

Rulemaking Hearing Process Description

Overview

The Rulemaking Hearing is the third and final step in a three-step process used by the Water Quality Control Commission for triennial review of water quality classifications and standards in Colorado. The first step is an Issues Scoping Hearing, which provides an opportunity for early identification of potential issues that may need to be addressed in the next major rulemaking hearing for particular regulations, and for identification of any issues that may need to be addressed in rulemaking prior to that time. The second step in the triennial review process – the Issues Formulation Hearing – results in the identification of the specific issues to be addressed in the next major rulemaking hearing. The third step is the Rulemaking Hearing, where any revisions to the water quality classifications and standards are formally adopted. The timing of the three steps is as follows: (1) the Issues Scoping Hearing – for the Basic Standards and Methodologies for Surface Water or individual river basin classifications and standards – is held in October of Year 1; (2) the Issues Formulation Hearing is held in November of Year 2; and (3) the Rulemaking Hearing is held in June of Year 3.

The Water Quality Control Commission's web site includes a section regarding water quality classifications and standards reviews. Separate sub-pages are set up for the Basic Standards and Methodologies for Surface Water and for the individual river basins. These sub-pages identify when the last major rulemaking hearing occurred, and when the next Issues Scoping Hearing, Issues Formulation Hearing, and Rulemaking Hearing will occur for each of the regulations. As the date of a particular hearing approaches, the plan is to post the hearing notice, Water Quality Control Division testimony/comments, and any other testimony or comments submitted in an electronic format. In addition, comments received in an Issues Scoping Hearing and/or an Issues Formulation Hearing for a particular regulation will be retained on the web site, so that those with a potential interest in the Rulemaking Hearing can review that information. The web site also includes a sub-page for tracking the status of EPA's review of water quality standards adopted by the Commission.

Hearing Notice

The Rulemaking Hearing notice, and accompanying proposed revisions to the regulation(s), along with proposed Statement of Basis and Purpose language, generally are approved by the Commission at a regular meeting four months prior to the rulemaking hearing. The draft notice and proposal will be distributed to the mailing list described below at the same time that it is sent to the Commission for its review. In addition to setting the hearing date, time and location, the notice will contain a general description of the three steps in the triennial review process (as noted above), including the purpose of this hearing and an explanation of the opportunity to provide input.

The notice will establish deadlines for several steps in the prehearing process, including the submission of (1) party status/ mailing list status requests, (2) prehearing statements and evidence from proponents of proposed revisions, (3) prehearing statements and evidence from those responding to proposals, and (4) rebuttal statements.

To facilitate exchange of information prior to the hearing, the notice will include information regarding contact persons for each of the entities advancing proposals. It will request that anyone seeking party status or mailing list status provide the organization's name, a contact person, mailing address, phone number, fax number and email address if available. The notice will

encourage informal discussions between parties and with the Water Quality Control Division prior to the hearing, in an effort to reach consensus or to develop proposed resolutions of issues and/or to narrow the issues potentially in dispute.

The notice will specify the scope of alternative proposals that will be considered in the rulemaking hearing. In particular, it will state that “alternative proposals related to the specific revisions proposed in the notice and developed to respond to those proposed revisions” will be considered in the hearing. It will also clarify that any alternative proposals to be considered are to be submitted with the responsive prehearing statements.

Formal publication of the Rulemaking Hearing notice is in the Colorado Register, which is published monthly. The notice also will be distributed, principally by email, to a list of persons who have expressed an interest in receiving notice of proceedings related to the regulation(s) in question. This list of interested persons will be developed initially from responses to a broadly distributed mailing that will notify potentially interested persons of the opportunity to be included on the list. (An option will be offered to receive notices by mail, for those who may not have easy access to a computer.) The initial mailing will be sent to: (1) all local governments, local health agencies and regional water quality planning agencies; (2) all participants in prior rulemaking hearings for these regulations; (3) all persons who receive the monthly Water Quality Information Bulletin, (4) water conservancy/water conservation districts, (5) watershed groups, (6) environmental groups, (7) permitted dischargers, (8) public water supply systems, (9) Riverwatch groups, and (10) any other potentially interested persons identified by Water Quality Control Division watershed coordinators or district engineers. The opportunity to be included on the notification lists maintained for each regulation will also be publicized by publishing information regarding this opportunity in the Colorado NPS Connection newsletter. In addition, information regarding being added to the list at any time will be posted on the Commission’s web site.

Once the lists of interested persons for each regulation are developed, emails sent to the list will include information regarding how to be added to or deleted from the list. In addition, the lists will be updated by information received in response to an annual mailing that is broadly distributed as noted above. No changes would be made unless persons ask to be added to or deleted from the lists.

In addition to those who request to be included on the notification lists for each regulation as noted above, the following state agencies will automatically be included: State Engineer’s Office, Colorado Water Conservation Board, Division of Minerals and Geology, Oil and Gas Conservation Commission, Division of Wildlife, Division of Oil and Public Safety, Department of Agriculture, and the Hazardous Materials and Waste Management Division.

In addition to distribution as described above, all hearing notices are posted on the Commission’s web site.

Prehearing Process

For each rulemaking hearing, the Commission appoints a Hearing Chair, who will preside at a prehearing conference and at the hearing itself. The Hearing Chair generally has authority to make decisions regarding procedural matters relating to the hearing. For some larger hearings, Co-Hearing Chairs may be appointed by the Commission.

