

MEMORANDUM OF AGREEMENT
FOR THE IMPLEMENTATION OF SB 181 AMENDMENTS
TO THE COLORADO WATER QUALITY CONTROL ACT (25-8-101, et seq)

THIS MEMORANDUM OF AGREEMENT (MOA) is entered into this 30th day of August, 1990, by and between the Colorado Department of Health, Water Quality Control Commission (WQCC), Water Quality Control Division (WQCD), the Colorado Department of Natural Resources (DNR) and the Office of the State Engineer (SEO).

1.1 BACKGROUND -- SB 181

Subsection 25-8-202(7) of the 1989 amendments to the state Water Quality Control Act (SB 181) restates and clarifies existing law, and provides a procedure for coordination between state agencies vested with responsibilities to implement water quality protection of state waters. Key among the provisions is the requirement that the WQCC and the WQCD recognize the water quality responsibilities of the following entities, referred to in the subsection as the "implementing agencies": the Mined Land Reclamation Division; 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" as amended. Currently, this is the Hazardous Material and Waste Management Division located in the state Health Department.

The WQCC is to remain 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 own programs after consultation with the WQCC and the WQCD. Generally, application of the standards and classifications would be limited to nonpoint surface discharges and to sub-surface discharges, as the WQCD remains solely responsible for the issuance and enforcement of permits for point source discharges 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 rulemaking 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 § 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 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.

Section 2. PURPOSE

This agreement is being entered into by the above-mentioned parties for the following purposes:

- 2.1 To recognize the responsibilities of each agency for protecting water quality within the State of Colorado;
- 2.2 To formalize the previous informal cooperative working relationships between the parties; and,
- 2.3 To provide procedures for communication, exchange of information, and resolution of problems necessary to carry out the provisions of S.B. 181.

Section 3. AUTHORITY

The principal authority for this agreement is contained in the Water Quality Control Act, section 25-8-101 et seq., C.R.S. (1989) as amended by S.B. 181, and title 37, articles 80 through 93, C.R.S. (1973, 1989 Supp.).

Section 4. DEFINITIONS

- 4.1 "Designated Official" means a person representing one of the parties to this agreement appointed to implement this agreement and to negotiate on behalf of that party. The designated official for the SEO shall be the State Engineer; the designated official of the WQCC shall be its Administrator; and the designated official for the WQCD shall be the Division Director.
- 4.2 "Implementing Agency" means any of the state agencies referred to in section 25-8-202(7), C.R.S. whose water quality responsibilities the WQCC and the WQCD are to recognize. For purposes of this agreement, the implementing agency is the State Engineer's Office.
- 4.3 "Points of Compliance" means one or more points or locations at which compliance with applicable groundwater standards must be achieved.

Section 5. RESPONSIBILITIES

The responsibilities of the Water Quality Control Commission (WQCC), the Water Quality Control Division (WQCD), and the State Engineer's Office (SEO) as they relate to the mandates of SB 181 are presented below.

