**COLORADO WATER QUALITY CONTROL COMMISSION**
**STATE OF COLORADO**

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**RESPONSIVE PREHEARING STATEMENT**
**OF THE CONSERVATION GROUPS**
**(CONSERVATION COLORADO, DENVER TROUT UNLIMITED, GREENLATINOS, ENVIRONMENTAL INTEGRITY PROJECT, AND PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY)**

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**WATER QUALITY CONTROL DIVISION CASH FEES, REGULATION NO. 102 (5 CCR 1002-102) AND COLORADO DISCHARGE PERMIT SYSTEM REGULATIONS, REGULATION NO. 61 (5 CCR 1002-61)**

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## I. INTRODUCTION

The not-for-profit organizations Conservation Colorado, Denver Trout Unlimited, GreenLatinos, Environmental Integrity Project, and Public Employees For Environmental Responsibility (PEER), collectively referred to in this rulemaking as the "Conservation Groups," submit this Responsive Prehearing Statement to oppose the Colorado Wastewater Utility Council (CWWUC) proposal to amend Colorado Discharge Permit System Regulations, Regulation 61, 5 CCR 1002-61. The Conservation Groups also offer a short comment regarding the Water Quality Control Division's (Division) "Notice and Comment For Preliminary Draft" Regulation 61 proposal.

## II. RESPONSE TO COLORADO WASTEWATER UTILITY COUNCIL REG. 61 PROPOSAL

The CWWUC proposal would amend Regulation 61 to direct the Division to modify permits that are "administratively extended," meaning permits whose five-year terms have expired but "[f]iling of a timely and complete application shall cause the expired permit to continue in force to the effective date of the new permit." Reg. 61.8(3)(o). Specifically, the CWWUC proposal states that "[a]t the request of a POTW," as long as it complies with Regulation 61's backsliding provision, "the Division shall modify an administratively extended permit," for the following reasons:

> (i) The POTW has received approval for changes to the hydraulic or organic capacity of the facility and a modification is required to incorporate this change in capacity pursuant to a site location approval obtained under 5 CCR 1002-22, Regulation No. 22; or
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> (ii) Material and substantial alterations or additions or activity at the facility entails the use of a new chemical, or change of chemical, and failure to modify the permit could result in the POTW's noncompliance with the permit;

> (iii) New information is available to justify a modification to a compliance schedule milestone or duration;
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> (iv) Failure to modify the permit may place the POTW out of compliance with another environmental regulation, or a modification would achieve an overall environmental benefit; or
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> (v) The POTW would be out of compliance with its discharge permit or would incur costs for unnecessary treatment absent modification.

CWWUC Prehearing Statement, Exhibit A, Proposed Redline to Regulation 61 ("CWWUC Exh. A").

The Conservation Groups oppose the CWWUC proposal in its entirety for numerous legal and policy reasons. The CWWUC proposal violates fundamental federal Clean Water Act (CWA) and Colorado Water Quality Control Act (WQCA) requirements in multiple ways, as described below. The CWWUC proposal will also increase the permit backlog, harm Colorado's water quality, and be difficult, if not impossible, to implement.

At its heart, the CWWUC proposal is a cynical attempt to corrupt Colorado's permitting process on behalf of one of Colorado's largest categories of point source water pollution. The proposal, whereby the Division "shall" modify expired permits at the POTWs' request, not only makes the Division work at these POTWs' direction rather than serving the public as intended, but by taking up the permitting resources that should be used for permit renewals, the CWWUC proposal insulates these POTWs from public input, more protective water quality standards, and the other needed improvements that come with permit renewal. We respectfully request that the Commission reject the CWWUC proposal in its entirety.

### A. Legal Background: This Commission is Required to Follow Both Federal and State Law When Establishing NPDES Permitting Regulations

The federal CWA sets as its goal the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters. To achieve this, the CWA prohibits the "discharge of any pollutant by any person" into waters of the United States except as in compliance with certain other enumerated sections of the CWA. 33 U.S.C. § 1311(a). These enumerated sections include Section 402, which provides EPA and delegated states the authority to issue National Pollutant Discharge Elimination System (NPDES) permits for the discharge of pollutants. 33 U.S.C. §§ 1342(a)(1), 1342(b)(1)(A).

In 1975, EPA delegated the authority to implement the NPDES program in Colorado (with the exception of federal facilities) to the Colorado Department of Public Health and the

Environment (CDPHE), then known as the Colorado Department of Health.[1] A central requirement of this delegation is that CDPHE, through the Division, must administer the state's NPDES permitting program in full compliance with the CWA and federal permitting regulations. *See* 33 U.S.C. § 1342(b)(1)(A) (NPDES permits issued by any state must "apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title"); 40 C.F.R. § 123.25 (requiring that states administer their permitting programs in conformance with a list of EPA regulations, including 40 C.F.R. §§ 122.46 and 122.6).

Reflecting this requirement, the WQCA similarly requires that when this Commission promulgates permitting regulations, those regulations "shall be consistent with … federal requirements." § 25-8-501(c), C.R.S. Similarly, Regulation 61 notes that the permitting regulations "are designed to be in conformity with … the Federal Clean Water Act and regulations promulgated thereunder." Reg. 61.1(1).

