



COLORADO

**Water Quality
Control Commission**

Department of Public Health & Environment

Considerations for Advancing External Proposals For Revised Water Quality Classifications and Standards Before the Water Quality Control Commission

Encouraging "Ripeness" of Proposals

Introduction

The Colorado Water Quality Control Act (Act) establishes certain duties for the Water Quality Control Commission (Commission) (§25-8-202) and directs the Commission to consider, at a minimum, certain relevant information when classifying state waters (§25-8-203) or promulgating water quality standards (§25-8-204) and control regulations (§25-8-205). In an effort to make the regulatory process as efficient as possible and still meet the statutory requirements, this guidance document is intended to assist parties who wish to propose regulatory changes before the Commission. The intent of this document is not to erect new barriers, but rather to help identify the most successful path through a complex and challenging process. In addition, the expectations outlined in this document are not intended to prevent communities without resources from bringing forward proposals. For those communities, the Commission recommends that a community without resources reach out to the Division for assistance in meeting the requirements of this document.

For proposed changes in water quality classifications and standards to receive substantive consideration by the Commission in a rulemaking hearing, the proposals must be "ripe" for decision. In the past, some proposals have come before the Commission with inadequate data to support the proposal or insufficient involvement of other impacted or relevant stakeholders and community members. When inadequately supported proposals proceed through the rulemaking process, the result can be a waste of limited resources by the proponent, the Water Quality Control Division (Division) as staff to the Commission, other external parties, and the Commission itself.

This document describes factors that external parties should consider to determine when their proposal would be ready for consideration by the Commission. This document also identifies stages in the rulemaking process where the Commission can determine whether a proposal is ready to proceed to a rulemaking hearing and the role that the Division should play in advising the Commission on such ripeness determinations. Although the ultimate decision regarding ripeness rests in each instance with the Commission, input from the Division as staff to the Commission will be an important consideration.

Commission Role

The Commission fully expects that in most instances a good faith effort to address the considerations and meet the expectations set forth in this document will result in a conclusion that ripeness considerations have been met. The Commission notes that the discussion in this document of ripeness factors does not provide a definitive, quantifiable test of ripeness and that the final decision will require a judgment call. The Commission intends to take into account on a case by case basis all the variables such as the resources available to a proponent, the adequacy of the data and the specific nature and scope of the proposal in

assessing ripeness.

Any participant in a water quality classifications and standards proceeding can raise the concern about any proposal's ripeness with the Commission for its consideration.

Factors that Affect Whether a Proposal Is Ripe for Consideration

The complexity of an issue and the potential impact of a proposed regulatory change will determine the level of analysis and the amount of supporting data and information required to permit substantive consideration of the proposal by the Commission. There is no one-size-fits-all data or process requirement. However, in general, the following factors would contribute to making a proposal for regulatory change ready for full consideration in a rulemaking hearing.

- The Division and other impacted or relevant stakeholders and community members have been involved in discussions regarding the proposal with the proponents. This includes the meaningful involvement of a diverse group of people who are representative of the impacted or relevant stakeholders and community members. The dimensions of diversity to consider include race, color, national origin, income, age, gender, and sexual orientation.
- Adequate data or other information is available to support the proposal.
 - Evidence in the record (or that will be submitted) contains the raw data from which conclusions, summary statistics or graphs were developed.
 - Data files have been submitted (or will be submitted) in accessible electronic form, so that information can be fully reviewed and calculations can be replicated.
 - Available data is adequate in amount and type to support the proposal and addresses any issues about seasonal or spatial variability in the constituent or the water body segment.
 - Scientific methods used to support the proposal have been discussed with the Division, CPW and EPA, and their input has been taken into account.
 - The data is submitted independently for the record in the rulemaking hearing, and the proponent does not rely on submittals to the Division in some other regulatory context.
 - Where a proposal is submitted that does not involve the use of data (e.g., changes to a regulation regarding implementation), clear and concise information is provided regarding the rationale for the proposal, including any relevant legal or technical references.
- The proposed revisions are within the legal parameters imposed by state and federal water quality statutes, the Basic Standards and EPA's water quality standards regulations, recognizing that interpretation of these provisions can be subject to debate.

