

<p style="text-align: center;"><b>Water Quality Control Division Implementation Policy</b></p> <p style="text-align: center;">Colorado Department Of Public Health And Environment</p>	<p>WQCD Policy Number: 1</p>
	<p>Statutory or Regulatory Citations: Colorado Administrative Procedures Act (APA), Article 4, Title 24 of the Colorado Revised Statutes. § 24-4-102(15), Colorado Revised Statutes (C.R.S.), 1998.</p>
	<p>Key Words: Policy Framework, Policy Lifecycle, Policy Template</p>
<p><b>TITLE:</b> <b>Implementation Policy Framework</b></p>	<p>Approved By:</p>  <p>Steven H. Gunderson, Director Water Quality Control Division</p>
	<p>Approval Date: November 4, 2010</p>
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## BACKGROUND

Colorado statutes that protect public health and the environment authorize the Colorado Water Quality Control Commission to promulgate regulations applicable to public water systems, wastewater dischargers, industrial dischargers, stormwater dischargers, and other regulated sectors, and the Colorado Board of Health to promulgate regulations applicable to bathing beaches and swimming pool operators. These regulations are administered and enforced by the Water Quality Control Division (WQCD or Division) in compliance with Colorado law with the goal of protecting the public's health and environment while achieving transparency, consistency, and efficiency in decision-making. These laws and regulations provide the Division some flexibility in interpreting and applying complex technical and regulatory requirements.

When it is necessary to interpret or determine the appropriate approach to exercising flexibility in the law or regulations while making case specific decisions, it is essential that the bounds and criteria applied to such decisions be known to affected parties. Division implementation policies provide affected parties with these bounds and criteria consistent with applicable Colorado statutes. Affected parties include the Division staff charged with decision making, the regulated community, and the public. Relevant and current policies improve the effectiveness of WQCD programs by improving consistency of regulatory implementation and providing materials to assist with staff training.

## PURPOSE

This policy sets out the directions for using implementation policies and associated procedures, and establishes the framework for organizing, developing, coordinating, approving, implementing, and

reviewing such policies and their associated procedures by the WQCD. Policies that are intended to apply to the Division as a whole (i.e., not directly related to laws and/or regulations implemented by a program) will be approved by the WQCD Director. The appropriate framework and associated elements applicable to Division-wide policies will be determined by the WQCD Director. Policies that are directly related to laws and/or regulations implemented by a program will be approved by the appropriate program manager.

## **AUTHORITY**

Colorado Administrative Procedures Act (APA), Article 4, Title 24 of the Colorado Revised Statutes (C.R.S.), ( § 24-4-102(15) C.R.S.), 1998.

## **DEFINITIONS**

Proper and lawful implementation of WQCD administered regulations requires that all WQCD staff be conversant with the proper use of the laws, regulations and other documents that provide the legal structure for the implementation process. Appendix 1 provides definitions of the following terms: WQCD Program, Law, Regulation, Policy, Implementation Policy, Guidance, and Procedure.

It should be noted that there are numerous references that provide other definitions for the terms policy and procedure, but the definitions included in Appendix 1 evolve from the Colorado Administrative Procedures Act (APA), Article 4, Title 24 of the Colorado Revised Statutes § 24-4-102(15), C.R.S. The APA does not succinctly define the term policy but rather, defines “rules” as “the whole or part of every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy or setting forth the procedure or practice requirements of an agency.” Generally, all rules must go through the APA’s formal rulemaking process prior to adoption. However, the statutory provision which establishes the requirement for formal rulemaking, § 24-4-103(1), C.R.S., exempts from that procedure “interpretive rules or general statements of policy, which are not meant to be binding as rules...”. The APA does not define and Colorado courts have not provided significant guidance on the meaning of the terms “interpretive rules” or “general statements of policy” beyond the statement that they are not meant to be binding as rules. The Attorney General’s office advises that: “Several cases have indicated that a document operates as a rule and is subject to the formal rulemaking process where the document establishes a ‘binding norm’ governing agency action or where the document attempts to impose legal obligations upon agency employees or regulated persons. By contrast, a document that provides agency employees with general guidance but that maintains agency discretion in particular circumstances is a ‘general statement of policy’ that need not go through formal rulemaking.”

Like policies, procedures are binding on the agency and regulated persons if they are set forth in statutes or rules/regulations. Procedures which are not set forth in rules, but rather in internal policies or stand alone documents, are not binding, but nevertheless should be adhered to by the Program. Deviation from established procedures as set forth in internal agency policies without good cause has been viewed by courts as constituting evidence of “arbitrary and capricious” actions.

## APPLICABILITY

This policy applies to all persons that organize, develop, coordinate, approve, implement or review implementation policies, or that implement WQCD administered regulations, including WQCD employees and contractors. It does not apply to, affect or constrain actions, functions or responsibilities of the Water Quality Control Commission.

## POLICY

1. Where WQCD administered regulations require interpretation or provide decision-making flexibility, WQCD Program Managers are to ensure implementation policies and their associated procedures (if applicable) are available to guide decision-making. Implementation policies are not binding regulations, and are not to be applied as such.