### B. The CWWUC Proposal's Mandatory Modification Language Violates Federal and State Law

The CWWUC proposal's statement that Colorado "shall" modify a permit flatly violates both the CWA and the WQCA.

It is a well-known legal precept that "the word 'shall' usually creates a mandate, not a liberty." *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018). By stating that "the Division shall modify an administratively extended permit," the CWWUC proposal makes such modification mandatory if any of the five conditions are met. CWWUC Exh. A.

Creating a mandate to modify permits runs afoul of many aspects of the CWA and WQCA. First, while the CWWUC proposal does include a note acknowledging that the modification cannot violate Regulation 61's backsliding provision, the CWA, EPA permitting regulations, the WQCA, and Regulation 61 contain numerous additional legal requirements for issuing permits and modifications. For instance, Section 402 of the CWA requires that Colorado must "apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title," when issuing permits. 33 U.S.C. § 1342(b)(1)(A). The WQCA prohibits the Division from issuing permits that allow violation of control regulations and requires specific processes if a permit modification would materially injure water rights. §§ 25-8-104, 25-8-503(3), C.R.S. Moreover, if the CWWUC proposal is intended to apply to general permits as well as individual permits (it is not clear), a host of other procedural requirements regarding general permits issuance would also apply. § 25-8-503.5, C.R.S.; Reg. 61.9(2). A mandate that the Division "shall" issue a modification, regardless of conflicts with the CWA, EPA permitting regulations, the WQCA, and the rest of Regulation 61, violates both the CWA and the WQCA.

[1] https://www.epa.gov/sites/default/files/2013-09/documents/co-moa-npdes.pdf

Second, the use of the term "shall" also violates CWA notice and comment requirements. *See, e.g.*, 33 U.S.C. §§ 1342(a)(1), (b)(3), (j) (general public notice); 40 C.F.R. § 124.10 (public notice of permit actions). Under EPA's permitting regulations, permitting agencies are not to make final decisions on non-minor permit modifications until after a draft has been put to public notice with at least a 30-day comment period, and the opportunity for a hearing has been provided. 40 C.F.R. §§ 122.64, 124.10. In order to comply with these EPA permitting regulations, Regulation 61 includes similar provisions. *See, e.g.*, § 25-8-503(8) ("The division's [permit] determination shall be based upon information available to it including information provided during the public comment period on the draft permit or in response to specific requests for information").

These public comment periods and hearings are not a formality—they are a critical opportunity for the public to weigh in and potentially change the Division's mind about issuing permit modifications. "NPDES permitting decisions should be determined in 'the most open, accessible forum possible, and at a stage where the permitting authority has the greatest flexibility to make appropriate modifications to the permit.'" *Env't Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 856–57 (9th Cir. 2003) (quoting 44 Fed. Reg. 32,854, 32,885 (June 7, 1979), internal brackets removed). A directive that the Division "shall" issue a modification regardless of public comments directly conflicts with the entire purpose of CWA and WQCA public notice provisions.

### C. The CWWUC Proposal to Modify Administratively Continued Permits Violates the Federal CWA

Administrative continuation of NPDES permits is not authorized by the CWA. The CWA, in fact, requires that both EPA and state NPDES permits are to be "for fixed terms not exceeding five years." 33 U.S.C. § 1342(b)(1)(B) (emphasis added).

Instead, the earlier federal Administrative Procedure Act ("federal APA"), which governs aspects of NPDES permits because they fall within the federal APA's definition of a "license," 5 U.S.C. § 551(8), provides that "[w]hen the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency." 5 U.S.C. § 558(c) (emphasis added).

EPA incorporated APA Section 558(c)'s administrative continuation provisions into its permitting regulations through two separate regulations. EPA's NPDES modification regulation states that "NPDES permits shall be effective for a fixed term not to exceed 5 years," but can be "extended by modification beyond the maximum duration specified in this section," as provided in 40 C.F.R. § 122.6, EPA's administrative continuation regulation. 40 C.F.R. §§ 122.46(a), (b). 40 C.F.R. § 122.6 in turn establishes the

circumstances under which "the conditions of an expired permit continue in force under 5 U.S.C. § 558(c) until the effective date of a new permit ...." 40 C.F.R. § 122.6 (emphasis added).

A key aspect of 40 C.F.R. § 122.6 and administrative continuance of permits is reflected in the regulation's use of the word "continue." The plain language definition of the term is "to maintain without interruption a condition, course, or action."[2] 40 C.F.R. § 122.6 merely allows the conditions of an expired permit to "continue in force," under the federal APA, i.e., to be maintained without interruption. (Emphasis added). The regulation does not authorize EPA or state permitting agencies to make discretionary decisions that would change those permit conditions. 40 C.F.R. § 122.6. This is consistent with federal courts' understanding of NPDES administrative continuation, described as the process wherein "the conditions of an expired permit continue until the effective date of a new permit if the permittee timely submits an application for a new permit." *Ctr. for Env't L. & Pol'y v. United States Fish & Wildlife Serv.*, 228 F. Supp. 3d 1152, 1155 (E.D. Wash. 2017) (emphasis added); *Upper Blackstone Water Pollution Abatement Dist. v. EPA,* 690 F.3d 9, 21–22 (1st Cir. 2012) (same).