5.1 State Engineer's Office

- a. The SEO 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 SEO 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 SEO has been designated an implementing agency through the provisions of Senate Bill 181. As such, the SEO 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. Implementation of standards and classifications by the SEO shall occur in those situations where the State Engineer has been assigned water quality statutory authority under a statute other than the Water Quality Control Act. Prior to exercising such authority, the SEO may require the applicant to provide such water quality data and analysis or other information as will permit the SEO to implement standards and classifications.
- d. The SEO 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 rulemaking after public hearing and consultation with the WQCC and the WQCD. Such points of compliance shall be established so as to protect present and future beneficial uses of water.
- e. In the event that the SEO 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 § 25-8-202(7)(b)(II)(A), (B) or (C), the SEO shall respond, in writing, to the notice within 15 working days. The SEO, 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.
- f. In the event that the SEO 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 within the jurisdiction of the SEO the SEO shall respond to such notification within thirty days. The response from the SEO will provide information to the WQCC that demonstrates that there is no need for WQCC action in accordance with § 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 the SEO to address the situation.
- g. Prior to the adoption of any water quality related regulation by the SEO, the SEO shall notify the WQCC and the WQCD and allow their participation in any committee meetings or hearings where such proposals are to be discussed.
- h. Within 90 days following the execution of this Memorandum of Agreement, the SEO shall provide to the WQCC and the WQCD a written report that describes how its programs will assure compliance with water quality standards and classifications for activities subject to SEO jurisdiction, including identification of any relevant proposed or existing regulations. The State Engineer shall identify those provisions of law which provide him substantive water quality responsibilities as to which the SEO shall apply the classifications and standards. This written report shall be updated annually by the SEO. The annual update shall be limited to changes made by the SEO during the course of the year and will include an annual summary of the activities and concerns of the SEO 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 SEO 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 §§ 25-8-501, 503, and 504, C.R.S.
- c. The WQCD shall not require permits for, or otherwise regulate, activities subject to the jurisdiction of the SEO 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 § 25-8-202(7)(b)(II)(A), (B) or (C), the designated official from the WQCD shall notify the State Engineer, 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 SEO 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 SEO 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 SEO. Such points of compliance shall be adopted by the SEO in accordance with criteria established through rulemaking as provided under Section 5.1.d of this agreement.
- d. 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 § 25-8-202(7)(b)(II)(A), (B) or (C), it shall proceed in the following manner:
 - i. 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 State Engineer, in writing, of such circumstances. A copy of such notice shall be provided to the WQCD. The notice shall specify the circumstances which may result in a basis for WQCC action,

and provide an explanation of the basis for the WQCC's concern(s), including supporting documentation.

- ii. The WQCC shall direct its designated official to meet with the designated officials of the SEO 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.
 - iii. If the SEO, WQCC and WQCD are unable to reach agreement regarding the implementation of water quality responsibilities as outlined in section 25-8-207(7)(a), the directors of the Department of Health and the Department of Natural Resources will address the issues in dispute, after consultation with the Attorney Generals Office, and, if possible, recommend a resolution to the WQCC and the SEQ 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 SEO of its intent to publish a Notice of Public Hearing to consider the adoption of control regulations or permit regulations for the activities subject to the jurisdiction of the SEO which are the subject of concern. Such notification to the SEO 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 rulemaking 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 SEO as much advance notice as possible. If the WQCC receives information from the SEO 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 rulemaking 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 SEO 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 93 of Title 37, C.R.S., 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 SEO fails to provide a reasonable assurance that compliance with standards and classifications has been obtained through its own programs.
- g. The WQCC shall provide to the SEO rulemaking and informational hearing notices and agendas and allow participation in formal proceedings addressing the establishment of standards and classifications and any other matters which could have an impact on SEO operations, and informal proceedings in which the SEO

has expressed an interest.

- h. The WQCC shall schedule a presentation by the SEO to discuss the annual report prepared and submitted by the SEQ at a regular public meeting, and shall provide the public with notice and an opportunity to comment on such report.

Section 6. SPECIAL PROVISIONS

6.1 Access to Records:

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 Effect on Prior Agreement:

When executed, this agreement shall supercede any prior agreement between the parties on the implementation of Senate Bill 181 whether written or implied, with the exception of the Memorandum of Agreement Concerning the Implementation of Section 25-8-104(2)(d), C.R.S. (Consultation Memorandum of Agreement), entered into between the WQCC, the WQCD, and the SEQ.

6.3 Effective Date and Termination:

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 SEQ. or it may be terminated upon 30 days written notice to the other parties by the WQCC, the WQCD or the SEQ.

Section 7. APPROVALS

Department of Natural Resources
Office of the State Engineer
Commission

State Engineer

Executive Director
Department of Natural Resources
Commission

Date: August, 1990

Colorado Department of Health
Water Quality Control

Water Quality Control Division

Executive Director
Colorado Department of Health

Chairman
Water Quality Control

Director
Water Quality Control Division