Agreement or disagreement with a proposal is not a determining factor for ripeness.

Steps in the Process where Ripeness Can Be Considered by the Commission

There are four steps in the standards review process when the Commission can decide which proposals for regulatory change are sufficiently ready for full consideration and potential

adoption. At each point in the process, the Commission will seek the Division's input regarding the ripeness factors described above.

The Issues Formulation Hearing

The Issues Formulation Hearing (IFH) is a public hearing in which the Commission identifies the specific issues to be addressed in the next major rulemaking hearing. The IFH process description (available on the Commission's website) includes the following:

In deciding whether any identified issue should be addressed in the upcoming rulemaking hearing, the Commission will consider whether the issue is ripe for resolution and whether there is any reason to address the issue in a hearing separate from the upcoming major hearing on the regulation(s) in question. The question of ripeness generally will turn on whether adequate data or other information is or will be available, whether there has been or will be a good faith effort toward informal exploration of the proposal with the Division and other impacted or relevant persons, entities, or communities, including the meaningful involvement of stakeholders and community members regardless of their race, color, national origin, income, age, gender, or sexual orientation, and whether there is a need for an expeditious resolution of the issue.

Division Role: In addition to identifying the issues that it intends to include in its rulemaking proposal, the Division should advise the Commission on:

- Whether the Division knows if adequate data or other information to support a proposal, as described above, is or will be available by the due date for the prehearing statements.
- The extent of informal discussions between the Division and the proponents regarding the proposal.
- Whether the Division knows of any reason why the issue should receive accelerated or delayed consideration.

The Commission intends to identify at the IFH any issues that are not ripe and which will not be included in the notice of public rulemaking. Only in exceptional circumstances, for example when it may still be possible for an external proponent to collect adequate data between the time of the IFH and the prehearing statement or when there is a likelihood that issues could further ripen between the IFH and the notice of rulemaking, will the Commission allow a proposal that is not ripe at the IFH stage to be considered again for ripeness at the time of the adoption of the notice of public rulemaking.

Adoption of the Notice of Public Rulemaking

Four months prior to the rulemaking hearing, the Commission considers and approves the draft Notice of Public Rulemaking and determines which proposals will be included in the public notice. In the past, the Commission has approved the draft notice without considering the ripeness of each proposal. The Commission has even allowed proposals that were not identified at the IFH to be included in the notice at times. In the future, this step in the process will be used to consider ripeness factors in order to ensure that only proposals that are expected to be ready for consideration will be subject to public notice and prehearing

and responsive statements.

Division Role: The Division should report to the Commission the extent to which it believes the issue will be ready for rulemaking consideration by the due date for the prehearing statements. The Division's advice should encompass the following ripeness factors:

- The extent of informal discussions between the Division, other stakeholders members of the community, and the proponents regarding the proposal.
- Whether the Division believes adequate data or other information to support a proposal, as described above, is or will be available by the due date for the prehearing statements.
- Any known concerns regarding the consistency of proposed revisions with the Basic Standards (Regulation #31, 5 CCR 1002-31) and EPA's water quality standards regulation (40 CFR, Part 131).

Prehearing Conference, Consideration of Motions

The prehearing conference, held one month prior to the rulemaking hearing, is another opportunity to remove proposals from further consideration. By this point in the process, the parties will have submitted prehearing and responsive prehearing statements, and the degree to which proposals satisfy the ripeness factors described above should be more evident. If the information in the record for a particular proposal appears to be inadequate, the Division or any other party can move to strike the proposal. The Commission or its designated hearing chair will determine ripeness based on the evidence in the record and the factors described above in ruling on any motions to strike.