Both the CWA's direction that a permit term not exceed five years and the APA's earlier direction that, in certain circumstances, a permit "does not expire" must be given full effect: "[w]hen confronted with two Acts allegedly touching on the same topic, this Court must strive 'to give effect to both.'" *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 498 (2018) (quoting *Morton v. Mancari,* 417 U.S. 535, 551 (1974)). "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

In an example of giving both laws full effect in 1988, the D.C. Circuit held that EPA's administrative continuation regulation, 40 C.F.R. § 122.6, did not violate the CWA because administrative continuance was strictly an application of the federal APA, not the CWA. *NRDC v. EPA 1988,* 859 F.2d 156, 212 (D.C. Cir. 1988).

> As in *Pan-Atlantic Steamship*, the standard that EPA must here apply in renewing discharge permits differs from that controlling issuance of earlier permits, and the agency cannot renew unless a more stringent test is satisfied. In both cases, however, the agency's lack of independent statutory power to extend the permit is over-balanced by Section 558(c); in each instance, the expired permit is continued, not by affirmative agency action, but by operation of law. We conclude that EPA's recognition of this result is entirely proper.

[2] Merrian-Webster Dictionary, https://www.merriam-webster.com/dictionary/continue

*Id*. at 214 (emphases added). The D.C. Circuit later restated the point: "the extension follows automatically from operation of Section 558(c), and not from action of the agency." *Id.* at 215 (emphases added). In other words, EPA's administrative continuance regulation was valid and continued to give full effect to the CWA because the regulation did not authorize the agency to take any action under the CWA. *Id*. Nor did it affect the EPA's implementation of the CWA. *Id.* Instead, 40 C.F.R. § 122.6 was simply a recognition that APA Section 558(c) applied. *Id.* "[T]he regulation does not purport independently to extend permits. Rather, it simply delineates the circumstances under which 'the conditions of an expired permit continue in force under 5 U.S.C. 558(c).'" *Id.* at 214 (quoting 40 C.F.R. § 122.6).

In contrast to 40 C.F.R. § 122.6, there is no way to give full effect to the CWA if the CWWUC proposal is promulgated. Rather than allow permits to simply "continue in force" under the APA without affirmative agency action, like 40 C.F.R. § 122.6 does, CWWUC's proposed regulation would have Colorado's delegated NPDES permitting agency, the Division, actively modifying permits long after those permits expired under the CWA, 33 U.S.C. § 1342(b)(1)(B). Moreover, these modifications would be—like all of Regulation 61—conducted under the auspices of the Division's NPDES delegation and the federal CWA. § 25-8-501-505(1)(c), C.R.S., Reg. 61.1(1). The requirements in the CWWUC proposal that the Division take "affirmative agency action" to modify these permits puts the CWWUC proposal in direct conflict with the federal CWA's five-year term requirements. 33 U.S.C. § 1342(b)(1)(B).

The conflict between modifying administratively extended permits and the plain language of the CWA has been recognized by EPA. In 2004, EPA added a clear prohibition on modifying administratively continued permits to the Louisiana-EPA NPDES permitting delegation Memorandum of Agreement (MOA). 70 Fed. Reg. 810, 815 (January 5, 2005). Responding to comments by industry that EPA lacked the authority to impose this restriction, EPA noted that such modifications were already barred by the CWA: the CWA requires that permits can only last "for fixed terms not exceeding five years," EPA wrote, and that "[t]o modify a permit that has been administratively continued would, in [e]ffect, be extending the permit beyond the specified period." *Id.* (emphasis added). EPA has also added similar prohibitions on modifying administratively continued permits to the recent NPDES MOAs for Arizona, Idaho, Louisiana, Maine, Oregon, and Washington,[3] as well as to EPA's own 2012 Model MOA. Model MOA § VI.E (2012).[4]

In fact, in a similar situation to what this Commission now confronts, EPA was asked during a rulemaking to amend its permit modification regulation to allow for the modification of administratively continued permits. 49 Fed. Reg. 37998, 38045 (Sept. 26, 1984). EPA flatly rejected the request. *Id.* Specifically, in 1984, commenters on EPA's

[3] All of these MOAs can be found at https://www.epa.gov/compliance/memorandum-agreements-between-epa-and-states-authorized-implement-national-pollutant
[4] https://www.epa.gov/sites/default/files/2013-08/documents/finalepastatemoa-attach2.pdf

proposed NPDES permit modification regulation, 40 C.F.R. § 122.62, asked the agency to "allow[] permits to be modified if the existing NPDES permit has been extended pending the issuance of a 'second-round' permit," i.e., a renewal permit. 49 Fed. Reg. at 38045. In response, EPA stated that "[p]ermits which have 'expired' cannot be modified. While expired permits may be continued in effect beyond the permit terms under the Administrative Procedure Act and 122.6, these permits may only be changed by reissuance." *Id.* (emphasis added).

