

Water Quality Control Division Implementation Policy Colorado Department Of Public Health And Environment	Implementation Policy Number: Clean Water 2
	Statutory or Regulatory Citations: Nutrients Management Control Regulation, 5 CCR 1002-85
	Key Words: Nutrient Effluent Limitations
TITLE: Applicability of the Nutrients Management Control Regulation Dilution Exception for Discharges to Waters Designated as Critical Habitat for Threatened and Endangered Species.	Approved By:
	Dick Parachini Clean Water Program Manager
	Effective Date: November 18, 2013
	Scheduled Review Date: November 18, 2018

Background:

The Water Quality Control Commission (WQCC) adopted Regulation 85, the Nutrients Mangement Control Regulation, in 2012. In 2013 the Water Quality Control Division (Division) interpreted the dilution exception for a discharge to waters designated as critical habitat for Threatened and Endangered Species for use in the assesment of funding eligibility for the Nutrient Grant Program.

Purpose:

This policy was deemed necessary to adopt a case by case determination made for one facility as statewide policy, for the purpose of increasing consistency in future determinations and transparency.

Authority:

The Division implements the provisions of Regulation 85.5 which necessitates the determination of the specific limitations applicable to each discharge of nutrients.

Applicability:

This policy is applicable to Divison administrative actions including site approval, grant approval, and permit issuance.

Policy:

The dilution exception contained in 85.5(3)(b)(iv) states:

(b) Exceptions

The numerical effluent limitations set forth in sections 85.5(1)(a)(iii), 85.5(1)(b), and 85.5(2) shall not apply under the following circumstances:

(iv) If effluent concentrations higher than the applicable numerical limitations under this Control Regulation are adequate to achieve the total phosphorus and total nitrogen instream values set forth in section 31.17 of Regulation #31, then those alternative concentrations will apply as effluent limitations under Regulation #85 rather than the numerical limitations set forth in sections 85.5(1) and 85.5(2) hereof.

The Division considered whether any restrictions on the applicability of a dilution allowance would be appropriate based on the fact that the receiving water for a facility is designated as critical habitat for threatened and endangered (T&E) species in accordance with the federal Threatened and Endangered Species Act. The Division

does constrain the regulatory mixing zones for discharges to waters designated as critical habitat for T&E species for the purpose of implementing water quality standards based effluent limits (WQBELs) for water quality standards based on aquatic life use protection. This is consistent with authority provided in Regulation 31.10 and agreement among the Division, the U.S. Fish and Wildlife Service, and EPA (see *Memorandum of Agreement*, October 2005)

The Division determined that it is not appropriate to restrict the dilution allowance for the purpose of determining the applicability of the specific effluent limitations contained in Reg. 85.

The Division determined that there is no direct nexus to the agreement made with USFWS and EPA in regards to Implementation of Colorado's Mixing Zone Rule and Regulation No. 85. The MOU with USFWS states:

"This Agreement is designed to facilitate Coordination among the Colorado Department of Public Health and Environment Water Quality Control Division (the Division); the U.S. Fish and Wildlife Service's Colorado Field Office (the Service); and the U.S. Environmental Protection Agency (EPA) Region 8's Ecosystems Protection and Water Programs (the Region) with respect to implementation of Colorado's Mixing Zone Rule (Section 31.10 of 5 CCR 1002-31)."

Because the technology based effluent limitations contained in Reg. 85 are not WQBELs the provisions of Regulation 31.10 regarding mixing allowances do not apply to these limits. Regulation 85 is a state control regulation and as documented in the statement of basis and purpose the Commission decided to adopt these effluent limits as a technology-based approach at this time, rather than adopting segment-specific water quality standards throughout the State.

Additionally, the Commission did not contemplate any further restriction of the exception contained in 85.5(3)(b)(i) based on discharges to waters designated as critical habitat for T&E species or provide the Division any authority beyond the direction contained in the exception itself. The rulemaking process for adoption of the requirements contained in Reg. 85 was extensive and there were many parties to the hearing process. Therefore the Division will implement the exception based on the language contained in the regulation and the statement of basis and purpose. Excerpts from the statement of basis and purpose include the following:

"The Commission provided exceptions to the requirement to meet the nutrient effluent limits for several situations where the discharge from a treatment facility is presumed to not have a significant impact on nutrient loads in the receiving waters or downstream reservoirs.

The Commission found it appropriate to make an exception for facility owners that demonstrate that the discharge from the wastewater treatment plant (i.e., without additional nutrient removal) will not cause the receiving water to exceed the interim numeric nutrient values for total nitrogen and/or total phosphorus in Regulation #31. This demonstration would have to be made based on a mass balance analysis using the following inputs:

- 1 Discharge at the design capacity of the facility;
- 2 Effluent quality based on the discharge quality predicted to be achieved at design flow;
- 3 Upstream flow equal to the low flow in subsection 31.9(1)(c); and
- 4 Upstream nutrient concentrations equal to the 50th percentile of the available data or an alternate value developed by the Division where representative upstream data are not available.

There may be situations where an entity can demonstrate that plant improvements which would result in a reduction in concentration of one or both nutrients to achieve the instream values (alternate effluent concentrations) would result in the instream values being attained. Where the alternate effluent concentrations are greater than the limit(s) in Regulation #85, an exclusion from one or both of the Regulation #85 limits is appropriate and these values would be included in the permit as enforceable limits."