2. Each implementation policy may include guidelines for decision-making, factors that influence best professional judgment or key facts that could lead to different resolutions or decisions.

3. The framework provided herein and in the accompanying procedure, when developed, is to be followed for organizing, developing, coordinating, approving, implementing, and/or reviewing WQCD implementation policies and, if applicable, associated procedures. The framework consists of the following elements as depicted in Figure 1:

- Establish Framework
- Need Identification and Preliminary Evaluation
- Development and Initial Coordination
- Administrative Quality Assurance
- Formal Concurrence Review (Internal and Potentially External)
- Issue Resolution and Policy Approval
- Stakeholder coordination as directed by the Program Manager
- WQCC and BOH Coordination (as directed by WQCD Director and coordinated with the Commission or Board Administrator)
- Publication and Implementation
- Periodic and/or Triggered Review

4. The WQCD Policy Implementation Procedure 1 (August 1, 2012) provides the detail necessary to effectively implement WQCD Policy 1. Procedure 1 provides the templates to be followed for developing, coordinating, publishing, approving and reviewing WQCD implementation policies. The procedure details the policy coordination and approval path that provides an early opportunity for involvement by affected parties including stakeholders, consideration of issues affected parties may identify, and a defined process for issue resolution by the Program Manager in those instances where the coordination process fails to satisfy the issues identified by affected parties.

5. A WQCD implementation policy will be implemented on the assigned effective date after being signed by the applicable Program Manager(s). It remains in effect unless and until it is revised or abolished by the Program Manager(s).

6. Adopted implementation policies (and associated procedures if applicable) are to be indexed and published within the structure of the web pages maintained by the WQCD as soon after signature as possible, but not later than the policy's effective date. Implementation policies adopted pursuant to the Colorado Water Quality Control Act shall be provided to each Colorado state library.

7. When there is good cause to not apply an approved policy or an approved procedure, a decision not consistent with the policy (or procedure) may be made if all of the following conditions are met:

- After discussion with the Program Manager, a justification is prepared in writing and approved with the signature of the unit or section manager for the responsible work group;
- A copy of the written justification is filed in the regulated entity's official file and is accompanied by any associated written communication provided to the regulated entity; and,
- A copy of the written justification is provided to the Program Manager, and shall be available to staff.

8. If the implementation of a WQCD policy will involve staff from more than one program, section or unit within the WQCD, the Program Manager(s) shall decide whether an associated procedure must be developed that establishes roles and responsibilities of the affected groups. If it is necessary to develop such a procedure, all the affected groups must participate in its development.

9. Procedures are intended to be internal documents that may or may not involve external coordination in their development or revision at the discretion of the Program Manager. Following initial publication, procedures may be revised separately from their associated policy with the approval of the Program Manager.

10. WQCD sections and units may develop and implement administrative procedures applicable solely within their sections and units provided such procedures supplement and do not conflict with WQCD implementation policies and are titled as section or unit procedures.

## REFERENCES

1. Colorado Revised Statutes (C.R.S.) §24-4-103(1), (1998).
2. Victoria University of Wellington, Policy Documentation Development Information, November 2007.



## **APPENDIX 1 - DEFINITIONS**

### **General**

All definitions provided herein are tailored to the specific requirements of Colorado Statute as it relates to use of “general statements of policy” and may not be consistent with definitions of such terms outside of this legal context.

### **WQCD Program**

A WQCD “Program” means one of the four programs identified in the most current organizational chart. As of May 1, 2010, these include: Operations, Water Pollution Control, Safe Drinking Water and/or Watershed.

### **Law**

“Law” means federal or state statutes such as the federal Safe Drinking Water Act, the Colorado Water Quality Control Act or Colorado Revised Statutes, Title 25, Article 1.5, Powers and Duties of the Department of Public Health and Environment, officially enacted by elected federal or state representatives and executives, and rules and regulations, as defined below, promulgated under the authority of such statutes.

### **Rule or Regulation**

“Rule” and “regulation” are interchangeable terms and mean binding requirements officially promulgated by federal or state agencies within the authority of such agencies as provided by federal or state statute.

### **Policy**

For the purposes of this WQCD implementation policy framework, the term “policy” means a “general statement of policy” that qualifies for the exemption to formal rulemaking under §24-4-103(1), C.R.S.(1998), and hence does not establish binding norms and preserves agency discretion in particular circumstances.

### **Implementation Policy**

A policy that defines how the Division interprets law or regulations or determines the appropriate approach to exercising flexibility in the law or regulations while making case specific decisions where the underlying applicable law or regulation is ambiguous or provides the implementing program with discretion.

### **Procedure**

Specific course of action for implementing a policy or regulation; the methodology for implementing a policy; that is, “how” regulations, policies, or program activities are to be carried out, and that qualifies for the exemption to formal rulemaking under §24-4-103(1). Procedures may be called “Business Rules” or “Regulatory Implementation Procedures.”

## **Guidance**

Non-binding recommended practice intended to assist and guide actions of internal staff, regulated entities or the public. Guidance documents are used for encouraging action or educating a targeted audience. Guidance documents may also provide background information or supporting details regarding a statute, regulation or policy.