Division Role: In addition to providing evidence in support of its own proposal, the Division evaluates and responds to the evidence submitted in support of external proposals with the prehearing statements. The Commission has requested that the Division be more assertive in identifying proposals without adequate supporting data and information. The Division should consider filing a motion to strike inadequately supported proposals where it believes further consideration in the rulemaking hearing would not be a productive use of internal or external resources.

Content of the Proponent's Prehearing Statement: In reviewing and evaluating prehearing statements, the Division will consider whether adequate data or other information is available in the record to support each proposal, including:

- Availability of the raw data from which conclusions, summary statistics or graphs were developed.
- Submission of data files in accessible electronic form.
- Adequacy of data in amount and type to support the proposal and to address any issues about seasonal or spatial variability in the constituent or the water body segment.
- Description of the scientific methods, and efforts to coordinate with the Division, CPW and EPA.
- Submission of information with the prehearing statement, and not in some other context.
- A clear and concise rationale for the proposal, including any relevant legal or

technical references.

The Division should notify the proponent prior to the responsive statement due date if the Division believes that the information submitted with the prehearing statement is insufficient to support the proposal, so that additional information can be submitted in a supplemental prehearing statement. The ability of this procedure to resolve ripeness concerns will depend on whether the sufficiency and timing of the evidence, including any supplements and corrections, provide an adequate opportunity for other parties to review proposals and develop responsive comments.

Alternative Proposals Submitted with Responsive Prehearing Statements: The same ripeness factors should be considered by the Division in reviewing alternative proposals that are submitted with a responsive prehearing statement. Where the alternative proposal relies upon data and information already on the record and reaches a different conclusion, the alternative proposal will probably satisfy the requirement for adequate data. However, where the alternative proposal relies upon independent information, the alternative proposal must satisfy the same requirements for submission of data and information, and provide sufficient time for consideration by the Division, EPA, and other parties.

Rulemaking Hearing

The Rulemaking Hearing is the Commission's formal consideration of noticed proposals based on information in the record. Oral testimony is presented by the Division and other parties.

Division Role: In addition to providing testimony in support of its own proposal, the Division staff makes recommendations to the Commission regarding external proposals. The Division should generally make one of the three following recommendations:

1. Recommend the Commission adopt the proposal as modified through the formal rulemaking process. This recommendation usually results from the proponent's working closely with the Division, EPA and other parties to resolve details and conflicts.
2. Recommend the Commission not adopt the proposal due to disagreement over technical, legal or policy issues. This result occurs when the proponent, the Division, EPA and other parties are not able to reach agreement.
3. Recommend the Commission not adopt the proposal because inadequate information was submitted on the record and/or insufficient time was provided for consideration by the Division and other parties. This is the result the Commission intends to avoid by considering ripeness factors throughout the rulemaking process.

Summary of Process and Potential Actions Regarding Ripeness

The following table presents a summary of the anticipated Commission and Division actions regarding ripeness of external proposals.

Step	Division Action Regarding Ripeness	Commission Action	Potential Commission Decision Regarding Ripeness
<i>informal process</i>	Discuss issues with potentially impacted or relevant stakeholders and community members		

Issues Formulation Hearing	Advise on ripeness factors	Establish the scope of the hearing	Decide which issues will be ready for rulemaking consideration
<i>development of formal proposals</i>	Discuss proposals with parties upon request		
Adoption of the Notice of Public Rulemaking	Advise on ripeness factors	Approve the Notice and various proposals	Decide whether a proposed regulatory change will be ready for rulemaking consideration and should be formally noticed
<i>formal rulemaking process</i>	Review supporting evidence, discuss proposals with parties		
Prehearing Conference	Move to Strike if supporting evidence is inadequate	Rule on Motions to Strike	Decide whether to remove from consideration a proposal or alternative proposal
<i>formal rulemaking process</i>	Continue discussions with parties		
Rulemaking Hearing	Recommend Commission not adopt proposals not supported by adequate evidence.	Adopt proposed changes	Decide whether adequate evidence has been presented on the record to allow full consideration and to support the proposed change.