In sum, the CWAs bars extending a permit beyond its five-year term, and modifying a permit that has been administratively continued after that five-year term would be such an extension—and a violation of the CWA. 33 U.S.C. § 1342(b)(1)(B).

### D. The CWWUC Proposal to Modify Administratively Continued Permits Violates the Colorado WQCA

The adoption of regulations allowing for the modification of administratively continued permits by the Commission would also conflict with Colorado law.

First, the WQCA requires that when the Commission promulgates permitting regulations, they "shall be consistent with … federal requirements." § 25-8-501(c), C.R.S. Thus, regardless of the specifics of Colorado's own laws, the conflict between the federal CWA and the modification of administratively continued permits described in Section II.C makes the Commission's adoption of the CWWUC proposal a violation of the WQCA. § 25-8-501(c), C.R.S.

Second, like at the federal level, administrative continuation of permits is not authorized pursuant to the WQCA but through the state Administrative Procedure Act ("Colorado APA"), which mandates that when a permittee has timely and sufficiently applied for the renewal of a permit, "the existing [permit] shall not expire until such application has been finally acted upon by the agency…." § 24-4-104(7), C.R.S. The WQCA, like 40 C.F.R. § 122.6, then delineates the circumstances under which the Colorado APA administrative continuance provision applies, directing the Division that if a permittee files a request for a renewal of an existing permit, the "existing permit shall be extended pursuant to the operation of section 24-4-104, C.R.S." § 25-8-502(5)(a)(1), C.R.S. (emphasis added).

Thus, like the CWA, the WQCA does not provide the Commission or the Division the authority to take "affirmative agency action" regarding administratively continued permits. § 25-8-502(5)(a)(1), C.R.S. Consistent with this lack of authorization for affirmative agency action, Regulation 61 states that "[f]iling of a timely and complete application shall cause the expired permit to continue in force to the effective date of the new permit." Reg. 61.8(3)(o) (emphasis added).

This lack of affirmative agency action in administrative continuation was further noted by the Denver District Court in the 2015 case, *IRG Bayaud, LLC v. CDPHE*, No. 2014CV32636 (Den. Dist. Ct. July 29, 2015). (Attached as Exhibit CG-1.) In the *IRG* case, the Denver court noted that when the Division administratively continued the NPDES permit at issue, "[t]he Division did not change the termination date of the Permit – the extension occurred by operation of law under the CWQCA and APA and by legislative mandate." *Id.* at 15 (emphasis added). The court further noted that the administrative extension had not harmed the plaintiffs (who wanted to withdraw their permit application) because, with the continuation "[t]he terms and conditions of the Permit remain unchanged and have simply been extended without modification as a result of C.R.S. 25-8-502(5)(a)(I) and 24-4-104(7). Unless and until the Division makes a final determination on the Renewal Application and modifies the terms and conditions, IRG is not entitled to relief." *IRG Bayaud*, No. 2014CV32636 at 15 (emphases added).

In sum, the WQCA does not authorize the affirmative agency action required to modify administratively continued permits. As such, a regulation like the CWWUC proposal instructing the Division to modify these permits violates the WQCA's direction that the Commission promulgate its permitting regulations under the authority of the WQCA. § 25-8-501(3), C.R.S.

### E. The CWWUC Proposal Will Harm Colorado's Water Quality

#### 1. Protecting Colorado Waters and Communities Requires Comprehensively Updated Renewal Permits, Not Permit Modifications

POTWs are one of the largest sources of point-source water pollution in Colorado. In 2024, Colorado's 190 surface-water POTWs discharged more than **280 million pounds** of pollution, including more than seven million pounds of sediment (total suspended solids) and one million pounds of ammonia.[5] POTWs are one of the largest sources of point-source nutrient pollution in the state, discharging more than 5,000,000 pounds of inorganic nitrogen and 168,000 pounds of phosphorus in 2024.[6] Colorado POTWs also discharged more than 133,000 pounds of metals that are harmful to aquatic life at concentrations as small as .12 mg/L, like zinc, iron, nickel, selenium, and arsenic.[7] POTWs are a known source of per-and polyfluoroalkyl substances (PFAS).[8]

Many Colorado POTWs discharge their waste into waters that are already fragile and in communities already hit hard. Over 22% of Colorado POTWs discharge to waters that are

[5] Data obtained using EPA's Water Pollution Loading Tool, https://echo.epa.gov/trends/loading-tool/water-pollution-search, https://echo.epa.gov/trends/loading-tool/water-pollution-search/results?s=9b530a48d18462c3d09835521dd8b9f91efa11fd
[6] *Id.*
[7] *Id.*
[8] https://www.epa.gov/eg/potw-influent-pfas-study

already so polluted they are impaired for one or more of their uses.[9] And POTWs, especially large ones, are frequently located in low-income, environmental justice communities. For instance, six of Colorado's largest ten POTWs are in areas where more than 40% of the population is low-income, and four of the ten plants, including Colorado's largest two POTWs, are in areas with Colorado EnviroScreen scores above 80%.[10]

The enormous pollution footprint and environmental impact of Colorado's POTWs makes it all the more important that every POTW in Colorado has a current, protective permit that includes updated, protective numeric limits for the pollutants that harm drinking water and aquatic life like ammonia, metals, and nitrates; the nutrients that cause algae blooms; and the salts that compromise the agriculture uses of downstream waters, as well as monitoring for PFAS and other pollutants of concern.

