorine	0.019	0.011	Molybdenum(T)	---	150	
		Cyanide	0.005	---	Nickel	TVS	TVS	
		Nitrate	100	---	Selenium	TVS	TVS	
		Nitrite	---	0.5	Silver	TVS	TVS	
		Phosphorus	---	TVS	Uranium	varies*	varies*	
		Sulfate	---	---	Zinc	TVS	TVS	
		Sulfide	---	0.002				