

**MEMORANDUM OF AGREEMENT FOR THE IMPLEMENTATION OF SECTION 25-8-202(7) OF THE
COLORADO WATER QUALITY CONTROL ACT (25-8-1 01, et seq)**

THIS MEMORANDUM OF AGREEMENT (MOA) is entered into this 13 day of August, 2012, by and between the Colorado Department of Public Health and Environment (CDPHE), Water Quality Control Commission (WQCC), Water Quality Control Division (WQCD), and the Division of Oil and Public Safety (OPS) of the Colorado Department of Labor and Employment (CDLE).

1. BACKGROUND

Subsection 25-8-202(7) of the 1989 amendments to the state Water Quality Control Act restates and clarifies existing law, and provides a procedure for coordination between the state agencies vested with the responsibilities to implement protection of the groundwater quality of state waters.

Key among the provisions of the 1989 amendments to the state Water Quality Control Act is the requirement that the WQCC and the WQCD recognize the water quality responsibilities of the following entities, referred as the "implementing agencies": the Division of Reclamation, Mining, and Safety; the State Engineer; the Oil and Gas Conservation Commission; and the state agency responsible for activities related to the federal Resource Conservation and Recovery Act of 1976 (RCRA) as amended. Currently, there are two agencies that implement provisions of RCRA: The OPS located in the CDLE; and the Hazardous Material and Waste Management Division located in the CDPHE.

The WQCC is solely responsible for the adoption of water quality standards and classifications for state waters. Each implementing agency is to apply these water quality standards and classifications adopted by the WQCC through their respective programs after consultation with the WQCC and WQCD. Generally, application of the standards and classifications would be limited to non-point surface discharges and to subsurface discharges as the WQCD remains solely responsible for the issuance and enforcement of permits for point source discharge into state surface waters. The implementing agencies are to specify applicable points of compliance for groundwater discharges. The points of compliance are to be adopted in accordance with criteria established through public rule-making following consultation with the WQCC and the WQCD. By requiring the implementing agencies to apply the standards and classifications established by the WQCC, the legislature has attempted to clarify the primary regulatory authorities responsible for assuring uniform water quality protection for all waters of the state.

In acknowledging the water quality responsibilities of the implementing agencies cited in the act, the amendments further specify that the WQCC and the WQCD shall not require permits for, or otherwise regulate, activities subject to the jurisdiction of the implementing agencies unless the WQCC finds, pursuant to Section 25-8-202(7)(b)(II), and after notice and public hearing, that such regulation is necessary to assure compliance with the federal Clean Water Act, the water quality control requirements contained in the Colorado water rights statutes, or water quality classifications and standards; to protect present and future beneficial uses of water to avoid the imposition of a disproportionate burden on other dischargers, or classes of dischargers; or in the event an implementing agency fails to provide reasonable assurance that compliance has been obtained through its own programs.

In the event the WQCC must take regulatory action to ensure compliance, WQCC action shall be undertaken solely through the adoption of control regulations under Section 25-8-205, or through the permit regulations under Section 25-8-501. The WQCD may enforce such regulations.

2. PURPOSE

This agreement is being entered into by the above-mentioned parties for the following purposes: To recognize the responsibilities of each agency for protecting water quality within the State of Colorado; To provide procedures for communications, exchange of information and resolution of problems as necessary to carry out the provisions of the 1989 amendments to the state Water Quality Control Act.

3. AUTHORITY

The principal authority for this agreement is contained in the Water Quality Control Act, Section 25-8-101 et seq, CRS.

4. DEFINITIONS

- 4.1 "Designated Official" means a person representing one of the parties to this agreement, and is appointed to implement this agreement and to negotiate on behalf of that party. The designated official for the OPS shall be the Director of the OPS; the designated official of the WQCC shall be its Administrator; and the designated official for the WQCD shall be the Director of the WQCD.
- 4.2 "Implementing Agency" means any of the state agencies referred to in Section 25-8-202(7), CRS whose water quality responsibilities the WQCC and WQCD are to recognize. For purposes of this agreement, the implementing agency is the OPS. The OPS is responsible for activities related to the federal Resource Conservation and Recovery Act of 1976 (RCRA) as amended, and related state programs.
- 4.3 "Point(s) of Compliance" means one or more points or locations at which compliance with applicable groundwater standards must be achieved.

5. RESPONSIBILITIES

The responsibilities of the OPS, the WQCD, and the WQCC, as they relate to the 1989 amendments to the state Water Quality Control Act, are presented below.