Permit renewal is the key to protecting Colorado waters from POTW pollution. It is when new water quality standards, new receiving water quality data, and new effluent data are used to recalculate whether there is the reasonable potential for the plant's discharges to cause or contribute to an exceedance of a water quality standard and assess the need for water quality-based limits (WQBELs). Reg. 61.8(2)(b)(i)(A). Permit renewal is when wasteload allocations from new TMDLs are added to permits, effluent and industry data are evaluated for new pollutants of concern and emerging contaminants, and technology-based limits are revised to reflect new federal technology-based limits (ELGs). Reg. 61.8(2)(a), (c). Permit renewal is also when affected communities and downstream drinking water treatment plants have the critical opportunity to weigh in on whether or not the draft renewal permit is strong or comprehensive enough to protect the waters they use, or whether needed protections are missing. Reg. 61.5(2).

Colorado waters need those updated POTWs permits. While the Division has used its limited permitting resources strategically to include nutrient limits in permits for many of the state's largest POTWs and the maze of Regulations 31 and 85 do not yet provide comprehensive protections from nutrient limits, the bottom line for water quality is that there are serious nutrient pollution problems across the state and only 12 of the 88

[9] https://echo.epa.gov/trends/loading-tool/water-pollution-search/results?s=b112bc100a04c5f48bed174db98c312da988a8e9

[10] These facilities are the Robert W Hite Treatment Facility, CO0026638; South Platte Renew WWTF, CO0032999; Persigo WWTF, CO0040053; James R Diiorio Water Reclamation Fac, CO0026646; Montrose WWTP, CO0039624; Las Animas WWTF, CO0040690; Marcy Gulch WWTF, CO0037966; Williams Monoco WWTF, CO0026662, Delta WWTF, CO0039641; and Steamboat Springs WWTF, CO0020834. Loading data found at https://echo.epa.gov/trends/loading-tool/water-pollution-search/results?s=80a7ca195ae8107f01f742989947da46d596bd4b; Environmental justice data found at https://www.cohealthmaps.dphe.state.co.us/COEnviroscreen_2/; low-income percentage data found at https://www.cohealthmaps.dphe.state.co.us/DICommunity/.

major (over 1 MGD) surface-water POTWs have numeric phosphorus limits.[11] Older POTW permits also may no longer ensure that the POTWs' discharges do not cause or contribute to an exceedance of a water quality standard because the permits rely on outdated mixing zone studies and/or stream flow data. Other old POTW permits may be based on outdated water quality standards that are no longer protective of Colorado's designated uses, failing to reflect, for instance, the revised organic chemical standards promulgated by the Commission in 2020. Statement of Basis and Purpose (June 30, 2025), 5 CCR 1002-31. Other POTW permits may need tighter limits because their receiving waters have become so polluted that they are now impaired. Regulation No. 93, 5 CCR 1002-93. Finally, despite the Commission's adoption of Policy 20-1, *Policy for Interpreting the Narrative Water Quality Standards for Per- and Polyfluoroalkyl Substances (PFAS)* in 2020,[12] which provided that POTWs would monitor PFAS for a term in order to develop robust source control programs if needed, only six of Colorado's 88 major POTWs discharging to surface waters currently have PFAS monitoring.[13]

**2. The CWWUC Proposal Will Worsen Colorado's Permitting Backlog**

There are many reasons for Colorado's permit renewal backlog. A number of them are direct consequences of Commission decisions, including the complexity and breadth of Colorado's water quality standards and nutrient limits, as well as the large number of permittees discharging to waters with a "reviewable" antidegradation designation, which requires that permit writers engage in several additional quantitative analyses in order to ensure that those discharges do not significantly degrade those reviewable waters. Reg. 31.8, 5 CCR 1002-31.

Other reasons for the permit backlog are tied to the state's geography, particularly the large number of Colorado waters that have multiple dischargers and limited dilution, meaning more complex modeling is needed to ensure that water quality standards are not collectively exceeded. The high levels of selenium, arsenic, and radioactive compounds that are both naturally occurring in many Colorado waters and highly dangerous for drinking water and aquatic life also make permitting in Colorado complex. The high and growing levels of salinity in many of Colorado's receiving waters, which could compromise their use for aquatic habitat, drinking water supplies, and agriculture, often requires the calculation of a number of different kinds of salinity limits in permits, including EC/SAR, further complicating and lengthening the permitting process.