Interested persons may participate formally in the rulemaking process by obtaining party status or mailing list status. Persons with party status must meet certain prehearing deadlines for the submission of documents. They receive copies of the documents from the Division and other parties, and at the hearing have the right to cross-examine witnesses. Mailing list status allows receipt of all documents, but does not entail a right to cross-examination. Persons with mailing list status must provide any testimony to be offered in writing by a specified deadline.

In addition to these opportunities for formal participation, any interested person may submit written comments prior to or at the hearing, or oral comments at the hearing. However, the submission of written comments at least two weeks prior to the hearing is strongly encouraged, so that the comments can be circulated to Commission members for review.

The prehearing process relies on the sequential submission of prehearing statements, including written testimony and exhibits (i.e., first from proponents of proposed revisions and then from those responding to proposals) to assure that the full information in support of a proposal is available before others are required to respond. Proponents, and other parties whose perspectives may differ from those offered in the responsive prehearing statements, are also provided an opportunity to submit rebuttal statements. The prehearing conference will be scheduled for a date after all of these documents are submitted, to allow for a better assessment of the status of the various issues in planning the time to be provided for testimony from individual parties at the rulemaking hearing.

In general, the timing of the various steps in the prehearing process leading up to a rulemaking hearing will be scheduled roughly as follows. (**NOTE:** The dates listed below are examples. Specific dates will vary from year to year.)

- Notice approved by Commission: February 11
- Notice published in Colo. Reg.: March 10
- Party status requests due: March 25
- Proponents' prehearing statements due: April 1
- Responsive prehearing statements due: April 29
- Rebuttal statements due: May 14
- Prehearing conference: May 24
- Rulemaking hearing: June 8

The Commission encourages informal discussions between parties and with the Water Quality Control Division prior to rulemaking hearings, and encourages the development and submission of joint proposals for the resolution of issues. The goal of the Commission is to assure that information regarding any proposed resolution of issues resulting from an agreement between individual parties and the Division be made available in a manner such that all interested persons have an opportunity to provide input regarding such proposals.

Therefore, the hearing notice will establish a deadline by which the submission of all multi-party/Division proposals for the resolution of issues are strongly encouraged to be submitted in writing, along with proposed Statement of Basis and Purpose language whenever feasible. Generally, that deadline will be the prehearing conference. Any such proposals will be provided to other parties at the prehearing conference, and will be posted on the Commission's web site and available in the Commission Office for interested members of the public. If agreements regarding a proposed resolution of issues are submitted after the prehearing conference, the Division and the Commission will attempt to assure that others have an opportunity to be aware

of and respond to such proposals, particularly when the Commission has reason to believe that other interested persons may have a different perspective on the proposals.

The primary task at the prehearing conference is to finalize plans for the hearing. In particular, this includes resolving any outstanding motions regarding the conduct of the hearing and establishing an order of testimony and time allocations for oral testimony at the hearing. Time limits for testimony from both parties and members of the public are established, based on factors such as the number of parties, the degree of controversy and complexity of individual issues, and the total time available for the hearing. In addition, at the prehearing conference the Division will provide a draft “scorecard”, which will identify the Division’s individual proposals or positions and will list, segment-by-segment (or section-by-section for the Basic Standards), which parties/persons have submitted comments on individual proposals. The scorecard will also include segment-by-segment identification of all other noticed proposals. The Commission does not expect that the scorecard will identify the specific positions of each of the parties on all of the issues. The possible need for any corrections or additions to the draft scorecard will be discussed at the prehearing conference. The scorecard will then serve as a checklist for Commissioners in reviewing materials prior to and at the hearing, and during deliberations.

Conduct of the Hearing

At the Rulemaking Hearing, testimony generally will be received first from the Water Quality Control Division regarding its proposals. Testimony is then received from the parties to the hearing. The order of testimony may be organized around specific issues and/or water body segments that have received comment from multiple parties. Oral testimony from the parties should summarize written evidence already submitted, rather than providing new information. Following the conclusion of testimony from all parties, the Commission generally requests that the Division staff provide additional testimony, to summarize the status of the issues and provide its perspective on any new information that may have been presented in the hearing.

The Commission generally will provide at least two separate times when non-party members of the public may offer oral comments at a hearing. For example, comments are often received at 1:00 p.m. and at 5:00 p.m., to provide predictable times for the public to appear to testify. In addition, the Commission will allow non-party members of the public the option of offering their comments after all testimony has been received from the parties (but prior to the final staff summary), if they prefer to wait until after the parties’ testimony has been given. This provides an opportunity for the public to comment on any agreements that may be submitted the day of the hearing regarding a proposed resolution of issues.

The Commission has stated its intent to set aside up to three days for meetings at which these major water quality standards rulemaking hearings will occur.

Commission Action

Following the close of the hearing record, time permitting the Commission generally will conduct its initial deliberations at the same meeting where the hearing is held. The result of the initial deliberations typically is “preliminary final approval” of a set of revisions to the regulation. Staff is then asked to put these revisions in draft final form, including any revisions to the Statement of Basis and Purpose. These draft final action documents are circulated to all participants to review for accuracy, recognizing that the hearing record has already been closed. With any necessary corrections that may be identified, the draft final action documents are then brought back to the Commission for final approval at a subsequent meeting.

While this is the typical post-hearing process, the Commission has discretion to modify this process as may be appropriate in particular circumstances. For example, where necessary the Commission can keep the record open to receive additional information, or reopen the record to seek such information prior to final action. If the record is kept open or reopened following a hearing, the Commission will not take final approval action until all information is received and the record is again closed.