- 5.1 Division of Oil and Public Safety
 - a. The OPS shall recognize that the WQCC is solely responsible for the adoption of water quality standards and classifications for state waters in accordance with Section 25-8-202(7).
 - b. The OPS shall recognize that the WQCD is solely responsible for issuance and enforcement of permits authorizing all point source discharges to surface waters of the

state as well as enforcing any control or permit regulation adopted by the WQCC under Section 25-8-202(7)(b)(III).

- c. The OPS has been designated an implementing agency through the 1989 amendments to the state Water Quality Control Act. As such, the OPS is responsible for implementing standards and classifications for discharges, other than point source discharges to surface water, through its own regulatory programs after consultation with the WQCC and the WQCD.
- d. The OPS has independent authority to establish concentration limits, including more stringent concentration limits, and points of compliance for management and clean-up activities for petroleum storage tanks. These concentration limits shall not be less stringent than a corresponding standard or classification adopted by the WQCC.
- e. The OPS implements the Spill Protection, Control and Countermeasure (SPCC) provisions (40 CFR 112 Subpart A) of The Clean Water Act (CWA) (33 USC 1370) pertaining to underground and aboveground storage tanks regulated by OPS.
- f. The OPS is responsible for adopting applicable points of compliance for statewide and site-specific standards and classifications for discharges into state waters, other than surface waters, in accordance with criteria established through rule-making after public hearing and consultation with the WQCC and the WQCD.
- g. In the event that the OPS receives a written notice from the WQCC or the WQCD that circumstances exist which may result in a basis for WQCC action in accordance with Section 25-8-202(7)(b)(II)(A), (B) or (C), the OPS shall respond, in writing, to the notice within fifteen (15) working days. The OPS, through its designated official, will meet informally with the designated officials of the WQCC and the WQCD through one or more meetings to attempt to resolve the concern.
- h. In the event that the OPS receives notification from the WQCC of its intent to publish a Notice of Public hearing to consider the adoption of control regulations or permit regulations for one or more of the water quality responsibilities currently with the jurisdiction of the OPS, the OPS shall respond to such notification within thirty (30) days. The response from the OPS may provide information to the WQCC that demonstrates that there is no basis for WQCC action in accordance with Section 25-8-202(7)(b)(II)(A), (B), and (C), or if such a basis may exist, identifies the action(s), if any, to be undertaken by OPS to address the situation.
- i. Prior to the adoption of any water quality related regulation recommended by the OPS, the OPS shall notify the WQCC and WQCD, and allow their participation in any committee meetings or hearings where such proposals are to be discussed.
- j. The OPS shall provide to the WQCC and the WQCD an annual written report that describes how its programs are assuring compliance with ground water quality standards and classifications for activities subject to the OPS jurisdiction, including identification of any relevant proposed or existing regulations. The annual update will

include an annual summary of the activities and concerns of the OPS relative to the implementation of standards and classifications.

5.2 Water Quality Control Division

- a. The WQCD shall recognize the water quality responsibilities of the OPS as presented under Section 5.1, and its designation as an implementing agency in accordance with Section 25-8-202(7).
- b. The WQCD shall be solely responsible for the issuance and enforcement of permits authorizing point source discharges into surface waters of the State. See Sections 25-8-501, 503 and 504, CRS (1989).
- c. The WQCD shall not require permits for, or otherwise regulate, activities subject to the jurisdiction of the OPS unless such regulation is promulgated by the WQCC as provided under Section 5.3 (e) and (f) below.
- d. In the event that the WQCD has reason to believe that circumstances exist which may result in a basis for WQCC action in accordance with Section 25-8-202(7)(b)(II)(A), (B) or (C), the designated official from the WQCD shall notify the Director of the OPS, in writing, of such circumstances. The notice shall specify the circumstances which may result in a basis for WQCC action and provide an explanation of the basis for the WQCD's concern(s), including any supporting documentation. Copies of this correspondence shall be forwarded to the WQCC. The designated official of the WQCD will attempt to resolve the concern(s) informally with the designated officials of the WQCC and the OPS through one or more meetings. All reasonable efforts will be made, at the agency level, to resolve the concern(s) identified.
- e. In the event that the WQCD determines that the circumstances identified in accordance with subsection (d) above cannot be remedied through informal discussions at the agency level, it shall so notify the WQCC.