Significantly, the Division has adopted practices at the urging of permittees, including the CWWUC, that provide permittees the *highest possible* WQBELs and antidegradation limits, though neither the WQCA nor the CWA requires this precision. Many of these

[11] https://echo.epa.gov/trends/loading-tool/water-pollution-search/results?s=2fe268c65c8dff6999c9821567e28a5d69f47c4c
[12] https://drive.google.com/file/d/119FjO4GZVaJtw7YFvFqs9pmlwDhDO_eG/view?usp=sharing
[13] https://echo.epa.gov/trends/loading-tool/water-pollution-search/results?s=92999440d6244b0be93c6c5e29bb03c146de595a

practices are not conducted in other states, add significantly to how long it takes to write permits, and require a higher level of training and expertise by permit writers. These permittee-driven practices include: calculating complex, pollutant-by-pollutant, Non-Impact Limits (NILs) for permittees discharging to reviewable waters, rather than requiring these permittees meet more protective antidegradation limits;[14] conducting separate dilution and antidegradation calculations for affected downstream segments; calculating different ammonia limits each month in many POTW permits; and modifying permits to decrease the frequency of monitoring in certain circumstances.

Finally, the failure of permittees to fully and timely respond to the Division's routine requests for the follow-up technical information needed for permit renewal, including formal Requests for Information (RFIs), is an important factor contributing to how long individual permit renewals currently take. *See* Reg. 61.4 (permit application requirements). This key problem, which is rarely, if ever, acknowledged when permittees speak publicly about the permitting backlog, can be responsible for delaying individual permits by months and even years. It also creates additional burdens on Division permit writers to reach out to permittees again and again to obtain the required information.

The CWWUC proposal will not improve **any** of the underlying reasons for Colorado's permitting backlog. Instead, the CWWUC proposal will make the backlog significantly **worse** by tying up the Division's limited number of trained domestic wastewater permit writers with calculating and drafting the complex permit modifications sought by POTWs within Regulation 61's 180-day requirement. *See* Reg. 61.8(8)(e) ("The Division shall act on a permit modification request, other than minor modifications requests, within 180 days of receipt thereof").

Such modifications are not a substitute for permit renewals. Even when permit modifications are subject to public notice and comment, they cannot be broadened to comprehensively include the other provisions needed in the permit, like limits based on up-to-date water quality standards or more recent effluent data. Instead, "only the conditions subject to modification are reopened." Reg. 61.8(8)(g); *see also* 40 C.F.R. § 124.5(c)(2) (same). The lack of comprehensive water quality protection and public engagement in permit modifications is exacerbated by the specifics of the CWWUC Proposal, which would only authorize the kinds of modifications that the *permittee* wants. CWWUC Exh. A. The CWWUC Proposal does not, for instance, allow the Division to modify permits for urgent public health reasons, as the Division may do during the permit's five-year term. *See, e.g.*, Reg. 61.8(8)(a)(iv) (authorizing the Division to modify permits "upon a determination that the permitted activity endangers human health or the classified or existing uses of state waters"). Instead, the CWWUC proposal would delay the POTW permit renewals needed to protect Colorado's waters so that POTWs

[14] https://docs.google.com/document/d/1bVeyrmkGcA2OYvNA9CVtl7MMMWqpTTI4uL5ZKclSeic/edit?usp=sharing

could obtain modifications to avoid instances when the POTW "would incur costs for unnecessary treatment absent modification." CWWUC Exh. A.

### 3. Implementing the CWWUC Proposal Will Cause Confusion and Litigation

Finally, the on-the-ground implementation of the CWWUC proposal will be highly difficult, confusing, and potentially litigious, wasting Division resources better spent on permit renewals.

First, the CWWUC Proposal contains a number of highly imprecise conditions for the modification of administratively continued POTW permits that will cause confusion and even potentially litigation in the future. CWWUC Exh. A. For instance, the conditions for modification include that "[f]ailure to modify the permit may place the POTW out of compliance with another environmental regulation," and "[t]he POTW would be out of compliance with its discharge permit." It is far from clear from the CWWUC proposal what would constitute such noncompliance. If the permittee could take some other step to prevent noncompliance, would that mean there weren't grounds for modification? What if that other step was difficult? What if the other step was easy?

Other conditions are equally vague. What does it mean if "a modification would achieve an overall environmental benefit"? CWWUC Exh. A. Would adding a chemical with aluminum to treat nutrients be such an overall environmental benefit? What if that aluminum harmed fish? And what does it mean for a POTW to incur costs for "unnecessary treatment absent modification"? What if the requested modification is unlawful under the WQCA? Would that treatment still be "unnecessary"?

Second, as noted, the CWWUC proposal is unclear as to whether it would allow for the modification of general permits. How such modification would work is also unclear, given the many additional requirements relating to the issuance and modification of general permits. § 25-8-503.5, C.R.S.; Reg. 61.9(2).