5.3 Water Quality Control Commission

- a. The WQCC shall recognize the water quality responsibilities of the OPS and its designation as an implementing agency in accordance with Section 25-8-202(7).
- b. The WQCC shall be solely responsible for adoption of water quality standards and classifications for all state waters.
- c. In adopting water quality standards and classifications for state waters other than surface waters, the WQCC shall not specify points of compliance applicable to discharges regulated by the OPS. Such points of compliance shall be adopted by the OPS in accordance with criteria established through rule-making as provided under Section 5.1 (d) of the agreement.

- i. In the event that the WQCC has reason to believe that circumstances exist which may result in a basis for WQCC action in accordance with Section 25-8-202(7)b)(II)(A), (B) or (C), it shall proceed in the following manner:
 - ii. Unless the WQCD has previously provided such notice as specified under paragraph 5.2(d) of this memorandum, the WQCC or its designated official, shall notify the Director of the OPS, in writing of such circumstances. A copy of such notice shall be provided to the WQCD. This notice shall specify the circumstances which may result in a basis for WQCD actions and provide an explanation of the basis of the WQCC's concern(s), including supporting documentation.
 - iii. The WQCC shall direct its designated official to meet with the designated officials of the OPS and the WQCD to attempt to resolve the concern(s) informally. All reasonable efforts will be made to resolve the concern(s) at the agency level. Any such resolution shall be presented to the full WQCC for its approval.
- d. If the OPS, WQCD and WQCC are unable to reach agreement regarding the implementation of water quality responsibilities as outlined in Section 25-8-202(7)(a), the director of the CDPHE and the director of the CDLE will address the issues in dispute, after consultation with the Attorney General's Office and, if possible, recommend a resolution to the WQCC and the OPS for their consideration.
- e. In the event that the WQCC determines that the circumstances identified in accordance with subsection (d) above cannot be remedied through informal discussions it shall notify the OPS of its intent to publish a Notice of Public Hearing to consider the adoption of control regulations or permit regulation for the activities subject to the jurisdiction of the OPS which are the subject of concern. Such notification to the OPS shall precede the publication of the WQCC's Notice of a Public Hearing by no less than forty-five (45) days, unless the WQCC determines that an emergency rule-making must be initiated to assure compliance with either the federal Clean Water Act or the Colorado Water Quality Control Act. In such event the WQCC shall give the OPS as much advance notice as possible. If the WQCC receives information from the OPS pursuant to Section 5.1(f), the WQCC shall not proceed with the publication of the Notice of Public Hearing unless the WQCC has determined that the proposed rule-making is still necessary after it has reviewed the information at the next WQCC public meeting.
- f. The WQCC shall adopt appropriate control regulations or permit regulations to address one or more of the water quality responsibilities within the jurisdiction of the OPS only if it makes a written finding, after public hearing that:
- i. Such regulation is necessary to assure compliance with the Federal Clean Water Act, the provisions of Articles 80 to 03 of Title 37, CRS, or water quality standards and classifications adopted for state waters, or to protect present and future beneficial uses of water; or

- ii. Such regulation is necessary to avoid the imposition of a disproportionate burden on other dischargers or classes of dischargers to the affected state waters who are subject to the requirements of this article; or
 - iii. The OPS fails to provide a reasonable assurance that compliance with standards and classifications has been obtained through its own programs.
- g. Nothing in this MOA is intended to grant additional authority to the parties or to curtail their jurisdiction to fulfill their statutory responsibilities, including jurisdiction to maintain a program consistent with the requirements of the federal Resource Conservation and Recovery Act of 1976, as amended.
 - h. The WQCC shall provide to the OPS rule-making and informational hearing notices and agendas and allow participation in formal proceedings addressing the establishment of standards and classifications, or any other matter which could have an impact on OPS operations, and informal proceedings in which the OPS has expressed an interest.
 - i. The WQCC shall schedule a presentation by the OPS to discuss the annual report prepared and submitted by the OPS at a regular public meeting, and shall provide the public with notice and an opportunity to comment on such report.

6. **SPECIAL PROVISIONS**

- 6.1 Each agency shall, to the extent allowed by law, make available to the other, information within its possession. Requests for information shall not impose an unreasonable resource burden on either agency.
- 6.2 When executed, this agreement shall supersede any prior agreement regarding the implementation of the 1989 amendments to the state Water Quality Control Act whether written or implied.
- 6.3 This agreement shall become effective on the date of execution by the last signatory party. It may be amended upon the mutual agreement of the WQCC, the WQCD and the OPS.

7. APPROVALS

Peter Buttl

8/13/12

Chairman
Water Quality Control Commission

Date

Calbuquerque

9/6/12

Director
Division of Oil and Public Safety

Date

Steve A. Hand

8/23/12

Director
Water Quality Control Division

Date