Third, the CWWUC proposal would likely require that the Division set up some kind of complex record-keeping process to track and enforce these administratively continued modified permits, since EPA's Integrated Compliance Information System (ICIS), the federal permitting and compliance database the Division uses to report this data to EPA, does not appear to allow changes to the terms of administratively continued permits.[15] A separate permit tracking system could create confusion with EPA as to which version of the permit constituted the "final" permit, and even potentially violate the information-sharing requirements required by Colorado's NPDES MOA. Colorado NPDES MOA at 3.[16]

[15] https://enviro.epa.gov/envirofacts/metadata/model/icis-npdes?parentNode=564&parentDirection=RightToLeft
[16] https://www.epa.gov/sites/default/files/2013-09/documents/co-moa-npdes.pdf

Such a separate tracking system could also create confusion with the public, who frequently rely upon the ICIS data in EPA's public database, ECHO.[17]

In sum, the CWWUC proposal is illegal under both federal and state law, is bad for Colorado's waters, will worsen the permit backlog, and is highly unworkable. We ask that the Commission vote to reject it at the October hearing.

## III. RESPONSE TO COLORADO WATER QUALITY CONTROL DIVISION REG. 61 NOTICE AND COMMENT FOR PRELIMINARY DRAFT PROPOSAL

Finally, the Conservation Groups urge the Commission to give careful scrutiny to the Division's proposed "preliminary draft" amendment to Regulation 61 in order to ensure that Colorado's permitting processes will still allow effective participation by the public, including overburdened and disadvantaged communities.

Public participation is not a bonus or side feature in the CWA; it is at its heart. "Congress identified public participation rights as a critical means of advancing the goals of the Clean Water Act in its primary statement of the Act's approach and philosophy." *Env't Def. Ctr., Inc.*, 344 F.3d at 856–57 (emphasis added). Moreover, Congress specifically singled out the importance of public participation in the NPDES permitting process: "Public participation in the development, revision, and enforcement of any … effluent limitation … established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States." 33 U.S.C. § 1251(e) (emphasis added); *see also Costle v. Pacific Legal Found'n*, 445 U.S. 198, 216 (1980) (noting the "general policy of encouraging public participation is applicable to the administration of the NPDES permit program").

Effective public participation in the Division's permitting processes is also mandated by Title VI of the Civil Rights Act of 1964, which prohibits agencies that receive federal funds from discriminating on the basis of race, color, and national origin. 42 USC §§ 2000d et seq.; 40 C.F.R. §§ 7.30, 7.35 (EPA Title VI regulations). To ensure compliance with Title VI, it is essential that permit-issuing agencies "focus on early, inclusive and meaningful public involvement throughout the entire permitting process." EPA, *Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs*, 71 Fed. Reg. 14,207, 14,210 (Mar. 21, 2006) (emphasis added).[18]

The Conservation Groups understand that Senate Bill 25-305 (SB25-305) amended the WQCA to direct the Commission to "adopt rules establishing procedures whereby the division, prior to giving public notice of a complete permit application for an individual permit and the division's preliminary analysis of the application pursuant to subsection

[17] https://echo.epa.gov/
[18] Updated version at https://www.epa.gov/sites/default/files/2013-09/documents/title6_public_involvement_guidance.3.13.13.pdf

(3)(b) of this section, may provide a period of public notice and review of a preliminary draft prepared by the division." § 25-8-502(3)(d), C.R.S. However, we caution that in other states, this "pre-public notice" process has significantly undermined the ability of public to participate in permitting and has even led to permits being stripped of key water quality protections without the knowledge of the public.

A recent example is NPDES Permit No. IL0004065 for the Rain CII Carbon LLC Robinson Coke Plant in Robinson, Illinois. When, as required, the state transmitted a draft of the permit with the permittee prior to public notice this past January, the permittee literally struck out the permit's cyanide and silver effluent limits and the bulk of the monitoring requirements with a red pen. Exhibit CG-2.

Outfall(s): 001 Treated Stormwater**, Cooling Water Overflow, and Area Washdown (Average Flow = 0.288 MGD)

| PARAMETER | LOAD LIMITS lbs/day DAF (DMF) 30 DAY AVERAGE | LOAD LIMITS lbs/day DAF (DMF) DAILY MAXIMUM | CONCENTRATION LIMITS mg/L 30 DAY AVERAGE | CONCENTRATION LIMITS mg/L DAILY MAXIMUM | SAMPLE FREQUENCY | SAMPLE TYPE |
|---|---|---|---|---|---|---|
| Flow (MGD) | See Special Condition 1. | | | | 1/Week* | Measurement |
| pH | See Special Condition 2. | | | | 1/Week* | Grab |
| Temperature | | | Monitor Only | | 1/Week* | ~~Continuous~~ Single Read. y |
| Total Suspended Solids | | | 15.0 | 30.0 | 1/Week* | Grab |
| ~~Cyanide (Available)~~ | | | ~~0.0052~~ | ~~0.022~~ | ~~1/Week*~~ | ~~Grab~~ |
| ~~Silver~~ | | | | ~~0.005~~ | 1/Week* | ~~Grab~~ |
| ~~Stormwater~~ | ~~See Special Condition 11.~~ | | | | | |

*Daily monitoring is required in accordance with Special Condition 6, when discharging from the Emergency Bypass, Outfall B01.

** See Special Condition 11 for additional Stormwater requirements

SPECIAL CONDITION 10. The Permittee shall conduct semi-annual monitoring of the effluent and report concentrations (in mg/l) of the following listed parameters. Monitoring shall begin three (3) months from the effective date of this permit. The sample shall be a grab sample and the results shall be submitted on Discharge Monitoring Report Forms to IEPA unless otherwise specified by the IEPA. The parameters to be sampled and the minimum reporting limits to be attained are as follows:

| STORET CODE | PARAMETER | Minimum reporting limit |
|---|---|---|
| ~~01002~~ | ~~Arsenic~~ | ~~0.05 mg/L~~ |
| ~~01007~~ | ~~Barium~~ | ~~0.5 mg/L~~ |
| ~~01027~~ | ~~Cadmium~~ | ~~0.001 mg/L~~ |
| ~~01032~~ | ~~Chromium (hexavalent)~~ | ~~0.01 mg/L~~ |
| ~~01034~~ | ~~Chromium (total)~~ | ~~0.05 mg/L~~ |
| 01042 | Copper | 0.005 mg/L |
| 00718 | Cyanide (available*** or amenable to chlorination) | 5.0 ug/L |
| 00720 | Cyanide (total) (grab not to exceed 24 hours) | 5.0 ug/L |
| ~~00951~~ | ~~Fluoride~~ | ~~0.1 mg/L~~ |
| 01045 | Iron (total) | 0.5 mg/L |
| ~~01046~~ | ~~Iron (Dissolved)~~ | ~~0.5 mg/L~~ |
| 01051 | Lead | 0.05 mg/L |
| ~~01055~~ | ~~Manganese~~ | ~~0.5 mg/L~~ |
| ~~71900~~ | ~~Mercury**~~ | ~~1.0 ng/L*~~ |
| ~~01067~~ | ~~Nickel~~ | ~~0.005 mg/L~~ |
| 00556 | Oil (hexane soluble or equivalent) | 5.0 mg/L |
| 32730 | Phenols | 0.005 mg/L |
| ~~01147~~ | ~~Selenium~~ | ~~0.005 mg/L~~ |
| 01077 | Silver (total) | 0.003 mg/L |
| ~~01092~~ | ~~Zinc~~ | ~~0.025 mg/L~~ |

Exhibit CG-2. In response, the state of Illinois removed the effluent limits and monitoring as requested by the permittee, and never mentioned these significant changes in the draft fact sheet or the draft permit. Exhibit CG-3. This left the public at an extraordinary disadvantage in the permitting process—how could the public decide for themselves if these effluent limits and monitoring requirements are necessary if the state never disclosed that the terms were originally in the draft permit, never disclosed why the terms were originally included, and never explained why the terms were removed? In fact, these changes only came to light due to a broad open records request and hours spent sifting through agency notes—efforts that the general public should not be expected to take just to have the information necessary to effectively participate in a permitting process.

It is paramount that the Commission ensure that this kind of fundamental undermining of the public's ability to effectively participate in permitting does not happen in Colorado, including that any changes made through the preliminary draft process are identified and explained in the fact sheet, and that effluent limits or monitoring requirements are not removed from preliminary permits in the guise of correcting "technical mistakes." We encourage the Commission, as it considers the Division's proposal, to ensure that Colorado will not only provide for public participation in its permitting processes, but, per the CWA, that our state will encourage and assist in such participation. 33 U.S.C. § 1251(e).

## IV. LIST OF EXHIBITS

| | |
|---|---|
| Exhibit CG-1 | *IRG Bayaud, LLC v. CDPHE*, No. 2014CV32636 (Den. Dist. Ct. July 29, 2015) |
| Exhibit CG-2 | IL0004065 Agency Memo Regarding Permittee Comments on Pre-PN Permit |
| Exhibit CG-3 | IL0004065 March 2025 Draft Public Notice Permit and Fact Sheet |

## V. WITNESSES

The Conservation Groups may call the following witnesses to the rulemaking hearing:

**Meg Parish, Environmental Integrity Project**, may testify regarding the legal and practical problems with the CWWUC proposal, as well as other issues raised in the parties' responsive and rebuttal statements.

**Josh Kuhn, Conservation Colorado**, may testify regarding the environmental, public participation, environmental justice, and other effects of the CWWUC proposal, as well as other issues raised in the parties' responsive and rebuttal statements.

**Sam Agnew, Denver Trout Unlimited**, may testify regarding the environmental, public participation, environmental justice, and other effects of the CWWUC proposal, as well as other issues raised in the parties' responsive and rebuttal statements.

**Chandra Rosenthal, PEER,** may testify regarding the environmental, practical, environmental justice, and legal problems with the CWWUC proposal, as well as other issues raised in the parties' responsive and rebuttal statements.

**Ean Tafoya, Patricia Nelson, and Jessica Herrera, GreenLatinos**, may testify regarding the environmental, environmental justice, practical, public participation, and legal problems with the CWWUC proposal, as well as other issues raised in the parties' responsive and rebuttal statements.

Respectfully submitted this 6th day of August 2025,

s/Meg Parish
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